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# Bundles, Big Deals, and the Copyright Wars: What Can Academic Libraries Learn from the Record Industry Crash?

Edward P. Keane
*CUNY La Guardia Community College*

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# Bundles, Big Deals, and the Copyright Wars: What Can Academic Libraries Learn from the Record Industry Crash?

EDWARD KEANE
*Brooklyn Campus, Long Island University, Brooklyn, New York, USA*

*This article reviews the contention that U.S. laws favor copyright owners over consumers, and pre-existing models over innovation. The relationship of commercial publishers to the Open Access movement is compared to that of the creators/users of file sharers and the Record Industry. The library literature bears out the contention that journal publishers have exhibited some of the behaviors that contributed to the decline of the major record labels. Librarians who support free scholarship will find the music industry plight instructive; just as iTunes fulfilled consumer demand, Open Access and other alternatives will transform publishing.*

*KEYWORDS academic journal publishing, music industry, copyright*

## INTRODUCTION

A brief review of copyright history leaves one to conclude that rights holders' interests, regardless of format, have been incrementally expanded to unfair proportions. It is in this context that the music industry and other commercial purveyors have conducted business. Large academic journal publishers, it turns out, have treated a part of their customer base, academic libraries, in much the same way as the labels responded to the preferences of music consumers, namely, ignoring them. Although listening to and purchasing digitally downloaded music has evolved into a convenient, relatively affordable form of entertainment that takes up a fair amount of our leisure time and money, there was a prolonged phase of conflict among various business

Address correspondence to Edward Keane, Reference/Instruction Librarian and Acting Serials and Electronic Resources Coordinator, Brooklyn Campus, Long Island University, 1 University Plaza, LLC 417, Brooklyn, NY 11201, USA. E-mail: ekeane@liu.edu

and consumer interests that had to be resolved before the current business model took off. Many of these conflicts were the inevitable result of innovation, as painful for the music industry as they were for newspapers, book publishers, and librarians. When first confronted with the perceived threat of file sharing, the music industry relied on the copyright laws of the United States to protect their preferred way to sell music in a bundled format, the CD, and then relied on intimidation of consumers by suing and threatening to sue individuals. To the casual observer it would seem the music industry prevailed, but in fact it lost out on millions by not working with peer-to-peer aggregators such as Napster when a compromise was offered years before Steve Jobs' timely introduction of iTunes to a suddenly receptive and desperate industry.

The yearly cost increases for online publisher "bundles" of journal content is well documented. Many librarians and other faculty members are now questioning publishers' business models, with some advocating increased flexibility in agreements and far tougher negotiating tactics. Publishers have responded to the criticism by establishing increased availability to Open Access titles and offering some flexibility in their models. However, the majority of informed librarians who work with serials would probably reflect that publishers have a long way to go to accommodate customer needs, just as many music consumers at one time balked at using the first commercial music digital downloading services. With some exceptions, libraries have been inclined so far to ask their institutions for more money to pay for publisher packages rather than walk away. Likewise, most scholars on tenure track are unlikely to quibble about details of a commercial copyright license that is actually limiting the impact of their research over the long term. These are the kind of issues that librarians are in a position to educate their faculty colleagues about, as are the alternative business models and improved accessibility that Open Access offers. Some readers may find that it is a bit of a stretch to say that Open Access is to commercial journal publishers what Napster was to Warner Brothers, but there are some interesting parallels. Over time, cash-strapped libraries and the commercial publishers may be compelled to compromise on something akin to the iTunes model for music downloads—imperfect, yes, but infinitely fairer to the customer than the preceding industry model.

## WHO BENEFITS MOST FROM COPYRIGHT LAW?

An example of how pervasive Digital Rights Management has become is the agreement Microsoft users are required to "sign" before using Windows Media Player which allows Microsoft to delete unauthorized content from one's computer.

The crux of the copyright debate in the Western world was summarized in an 1841 address to the British Parliament. Lord Thomas Macaulay contended that extending copyright terms and taxing someone for repeatedly using a copyrighted work was not in the public interest, but rather "a tax on readers for the purpose of giving a bounty to writers." Macaulay expressed fear that by extending copyright terms Parliament was inadvertently helping to monopolize thought and that future generations would come to view the licensing of ideas as inalienable.[1] The Parliamentary debate of the 19th century, as to whether copyright is an inherent right that should be protected and periodically extended by the state, or should be limited by terms that do not exceed human mortality and protect innovation, remains the essence of the contemporary debate.

The U.S. Constitution is unambiguous when it comes to copyright: *The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries*.[2] Since 1790 copyright terms have steadily increased in the Untied States while successful judicial victories in favor of "readers" have been modest and infrequent. For example, in Supreme Court cases like *Sony Corp. of America v. Universal City Studios, Inc*. (1984)[3] and *Fiest Publications, Inc. v. Rural Telephone Service Company* (1991)[4] the court affirmed the rights of those who backed innovative technology and used published work without permission. In *Sony* the court ruled that the owners of VCRs did not violate copyright law when they taped free television broadcasts. Despite the best efforts by the film industry in the early 1980s, and in particular the over-the-top Congressional testimony of the Motion Picture Association of America (MPAA) President Jack Valenti, that "the VCR is to the American film producer and the American public as the Boston Strangler is to the woman home alone," the court protected the new technology against claims of infringement.[5] Some saw the suit brought by Universal studios against Sony, maker of the VCR, as nothing more than an attempt by one industry to stifle a competitive threat from another and avoid the lost revenue.[6]

The particulars of the Fiest case involved the expense and time it took to compile and publish a list of customer contact information derived from another published source, with the court ruling that the original work was not protected because directories, databases, and so on do not reach a threshold of creative originality worthy of copyright protection.[7] For those who felt American copyright law in 1984 were too restrictive, the Fiest ruling was a minor victory. Like the Sony case, Fiest gave opponents of restrictive copyright false hope that other similar rulings were on the way and would signal a judicial and legislative trend.

