

## Expanding the Spectrum: Open Access and the Internet Age

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I speak to you as a practitioner, someone who has represented clients on both ends of the spectrum of copyright. This spectrum has at one end a closed, more traditional, proprietary model of copyright, and, at the other end of the spectrum an open, more collaborative based model of copyright. And in between those ends there are many intermediate positions. Our future will include copyright activity on the whole length of that spectrum between the open and proprietary ends.

I have represented clients, I suspect, on each and every point now known on that spectrum, from big publishers down to creators and academics and nonprofits wanting to play in the “open” paradigm.

How many of us have shadow currencies? This issue of shadow currency is important because the nonmonetary values are at the core of the open movement. And the shadow currencies I direct your attention to include airline points—how many of you have paid more money out of pocket than the discount bargain fare for an airfare because you wanted to obtain those miles that the cheaper bargain fare did not offer? Or how many of you are members of Amazon Prime because there is a thrifty part of you that is willing to pay a premium for the product on Amazon so that you feel like you are getting shipping for free?

Today, I am going to focus on two shadow currencies as analogous to the incentive of the open copyright end of that spectrum. One is reputational currency. I would propose that reputational currency is a shadow currency in the copyright world. We know that for many authors and other expressive artists, the attribution is the reputational currency, which motivates as a currency to create the work. And I would say the second large motivating shadow currency is the speedy advancement of larger goals. Specifically, the shadow currency in this instance is the satisfaction and meaning that comes with participating in a project that is successful because everyone is working in collaboration for a larger community benefit. Wikipedia participation includes such a shadow currency.

We heard some remarkable speakers this morning, and I am so glad I was able to hear them all. The two who moved me most were Ruth Towse and Mary Rasenberger. What I particularly appreciated about Ruth’s comments was that a publishing contract is a statement of hope, not a payment. And I think that is one

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of the most pivotal doorways to beginning to discuss open access—discussing the “open end” of the spectrum of publishing and of deployment of content through the plumbing of the open, unrestricted Internet now. It is important to realize that there are a number of people who have listened to all of the sentiments and insights that we heard this morning. I do not disagree with anyone who spoke this morning about economic reward being copyright’s incentive; my experiences in the last two decades led me to understand that there are some people who are disenfranchised from the economic model of copyright in favor of the nonmonetary incentives, the shadow currency, that I mentioned a moment ago.

I would suggest that every discussion this morning was focused on a lovely, antiquated, pre-Internet model of copyright. I would further suggest that Mary Rasenberger had it right when she said the economic incentives are not working universally in the market anymore.

The elephant in this room that no one talked about today is the Internet. The fact that we have had as many speakers as we have had today and we have only had two speakers address the Internet even tangentially is a diagnostic—it tells you about how long we are remaining in the denial bubble. Enjoying the luxury of occupying the denial bubble is not free of cost. Such a luxury comes with a price—so before we go too far, let me back up and tell you that I am not making the remarks that I came originally to deliver. I have moved my thinking since this morning into a different sphere—I was going to pace us through five very simple slides, which I am still going to do, but I am framing it differently now. I am re-framing my prepared remarks because the speakers this morning moved my thinking of the copyright paradigm of what we are here actually thinking about now, in how we are proceeding to address copyright.

The open access movement began in the 1990s, about the time we started moving floppy disks around, and we started shipping them as objects. I should tell you I spent about ten years of my life representing Microsoft as outside counsel, running up and down the West Coast, chasing floppy disks out of huge container ships. Those floppy disks were containers that could be seized and interrupted from distribution into interstate commerce. As a member of the Copyright Seizure and Impound teams acting for Microsoft from 1984 to 1994, we ran raids often in seventy two-hour cycles where we would go and grab whole container loads of floppies. The game was to hold it in warehouses until the counterfeiters’ line of credit ran and then the counterfeiter would collapse when the money failed, only to rise again six to eight weeks later running a new import scheme of counterfeit floppies. We called this process ‘WackaMole’. Time has passed, and I am now in-house in the legal department at Microsoft. Distribution of software is radically different now. There is no object acting as a storage medium any longer. Software is downloaded from the Internet. This delivery change radically challenged the proprietary model of copyright for software.

In an unrelated riptide in creative activity at the other end of that spectrum, the open access movement moved into legitimacy in part by the Creative Commons (you will think about one Larry Lessig perhaps when you think about the Creative Commons, but, of course it happened on the backs of many remarkable, generous,

smart people). The Creative Commons began on January 15, 2001, and it was founded with the goal of the expansion of reasonable and flexible copyright arrangements. Now, it is an interesting thing to remember, Creative Commons did not get founded to desecrate or destroy copyright. It instead was founded by academics, technologists, nonprofits and everyday people who wanted to deploy original, expressive content outside of the proprietary paradigm of copyright—the scarcity model. This is a group of people who embraced the changing paradigm, and these people included Mike Carroll, Paul Keller, Ben Adita, Diane Peters and Molly Van Houwelling. Those five remarkable contributors have carried the Creative Commons on their back for almost two decades, patiently, slowly, stewarding a remarkable paradigm shift.