To protect the interests of copyright holders in the digital age, political and business forces mobilized, closed ranks, and tightened U.S. copyright law further in 1998. Congress introduced and passed two copyright laws that codified what opponents believed advanced an anti-consumer,

anti-innovation agenda, generally reinforcing the interests of large corporations holding the rights to intellectual and creative property. Also known by turns as the Sonny Bono Act and the Mickey Mouse Protection Act—because the law affirmed that Disney would not lose their mascot to the public domain—the Copyright Term Extension Act (CTEA) increased the term of copyright, and protected work for the life of the author plus 70 years, or 50 additional years from the last time the terms were adjusted in 1976. Corporate authorship rights, also called Work For Hire, were extended to 120 years after creation, or 95 years after publication, whichever comes first. Copyright protection for works published prior to January 1, 1978, was extended by 20 years.[8]

*Sony Corp. v. Universal City Studios* stood more or less unchallenged until a group of twenty-eight Hollywood studios and major record labels, led by Metro-Goldwyn-Mayer studios, took Grokster, Streamcast, Kazaa and other entities to U.S. District Court and the Court of Appeals for marketing file sharing software and both courts held for the defendants. The entertainment companies then took their case to the Supreme Court, where, in a unanimous decision, the court established a test for distributors of file sharing software which required intent to advertise or induce use in order to prove infringement. The ruling essentially made the distributors rather than the developers responsible for sharing files.[9] The constitutionality of CTEA was challenged in *Eldred v Ashcroft* but once again the law was upheld by the Supreme Court. In a dissenting opinion, however, Justice Stephen Breyer echoed Lord Macaulay's 1841 speech when he maintained that the CTEA essentially bestowed perpetual copyright that undermined public interests. Breyer's dissent also served to underscore the absurdity of retroactively extending copyright by pointing out that it was highly unlikely someone would be motivated to produce work so their great-grandchildren could receive royalties.[10]

The Digital Millennium Copyright Act (DMCA), signed into law in 1998 by President Bill Clinton, criminalized any attempt to circumvent Digital Rights Management (DRM) technology. An example of how pervasive DRM has become is the agreement Microsoft users are required to "sign" before using Windows Media Player, which allows Microsoft to delete unauthorized content from one's computer.[11] As a result of the DMCA it is a crime in America for someone to reconfigure a DRM (such as programming a DVD player to work with otherwise incompatible discs) and share the source code, even before there has been any actual copyright violation. In 2001, the DMCA was challenged when a computer programmer reverse-engineered a DVD so the encryption algorithm could be made available for free on the Internet. The MPAA sent out cease and desist letters to selected offenders, some of whom complied, but the movie studios targeted the editor of *The Hacker Quartely*, Eric Corley, and two others who maintained links to websites where the digital lock-picking tool was still available. After

a preliminary injunction, the U.S. District and the U.S. Court of Appeals upheld the injunction. The district court noted that the defendants' primary purpose was to promote redistribution of DVDs in violation of copyright laws. However neither court ruled on the First Amendment merits but on the "confrontational" strategy of the defendants.[12]

Yu-Lin Chang wrote that DRM's not only were an attempt by the entertainment industry to avoid being held accountable to the narrow amount of copyright law that reined them in, but they "seem to make it possible to grant information industries a new access right out of the traditional exclusive rights of copyright holders."[13] The DMCA-blessed authentication processes, intentionally or not, gave some large companies the legal right to control creative and intellectual content at the expense of the Constitution's clause promoting progress in the sciences and useful arts. Chang predicted that the technological flaws in DRMs and the inevitable circumvention by hackers would prevent the entertainment and information industries from ever seeing a world where copyright is trumped by proprietary technology.[14] Indeed, legality aside, there is almost always a way to access copyrighted films, TV shows, music, and scholarly content on the Internet. The negative impact of the aforementioned laws and the judicial decisions that upheld them, not to mention the near-unanimous support they received in Congress following intensive lobbying by the entertainment and publishing industries, could lead one to conclude that a full realization of the collective damage of the aforementioned laws and judicial ruling was lost on the average American and most politicians. However, there are any number of groups and individuals disappointed with the copyright laws in the United States professional organizations (e.g., the American Library Association has a standing committee on intellectual property rights and advocate policies that one day could be part of a successful reform movement). Reformers have participated in activities that have ranged from legal scholars making the written case for the laws to be amended to hackers redistributing newly released commercial blockbuster films on the Internet.

The copyright laws of the late 1990s could ultimately alienate consumers of household digital devices too. Quaedvlieg states that "Digitization and mass use are changing the nature of copyright: originally a property right focused on protecting work from being copied ... it has developed into the weighing of interests. The citizen now encounters the copyright law and its restrictions in his own living-room: citizens' acceptance on limitations in this sphere will be very low."[15] A legislative push-back on copyright was needed, some scholars contended, but others, like Robert Merges, noted that private individuals and companies added content to the public domain, albeit for dubious motives. Biotechnology firms, for instance, invested millions of dollars with the respective goals of publishing information like gene sequences and pre-empting competitors who developed the same sequences from claiming infringement. Motive aside,

Merges maintained that this dynamic had the unintended consequence of providing users with free content they otherwise would not be able to use, and cited projects like the Creative Commons as an organized effort that provides alternatives to traditional property right models. These private investments and public domain initiatives revealed a "self-correcting feature" and demonstrated that congressional legislation is not the only recourse through which the "excesses of intellectual property may be addressed."[16]

Lawrence Lessing's theory of "code is law" portrayed an Internet increasingly controlled by computer programs, less the ideal of an open democratic medium and more a nexus of commerce supported by government legislation. Code writers who enforce DRM for Apple and Microsoft are writing Internet law, regardless of what has been or will be enacted by Congress.[17]

Whether an age of "information totalitarianism" is coming, or already exists, depends on who one asks. But it *is* fair to say that DRMs have given the MPAA, the Recording Institute Association of America (RIAA), and huge entertainment companies control over the fastest growing markets in an unregulated environment. Imagine an academic environment where most or all textbooks a library puts on reserve are only available in digital format and locked down by a DRM, circumventing fair use. Although it is fair to say that the invention of the Xerox copy machine caused as much outrage as the invention of the VCR, the high-speed tape dubbing machine, and LPs, those technologies still allowed educators and librarians to assess the risk of using them under the concept of fair use. DRM, by contrast, renders such assessment moot.

And from the point of view of academic librarians who have been writing about and designing access services for the 21st-century library, the DRMs not only block access but infringe on copyright clauses that are meant to protect the rights of libraries and their users.[18]

Since the late nineties when copyright owners succeeded in obtaining virtually everything they asked for from Congress related to extending terms, and the record companies sued Napster, then upped the ante by suing individual consumers, the give and take between Lord Macaulay's aforementioned "readers and writers" has decidedly favored the writers.

## BAD BUSINESS MODELS IN THE MUSIC BIZ

After having the courts, the legislature and the executive branches emphatically enact and then re-affirm CTEA and the DCMA, and after winning just about every lawsuit they filed, effectively bankrupting Napster, it could be asked why the record industry was viewed as the big loser in the digital music revolution. Some observers and advocates have gone so far as to argue that Congress, knowingly or not, has created a bad Business Model that they

dumped on consumers and that has turned out to be a perpetual bonanza for copyright holders. Despite this, how did such a one-sided, heavily regulated copyright environment come to prevail in the United States?

William Patry argued that the copyright industries have engaged in "moral panics," and explained that the imbalance came about because, "...bad business models, failed economic ideologies, and the acceptance of skewed metaphors have led to an unjustified expansion of our copyright laws."[19]

While the phrase appeared with some scholarly notoriety in Stanley Cohen's study of England's Mods and Rockers' street conflicts of the mid-sixties, "moral panic" was a type of hysteria that also characterized the Salem Witch trials, the comic book scare of the 1950s and McCarthyism. "Panic" in this context was not characterized by an actual frenzy nor did it deny the subject of the panic was real, but rather presented an existing problem of manageable proportions and turned it into an existential one to further a political agenda. Patry elaborated, "...debates rarely focus on the only relevant question: Will the proposal actually serve the public good by promoting learning? Instead, debates degenerate into name calling and the copyright equivalent of the sky is falling." The tactic was political and was used to advance "undeserving economic interests" under a pretense of moral imperatives. Citing Jack Valenti's comments before Congress as one of many examples, Patry noted that the unrelenting use of over-the-top metaphoric language—terminology like *pirates, thieves, parasites, trespassers*—was the manifestation of a false appeal, or moral panic, and portraying one's opponents with this kind of language was tantamount to turning them into "folk devils," portraying them as deviants because they threatened the status quo. This fear served the copyright industries well.[20] This coordinated and effective campaign, combined with strategies like the music industry's use of lawsuits to sue its presumptive former consumers for file sharing, was a significant, prominent, and telling characteristic of a particularly bad business model which, in the end, did not serve the interests of its architects.

In 1948, the Supreme Court ruled, in *U.S. v Paramount Studios*, that movie studios could not bundle their films to the theaters that screened them. The studios, like music labels who sold albums with erratic content, and eventually academic journal publishers and aggregators who bundle lightly used titles with more essential ones, had been forcing their customers to exhibit substandard works lest they lose the rights to show the more acclaimed and popular films.[21]

Thousands of albums across all musical genres have turned out to be universally loved and recognized works of art, but over time the format has proven to be a less popular option among music consumers who are offered a choice. By the time Napster was established the music industry was not providing its customers with what they wanted. The history basically reveals that the labels were the last concerned party to understand it.

It was this refusal to let go of the CD that cost the record industry time and new business, and, by 2003, managed to thoroughly anger, alienate, and frustrate consumers. According to industry figures, from the early 1970s through the late 1980s the total number of albums (in all formats) shipped each year in the United States hovered around 650 million. In 1992, CD sales reached 400 million; six years later they hit 800 million. By 2000, more than 900 million CDs were being shipped each year. Many of those were back-catalog purchases, as music fans converted to the format (CDs) that seemed destined to make all others extinct. The easy profits that the major labels reaped from CD sales in the 1990s created a collective state of denial even though a small, vocal group of music company insiders warned that the model should be changed.[22]

The labels could have avoided the crash of the past decade and cashed in on the digital tide if, in 2000, they had struck a licensing deal with Napster instead of shutting it down through a lawsuit. In 2002, bowing to the inevitable, the majors aligned behind two corporate allies in the digital subscription services industry, Musicnet (EMI, BMG, Time Warner) and Pressplay (Universal Music Group and SONY). It was soon apparent though that consumers were dissatisfied with a model that limited them to roughly half the music they wanted. In order to have access to all their favorite tunes, consumers would have to pay separate subscription fees for two services.[23] *TheWall Street Journal* noted, "The commercial music services are following a tough act: the free file-sharing Napster service and successors like Kazaa and Morpheus, which get their vast song selections from users who share the tunes, not the labels. The file-sharing networks don't have everything—there are a lot more hip-hop fans than classical addicts serving up their collections, judging by their selection of tunes—but they come close."[24] In *Appetite for Self-Destruction: The Spectacular Crash of the Record Industry in the Digital Age*, Steve Knopper maintained that the failure of the major labels to strike a deal with Napster was "the last chance" for the industry to avoid an economic collapse. The top executives were so preoccupied with the moral rhetoric and with suing individual file sharers that they were unable to act quickly enough to create what could have been a sustainable business model. After the industry's aggressive litigation subdued rampant illegal file sharing, some music industry insiders figured, CD sales would once again be the primary format for sales. After they had hitched their collective wagon to the CD format, there was substantial proof in the Napster case that Musicnet and Pressplay were actually designed to try and stave off the inevitable digital tide, rather than created to meet the needs of the industry's customers.[25]

The recording industry realized that although peer to peer (P2P) file sharing via Napster was shut down through litigation (Napster declared bankruptcy in 2002) the saga changed the consumer music business model thereafter. The corporations that had acquired or merged with the record

labels in the ′80s and ′90s focused on short-term financial windfalls, even as it become apparent that the reasons—control, convenience, durability, flexibility—for purchasing music on CDs were greatly enhanced once the online model was ubiquitious.[26]

Another area of frustration for anyone who has ever decided to replace a video with a DVD, a vinyl LP with a CD, or a CD with a digital album download is paying for the same product over multiple formats. To an extent, this dynamic boomeranged back on the entertainment industries and their accusation that P2P software users were pirates, thieves, plunderers, parasites, and so on. It is worth noting the irony when large entertainment companies are painted as parasitic. The big music companies' longstanding expectation of perpetually cashing in on a business model of the full album CD even after it was clearly no longer sustainable lends credence to Patry's charge that some rights holders were essentially "undeserving economic interests."