Let me suggest to you the most recent Creative Commons book that has just come out—*Made with Creative Commons*. The title itself conveys that the book is a spirit of collaboration. It is meant to be something in which everyone can participate in this radical paradigm shift, where indeed attribution, not monetary considerations, govern.<sup>1</sup> When we look at open access, and we look at the Creative Commons, you may say to me, “Yeah, yeah, yeah. Passing phase.” No, no. I would tell you. The open access paradigm, and specifically the Creative Commons, is a very mature movement and industry, complete with its own economics, complete with what my fellow speaker Rob Kasunic would call an “ecosystem.”<sup>2</sup>

In particular, I want to draw your attention to open education resources inside open access, which Creative Commons is very proud to be a part of. Let us look for a moment at the history of it. What you are seeing in this slide are the four major players, there are probably four hundred major players in many people’s minds, but this, historically, is the key player set who began the Creative Commons, who began the open access, who moved into open education resource, and who are participating strongly in the deployment of what is called “content” now. It is no longer called copyright, it is “content.” We deploy content down the plumbing of the Internet, and we do it with remarkable speed.

And what you are seeing in this chart is the Wellcome Trust. The Wellcome Trust had the first open access policy (of which I am aware) which created something that was extraordinary. If you were going to get a grant from the Wellcome Trust, you had to agree that your results would go up on publicly accessible open access archives immediately.<sup>3</sup> Now, Wellcome Trust does allow for embargos and waivers. Behind Wellcome Trust in time came the Gates Foundation. And as you know, the Gates Foundation announced their open access

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1. See PAUL STACEY & SARAH HINCHCLIFF PEARSON, *MADE WITH CREATIVE COMMONS: TO EVERYONE* (2017), <https://perma.cc/E2J8-QGBF>.

2. Robert Kasunic, *Exploring International Copyright's Gaps and Flexibilities*, 41 COLUM. J. L. & ARTS 489 (2018).

3. *Open Access Guidance*, WELLCOME TRUST, <https://perma.cc/BRE5-U7SK> (last visited Feb. 14, 2017).

policy in 2013 and deployed it January 1, 2017.<sup>4</sup> There is no embargo; there is no waiver; the Gates Foundation open access is a pure—it is the most pure—open access policy of which I am aware.

And the deal is simple: if you are going to take ten million dollars from the Gates Foundation to promote malaria research or polio research, the deal is you must deploy that content, that research, that monograph, the results of your research immediately. You must not slow down the lifting of the disease burden of the world, which Gates Foundation has at their mandate. They see anything that slows down lifting the disease burden of the world as being antithetical to their mission, and so they promote open access aggressively.

There is also SPARC. SPARC stands for the Scholarly Publishing and Academic Resources Coalition. And if you want to follow the heavy lifting organizations in open access, you will follow SPARC. SPARC meets in regularity with librarians, academics, teachers, and a whole spectrum of people who get together at SPARC and think hard about open access.<sup>5</sup> Then there is the Public Library of Science, of course, the PLOS.<sup>6</sup> PLOS is a very active player in open access. Most recently, we have the European Open Science Cloud, which is entirely based on open access.<sup>7</sup>

So, when you look at open access, you will want to check the vibrancy, and I would suggest these three resources to you as you evaluate vibrancy with a little metaphorical dipstick. If you were to drop in on, or call any one of these three, you would have an idea of how very vibrant the open access end of that spectrum is. And as you can see, the first one that I am commanding to your attention is International Open Access Week, which is SPARC's celebration.<sup>8</sup> The second is the Open Education Global Conference, which is in April 2018 in the Netherlands.<sup>9</sup> The third is the Creative Commons, which is very active in open education resources: Dr. Cable Green has been extraordinary in his use of the team that the Creative Commons makes available to him in getting textbooks and other resources out to schools that are not bound by copyright scarcity restrictions.<sup>10</sup> There is a copyright, people honor the copyright, and it is meant to be circulated.

Finally, the question I was asked to address is one which I am not as capable to address as perhaps Sam Ricketson or Jane Ginsburg. And so, I am going to put out my humble opinion: open access is consistent with the Berne Convention; in

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4. *Open Access Policy*, BILL AND MELINDA GATES FOUND., <https://perma.cc/WU5A-FQ78> (last visited Feb. 14, 2017).

5. SPARC, <https://perma.cc/4JBW-TRQF> (last visited Feb. 14, 2017).

6. *Why Open Access*, PLOS, <https://perma.cc/9JPL-U82A> (last visited Feb. 14, 2017).

7. *European Open Science Cloud*, EUR. COMM'N, <https://perma.cc/2WTD-EYSP> (last visited Feb. 14, 2017).

8. ASCD, CONFERENCE ON EDUCATIONAL LEADERSHIP, <https://perma.cc/6CXY-NXRD> (last visited Aug. 28, 2018).

9. OE GLOBAL CONFERENCE 2018, <https://perma.cc/59CH-QNU4> (last visited Feb. 14, 2017).

10. *Cable Green*, CREATIVE COMMONS, <https://perma.cc/YFH3-ZFV5> (last visited Feb. 14, 2017).

particular it is consistent with Article 9.2.<sup>11</sup> Where an author is making a choice, the Berne Convention tends to support them. I look forward to hearing from Sam Ricketson as to whether I am way off base on whether the Berne Convention would find open access to be in violation of the goal of Berne. I thank you for your attention, and, allow me to welcome you to the whole spectrum of copyright. This spectrum is fully alive and neither end nor the middle is likely to expire as obsolete soon.

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11. BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS ART. 9.2, Sept. 9, 1886, *as revised* at Paris on July 24, 1971 and *as amended* in 1979, S. Treaty Doc. No. 99-27 (1986), <https://perma.cc/A8MA-9CGV> (“It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”).