There is growing recognition that technology, innovation, and the democratic nature of the Internet are responsible for whatever measure of positive change has taken place in academic publishing manifesting as the Open Access (OA) movement and institutional repositories (IRs). More flexible copyright agreements are one result of this situation as some creators of music and of scholarly research are challenging their partners to work with them to find a balance between reciprocity and innovation. For example, the alternative rock band The Offspring limited the number songs from their album, *Conspiracy of One*, that were offered freely on the Web after their label complained when all the selections were available. Beside the obvious desire to protect their interests, the recording industry believed that sanctioning any free downloads would jeopardize pending litigation against their own consumer base.[27]

Even though the big record companies chased Napster from the market, the company might have the last laugh. The U.S. Department of Justice investigated charges that Musicnet and Pressplay were specifically designed to impede the digital music market on the Internet. Although the investigation was terminated with no charges filed after two years a venture capital firm filed suit in 2006 claiming the big labels formed the flawed, limited services named Musicnet and Pressplay, with the ulterior motive of driving the music-buying public back to the bundled content of the CD. When the music industry finally turned to Apple for help with their failed business model Steve Jobs told a Warner Brothers executive, as if speaking for all frustrated music fans, that the major labels were trying to corner the digital music market and the consumer deserved better. Jobs' insistence that songs be priced no higher than 70 cents was met with minimal resistance in the industry cohort given the financial beating they took before negotiating with Jobs. But before Jobs became involved, accessing digital music seamlessly was

unrealized due to pre-existing contracts with individual artists and publisher agreements.[28]

## BUNDLES, BAD BUSINESS MODELS, AND THE BIG DEAL: SCHOLARLY PUBLISHING

Historically, once copyright holders become hostile toward their consumers and initiate lawsuits the relationship is all but irreparable, and the resulting perception is that consumers' desires take a back seat to the industry's fears of cannibalizing their traditional market.

Although it is fair to say that the invention of the Xerox copy machine caused as much outrage as the invention of the VCR, the high-speed tape dubbing machine, and LPs, those technologies still allowed educators and librarians to assess the risk of using them under the concept of fair use. Digital Rights Management mechanisms, by contrast, render such assessments moot.

The founder of the Internet Archive, Brewster Kahle, publicly pondered whether the strategy used by the as the music industry to protect their digital content might be used more frequently by academic publishers. Addressing the specifics of a lawsuit brought against Georgia State University by several publishers Kahle stated, "I wonder if this will turn out to be 'an attack the innovator' suit like the peer-to-peer suits for the music industry."[29]

When the global financial crisis hit in late 2008, there were severe cuts in academic libraries and serials budgets were reduced anywhere from 3 to 30%.[30] Since the late 1990s, when publishers began offering almost all of their journal collection online with a pricing structure based on a library's print subscriptions and an additional e-access fee for the added content, librarians have used the term "Big Deal" to describe the business model. Ester Hoorn defined the library's predicament as a combination of upwardly spiraling prices for the journal subscriptions set by the publishers and a downwardly spiraling number of subscriptions by the academic libraries. This dynamic has threatened the accessibility to academic information.[31]

Libraries that signed their first Big Deal contract with Elsevier around 1999 and continued to renew the agreement with the company's standard annual price increase paid 80% more in 2009. And libraries that signed five year contracts with that particular publisher would essentially be paying almost *twice as much* as they paid for the Big Deal in 1999. Despite the recession, Elsevier and Springer increased 2009 subscription rates by an average of 5% for 2010.[32]

Like music consumers who were unhappy with their choices in 2002, librarians became unhappy with the Big Deal. In their 2009 study, "Building Relevant and Sustainable Collections*"* Nicole Mitchell and Elizabeth Lorbeer stated: "With endowment investments and state tax revenue at low levels, both private and public institutions are no longer able to support their libraries' excessive spending on content. Purchasing large bundles of content is no longer thrifty and the notion that someone will need it at some time in the future can arguably be considered wasteful spending; the 'Big Deal' is no longer a good deal."[33]

Tellingly, several society publishers have frozen rates or *decreased* them in the last two years in deference to the recession. Indeed, it is often the independently marketed journals, reasonably priced society titles, and competing start-ups that suffer when librarians review their titles in light of inadequate budgets and yet find themselves contractually or consortially bound to the Big Deal agreements.[34]

*The Serials Librarian* devoted a special 2009 section to libraries and the budget crisis, including implications for their Big Deals. The editor noted that some of the papers submitted to the journal on ending their Big Deal commitments were written before the meltdown of 2008, underscoring the long-term frustration and dissatisfaction librarians have had with this business model.[35] The trend of libraries to modify or eschew the Big Deal has been similar to music fans giving a collective thumbs down to a buying option that forced one to purchase buy a CD's-worth of tunes when they only wanted one song.

One recent survey that gauged the likelihood of librarians walking away from existing Big Deal agreements found that over 80% of the respondents were committed to at least one such commitment.[36] Curiously, the researchers found that librarians viewed the Big Deal as both a motivator to save money and an inhibitor to spend money, meaning that some libraries had looked at the issue closely and found it was not cost effective or, as is the case at many small and mid-sized schools, the Big Deal was more cost effective for a small serials staff who found it difficult to make collections decisions on a title-by-title, discipline-by-discipline basis.

Queried between December 2007 and January 2008 as to how they would deal with a flat or shrinking materials budget (a prescient question one month before the recession hit) 68% of librarians said they would cancel titles from their Big Deals and try to renegotiate with their publishers. Many librarians in this study reported that their institutions would not be able to endure static or reduced budgets given the cost of their Big Deals, and 77% said they felt compelled to accept titles in order to get what they still felt was a good deal.[37]

A 2009 UK survey of libraries that subscribed to at least one consortia-brokered Big Deal found that the main reason for subscribing was that Big Deal collections were "easier to administer" than traditional collection cherry

picking or subject clustering.[38] Anyone who has had to administer a journal collection at a small or mid-sized university will understand the reasons for the popularity of this answer. (At Long Island University, where the library budget has been static for the last three years and the author is employed as the Acting Periodicals Librarian at the Brooklyn center, for instance, librarians of the respective campuses are currently debating whether or not to renew a large publisher package for 2010–2011).

A number of the answers to this particular survey were indicative of the way that music consumers were (a) unhappy and (b) waiting for the business model to change. For instance, the most popular answer to the question, "What changes in Big Deal offerings would make them more attractive to you?" was a "pricing model which makes it affordable to move to e-only," and the second most popular was a "pricing model NOT based on historical print spend(ing)."[39]

The most popular answer was reminiscent of the music customer of eight years ago who said, "let me throw out my LPs and CDs and start downloading music." The next answer, "pricing model not base on historical print" was just like the music customer who said, "Please, I only want one or two songs, don't charge me for the whole album!"

Overall, the survey found that more respondents (45%), were "less happy" with their Big Deal than when they initially signed the deal. In light of the upcoming subscription increases, the majority of respondents reported the option they were most likely to exercise was to ask their universities for more money. Revealingly, and no less grim, was the next most popular option, "cut the book budget," which of course, for many librarians, is a common reality.

## THE LONG GOODBYE: CDs AND THE BIG DEAL

> It is often the independently marketed journals, reasonably priced society titles and competing start-ups that suffer when librarians review their titles in light of inadequate budgets and yet find themselves contractually or consortially bound to the Big Deal agreements.

The state of the library market for commercial journals today, with librarians weighing whether OA is a viable alternative to the Big Deal, or wondering whether they will continue to subscribe to their Big Deals at all, is similar to the situation of the music industry when Napster and its users turned away from the Musicnet/Pressplay model.

In comparing the commercial publishing and commercial music services it is true that the latter was changed when its customers—loyal and devoted though they were to the music—collectively announced they could survive

without digital downloads, and found other ways to hear music. It's worth remembering that it was well *after* people were using peer-to-peer software to share singles, clearly consumer's overwhelming preference, before the record industry finally adjusted its own business model. The industry's initial reaction was to steer consumers to their stale business plan, meaning albums on CD, instead of individual songs.

Consumers were cheated not just by the lack of choice, but also the selective nature of what was made available during this period. As the legal columnist for *Billboard* stated:

Pressplay and MusicNet launched in 2002 as the labels' answer to free and illegal downloads. But both quickly foundered as victims of high prices, poor design, and meager offerings that included music by major acts such as U2 and Counting Crows, but not necessarily the tracks users wanted.[40]

Large commercial journal publishers have not foundered like the music industry, but the complaints about the business model have been fairly consistent since 1999. Librarians have wondered in the professional literature, at conferences, and to the publishers about alternative ways of providing research/scholarly content. Unlike music fans, however, there has not been an organized boycott.

So, what *is* the viable option that comes to mind first, in light of a discussion about the merits of the Big Deal versus the positives of unbundling publisher packages? Theodore Bergstrom concluded, "if articles were purchased directly by users, demand for journal articles would be much more price elastic than the demand of libraries for subscriptions to bundled journals."[41] The current situation allows publishers to ensure the Pay Per View (PPV) model is not seized upon by libraries by keeping the cost per article around $25–$30, too much for most institutions, but cheap enough to offer users as a last-resort for emergency access when interlibrary loan is not an option.[42] Unlike the consumers who accurately evaluated Pressplay and Musicnet, librarians have not walked away from the Big Deal. But if they did, it is likely the cost of pay-per-view content would come down because, like the iTunes model, publishers would have a real interest in possessing a loyal base of repeat customers who would prefer to get their songs for free, but could live with and use a product that is fairly priced.

Like the music consumers who found, almost immediately, that they preferred micro-choosing songs instead of buying albums on CDs or being forced to download bundles of songs to get the one or two they really wanted, Michael Hanson and Terese Heidenwolf concluded that significant numbers of journal titles chosen by subject selectors from within and outside the library were not necessarily being used at their institution. Armed with such usage data they felt confident when they implemented the PPV model at Lafayette College.[43]

Similar to the "second tier" songs offered by Pressplay and Musicnet, the big publishers sometimes bundle hundred of titles with little relevance

to a school's curriculum in the packages sold with high impact titles. This approach helped to inspire a mass consumer correction, manifested in the academic library world via the OA and IR models.

The most teachable part of the Musicnet/Pressplay episode was that the labels could have avoided their industry's meltdown of 2003 if instead of targeting file sharers, their own customers, with lawsuits had they struck a licensing deal with Napster in 2000.

In 2000, the major record labels received an offer from Napster that would have split the profits evenly for legally downloaded content from Napster, but the labels refused. Beyond the obvious short fall in the proposal from the labels' point of view, there was conjecture that the real issue was the inherently incompatible phenomenon of innovation versus existing markets. This friction was played out and continues to be played out in any number of industries, including academic publishing, where innovations like OA and the Creative Commons have caught the attention of some librarians and commercial publishers.

It remains to be seen if the commercial journal publishers will respond to the demands of their consumers and offer greater flexibility in the pricing and bundling of their collections. However in at least one well-documented instance, one publisher decided it was better to tweak the Big Deal business model and work with an institution to keep their patronage and still return a profit-just not as big as previously.

For some time now, librarians have had alternatives to the value-added model of the Big Deal packages but have been hesitant to act due to the convenience of OA and faculty satisfaction. The well-publicized story of Cornell University's 2003 decision to walk away from their online Elsevier *ScienceDirect* subscription because of the bundling of unused, expensive titles demonstrates the validity of Bergstrom's maxim: that if you are going to bargain you must be prepared to walk.[44] Cornell deputy university librarian Ross Atkinson said, "This was not so much a strong ideological stand; business-wise, bundling [just] didn't work out." Atkinson emphasized that when libraries walk away from a major multi-year bundled commitment they gain more control over their collection decisions and are able to respond annually to budget upheavals and cut titles when necessary without penalty.[45] Like the negotiated business agreement that ultimately proved mutually beneficial to Sony, Universal, BMG, and iTunes, Elsevier was able to work with Cornell and modify its business model. By December 2003, it was reported that Elsevier disputed media accounts that Cornell University, Harvard University, and the Universities of California systems were dropping large numbers of their titles. The company claimed they had productive negotiations with the aforementioned schools, indicating to longtime observers of this market that in this particular instance Elsevier was listening to its customers.[46] By early 2004, the *Wall Street Journal* reported that Cornell, which had been spending 20% of its serials budget on 2% of

its titles in ScienceDirect, subscribed to a modified, unbundled package that reportedly eliminated about 150 journal subscriptions.[47] One indication that the current incarnation of the Big Deal has been successfully challenged, was a statement that appeared on Elsevier's corporate website under the heading, *Elsevier's position on universal access and open access:* "We are not attached to any single business model or publishing mechanism. We believe a mix is the best way to meet the needs of all stakeholders." However, under the heading "Sustainability," on the same corporate Web page, this statement appears: "Through these so-called 'Big Deals' libraries can license access to previously unsubscribed titles at a fraction of the list price." Today Elsevier offers users the PPV option through ArticleChoice, a hybrid model because, "Articles can be purchased in bundles (100, 200, and 500)."[48] This option was a welcome response to consumer demand and Elsevier's efforts should be commended,but the pricing model remains problematic;the approach is a variation of the phase in music consumerism when songs were available for downloading but the companies still wanted to bundle whole albums or restrict access to some content. As the iTunes business model has demonstrated, low prices yielding to consumer demand, and profits need not be mutually exclusive. Michael Beaudouin-Laron pointed out the problems that the OA author-pays model presents to any institution asked to fund faculty research. He revealed that at the conservative price of $2,500 per article X 100 published pieces, a hypothetical school would have to budget $250,000 to support scholarship and research—a figure beyond the financial means of most institutions of higher education. Like others, Beaudouin-Laron is a fan of iTunes and recommended 99 cent downloads of scholarly articles.[49]

The record industry advanced the idea that copyright violation was obliterating profits when it was promoting an inferior product that offered one or two quality songs for the price of 11 or 12. Scholarly journal publishers have been reluctant to make it convenient for librarians to unbundle publisher packages for fear of losing the most productive golden goose they have. By the time iTunes came around, the major labels had no choice but to adjust their business model or go completely out of business. The academic journal trade is suffused now with animus among librarians and informed faculty. For their part, journal publishers will not unbundle their Big Deals and offer individual articles or titles at a reasonable price until libraries strategize and prepare back-up plans.

In 2008, when Cambridge University Press, Oxford University Press, and Sage Publications sued four university officials at Georgia State University in U.S. District Court asserting "systematic, widespread and unauthorized copying and distribution of a vast amount of copyrighted works," through the university's website, the *New York Times* made a direct comparison between text books and CDs: "The dispute recalls problems the music industry had in protecting the format of an album on a CD," the *Times* quoted visiting Yale law professor Susan P. Crawford, who pointed out the win–win nature

of unbundling the content: "What publishers don't understand is they could disaggregate. They could electronically rip apart their books and sell them chapter by chapter, and everyone would be happier."[50] Historically, once copyright holders become hostile toward their consumers and initiate lawsuits the relationship is all but irreparable, and the resulting perception is that consumers' desires take a back seat to the industry's fears of cannibalizing their traditional market.[51] The publishers in the Georgia State case would not "rip apart" their content and offer it piecemeal as their customers wanted until they were convinced that the innovation would be at least as beneficial to them as it is to their customers.

It is important to note that whether a library will benefit from dropping a publisher package depends on the way a bundle of journal matches an institution's needs. Tim Bucknall's comparative study of three models—direct subscription, the Big Deal, and pay-per-view—indicated that PPV was cost-effective when compared to the direct subscription model, but ultimately not sustainable; Bucknall found that the additional vendor platforms required to accommodate added titles and related aggregate expenses were prohibitive. After signing Big Deal agreements with Springer, Blackwell, and Wiley and then analyzing the usage data from their platforms Bucknall found the Big Deal was more cost effective than PPV because there was a higher usage for bundled, added value titles, than for subscribed titles. He also reported that once UNCG signed on for Springer, Blackwell, and Wiley's Big Deal, PPV usage dropped by 75%.[52] Librarians considering moving towards or away from online publisher packages might consider reviewing the usage metrics in "A comparative evaluation of journal literature access options at the University of North Carolina at Greensboro." Based on Bucknall's findings at UNGC, the decision to stick with the publishers' Big Deals was obvious. However, it should be noted that the author's conclusions cannot be applied to all other libraries since usage data of non-subscribed content is likely to vary from school to school.[53] When curricular and research needs at other institutions do not match up with the added-value content in a bundled package usage statistics are not likely to be high.

Big music companies have become the target of an ongoing class action suit, which, so far, the federal judiciary has allowed to go forward. The litigants claim that the labels colluded against online music aggregators that would not consent to their rigid licensing terms. The labels wanted to control which artist and songs were available online, and also wanted to base pricing on consumer demand. Meanwhile, three economists researching academic journal publishing filed a Freedom of Information Act, in 2009, in order to collect copies of Big Deal contracts from libraries in order to report on what they suspected would be differences in the amounts universities are charged for their Big Deals. A preliminary review of the contracts led them to report, "hard bargaining has saved a lot of money for some libraries. If you fail to reach a Big Deal bargain, the result is not a catastrophe." The

author of the article reported that one publisher, Elsevier, took offense and in a tactic reminiscent of the music companies' strategy, namely litigation, *sued* Washington State University to prevent them from being released from the contract, but lost the case.[54] Suing one's customers, it turns out, allows the copyright holders to temporarily halt innovation and protect their business model. Aggregators and publishers sold libraries unwieldy collections with significant title overlap, reminiscent of music companies that repeatedly cashed in on the same content in different formats.

Bergstrom argued that librarians are at a disadvantage because they "are not likely to know as much about what their scholar-clients need to read as the scholars themselves."[55] Neither librarians, scholars who request subscriptions, nor the school administrators can make sound, effective, informed decisions about the Big Deal model, which, unlike a pay-for-view model, is not susceptible to the vagaries of supply and demand. Elsevier and Springer, as opposed to some society publishers, continued to hike their subscription prices even as the recession of 2008 and the devastating effects on libraries dragged on into 2011. Threatening to cancel a Big Deal licensing agreement will not move such corporations to compromise. In such an environment, how does the academic serials librarian remain relevant? Since there often is no reason for researchers to physically go to the library, university administrators have asked and will continue to ask, fairly, whether librarians have a useful role to play in acquiring online journal content. Librarians should have empirical studies at-the-ready that support the case they need to continue to take the lead in serials acquisition, and have a concise set of convincing bullet points highlighting a reasonably strong and informed knowledge of the *business* of academic publishing as well as the subject and content expertise in which they have traditionally excelled. Like record companies executives in the middle of the last decade, librarians will be asked to justify their role in the acquisition of scholarly articles as online autonomy beyond the library becomes the preferred user experience.

## OPEN ACCESS: BEYOND THE IDEAL

The serials crisis motivated some librarians, publishers and authors to participate in the OA movement. All of the major commercial publishers have reacted to the OA movement by offering some content on the Web for free. By 2011, being published in a peer reviewed OA journal had become a viable option for scholars, even for junior faculty on tenure track under pressure to publish in prestigious publications. OA journals and their author-favoring agreements contrasted with the traditional copyright policies of the commercial academic publishers and were a big reason that the OA movement attracted backers.

Commercial publishers have embraced OA by offering either some author-approved content for free or the author-pays model option. Springer saw the OA handwriting on the wall and decided to embrace the business model that many critics said was not sustainable. In 2008 Springer acquired BioMed Central's 196 titles and since then it has kept the author-pays, free-accessible model in place. Since Springer is a large for-profit large publisher one can assume that the BioMed Central acquisition has been profitable, but authors and researchers continue to have OA access to the publishers' titles. This acquisition by Springer may be partly responsible for giving OA the "mainstream" stamp of approval.

OA has gained steady momentum over the last decade and several citation impact studies, conducted on a regular basis since 2000, indicate that, in most disciplines, OA out-performed content available from publishers or aggregators via paid subscriptions. Although some studies have examined mitigating factors and concluded that findings favoring OA are faulty, most studies do indicate that research published in OA titles were cited more than proprietary content.

A 2004 paper examining OA and ISI's Web of Science revealed: . . . "that over 55% of the journals and over 65% of the articles indexed in Web of Science in 2003 are produced by publishers who permit some form of self-archiving, and so that these could be made OA by author archiving." The evolving environment of scholarly publishing includes additional avenues for making content openly available.[56]

An in-depth citation study, published in 2010 in the *Public Library of Science* (PLoS), reaffirmed what the same researchers had found in 2006, that OA already has a significant positive impact on the availability of the scientific journal literature. The results should be of general interest to scholars, but should also interest publishers, who need to take into account OA in their business strategies and copyright policies, as well as research sponsors, who like the National Institute of Health (NIH) are starting to require OA availability of results from research projects they fund. Of articles published in 2008, 8.5% were freely available at the publishers' sites, and an additional 11.9% free manuscript versions could be found using search engines, making the overall OA percentage 20.4%. Chemistry (13%) had the lowest overall share of OA, Earth Sciences (33%) the highest. In medicine, biochemistry and chemistry, publishing in OA journals was more common. In all other fields author-posted manuscript copies were dominant. The authors concluded that: "In spite of the criticism and opposition and doubts about its business model OA journals remain a viable option for scholarship."[57]

OA and its freely available content have emerged as a timely alternative for both the researchers who use it and the authors who create it, but it's appropriate to mention here that most OA journals publishers, unlike the commercial for-profits, do not ask for copyright transfer from the authors, but rather arrange the transfer of some rights via a license. There are

differences in these license agreements among various OA journal publishers and some agreements cannot be distinguished from commercial copyright transfer agreements in practice. Despite all the options, most long-time OA advocates believe copyright should revert to the authors upon publication.[58]

Trade groups like the Association of American Publishers have criticized the OA business and rights model for creating a situation where the peer review process is unduly influenced by federal and private money. Some government agencies and private philanthropies require research that they have sponsored to be freely accessible. These relationships, it has been argued, between benefactors and recipients are a form of government interference and a pose a threat to the traditional peer review process.

In reviewing the recent history of OA and the effort to legally require that government-funded research be freely accessible, one finds that Congress is divided between a pro-business, anti-regulation alliance and those who believe that transparency and open government should trump the commercial for-profit interests of publishers. Some government-funded research is made available no longer than six months after it is published but there are those who would like to see the content made available immediately.

## THE NIH GETS IT RIGHT

The NIH, to its credit, has had a policy, mandated by Congress in 2008, which requires that all investigators funded by the NIH publish an "election version of their final peer-reviewed manuscript" in PubMed Central within 12 months of the official date of publication. The NIH's FAQ indicates that this policy covers all manuscripts that are peer-reviewed, accepted for publication, and funded by a direct NIH grant, cooperative agreement, or contract.

Both the NIH policy and the 2009 Senate proposal, which requires a 6-month delay before publication of the public access version, have been criticized by a number of publishing groups. These groups acknowledge that maintaining their revenue streams for current and archived materials is central to their position. However, they also argue that they add value to the research through editing, enhanced readability, and secure and reliable archival access, to maintain the "continuity and sustainability" of the information.[59]

The NIH policy is one of the most visible manifestations of the OA movement in the United States. Proponents of OA see the movement as compatible with current copyright law, although some copyright holders argue that it undermines the policy aims of copyright. Jonathan Miller compared the Congressional debate in the 1960s on whether it was a good idea to make educational research available in the public domain to the current one on making government-funded scientific research accessible on the Internet.

He asserted that there was initially strong resistance from educational organizations and publishers who argued that the policy of the forerunner of the Department of Education, the U.S. Office of Education (USOE) would inhibit, rather than encourage, publication. But the NIH policy exhibits a sensitivity to copyright holders that the USOE did not consider, granting publishers or authors a twelve month period of exclusivity before the published content is publicly available. The historical context of the USOE policy on education material, including curricular materials for K–12 as well as research material, gained gradual momentum in the mid-sixties and included the Elementary and Secondary Education Act of 1965.[60]

Neither the Bush nor the Obama administrations, nor their respective Department of Education secretaries have been able to inspire and energize the country to support education legislation that would include making taxpayer-funded research available without the six month embargo, as proposed in a current bill before Congress. Such bills have been undercut by the political mantras of small government and economic self-sufficiency. Starting with 1976's Copyright Act, reinforced with CTEA by a succession of generally big business–friendly Congresses subscribe to the "trickle-down" school of economics, the pervading political consciousness on this issue has been unduly influenced by the lobbying of the copyright industry.

## ALTERNATIVE STRATEGIES FOR LIBRARIES

### Become Acquainted with RoMEO and SHERPA

Librarians who work at institutions with IRs are likely familiar with RoMEO (Rights MEtadata for Open archiving) and SHERPA (Securing a Hybrid Environment for Research Preservation and Access). But for librarians at small and mid-sized schools where resources for IRs are not practical reality, these websites can still be used as tools to raise awareness regarding alternatives to commercial publishing. Their copyright policies list those OA titles that can be used as publishing alternatives for faculty committed to the OA ideal. SHERPA provides a color-coded classification of publishers according to their support of self archiving, that is, the deposit of electronic versions of articles in institutional, disciplinary or interdisciplinary digital repositories and/or the distribution of authors' works from authors' websites. The road involves journals that offer their contents on an open-access basis. In both cases, article impact increases.[61] Faculty members who want to put their research articles online but are unclear about which funding agencies require open access for archiving their research and which do not—and which have requirements that fall somewhere in the middle—may be referred to RoMEO. RoMEO includes a database of publisher policies on the self-archiving of journal articles on the Web and in Open Access repositories.[62]

## Consider a PPV Strategy

Since the bundled Big Deal is no longer sustainable at many academic libraries where budgets are being cut, PPV is one of the options that should be considered. Nicole Mitchell and Elizabeth Lorbeer found that canceling the bundled Big Deal at the University of Alabama, Birmingham, was not as difficult as they first imagined when it was first proposed as a money-saving option. Their article, "Building Relevant and Sustainable Collections," one of several published in the last two years, outlines how a Web page is useful to a library communicating with its users about making collection decisions on a tight budget while also affording those users the opportunity to provide feedback on journals important to them. The authors also investigated allocating 20% of the journal budget to cover PPV patron orders to publishers. While fulfilling the need to supply content to users, this arrangement is a temporary solution to Alabama's two-year funding decrease for higher education. The librarians had devised another reduction in the number of journal subscriptions, but noted the provision of PPV would not be as significant as canceling the bundles.[63]

Patrick Carr and Maria Collins' **"**Acquiring Articles through Unmediated User-Initiated Pay-Per-View Transactions: An Assessment of Current Practices" is also recommended reading for those interested in learning what institutions have implemented PPV and how the model has fared for them.[64]

## Behold! A Successful Model!

There are a number of resources where one can learn about the changing nature of scholarship and viable, nascent alternatives to traditional publishing models, but for an informative, concise starting point, one can check out "Reshaping Scholarly Communication" on a University of California website (http://osc.universityofcalifornia.edu). This site reviews how other business models have been successfully deployed and offers a concise table that itemizes and details the feasibility of alternatives. There are links to the site's "News and Issues" page where visitors are urged to read up on models that some commercial publishers, to their credit—namely Springer, Oxford, National Academy of Sciences, and University Press—have followed. Designed for UC faculty, the site actually can be accessed by anyone who is frustrated by commercial publishing models and is looking for a place to become more informed and to learn what action can be taken.[65] Not all universities, or even systems, have UC's resources. But it can be hoped that their e-Scholarship digital publishing repository of 30 UC titles that are all OA will serve as inspiration to other schools. In addition to the repository, it is interesting to note that UC scholars also receive discounts based on their institution's participation in the Public Library of Science (PLOS) and BioMed Central.

### Manage Intellectual Property Differently

Encourage authors at your institution to use flexible copyrights with *some* rights reserved, as advocated by Creative Commons. In particular, negotiate with commercial publishers to retain the right to make a copy available in one's IR or own website.

### Support Sustainable Scholarly Communication

Thoroughly examine all copyright agreements before signing and make sure they do not unfairly favor the publisher by limiting access to the author's work. Also, refuse to serve on editorial boards of journals that have unreasonable subscription fees.

## CONCLUSION

The legislative and judicial record on copyright indicates that a business environment that greatly favors large commercial copyright holders has been in place since 1998. Trade groups like the MPAA, RIAA, and Association of American Publishers have effectively used hyperbolic public rhetoric (i.e., "moral panics"), to protect existing markets and curtail innovation. Given the strength of the copyright lobby and the U.S. Congress' public record on related legislation, it is unlikely that there will be copyright reform. In this environment, innovation and change are likely to come slowly to the academic journal publishing industry. However, alternative approaches agreed on by publishers and libraries, such as inexpensive (e.g., 99 cent), pay-per-view downloads, and freely accessible content via the OA models, could offer libraries relief from out-of-control serials budgets. What happened to the major music labels in 2003 will happen to journal publishers whose business models remain intractable and do not conform to the needs of their customers. Just as users passed by MusicNet, Pressplay, and full album CDs, libraries will abandon the bad business models that prevent them from utilizing innovation and purchasing their content on a micro rather macro level. There are a number of Web-based resources to help librarians and the teaching faculty at their institutions to find publishing aternatives that support OA and more progressive copyright agreements.

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