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The Ethics of Open Access and Copyright Infringement

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Abstract

This paper examines the movement to provide free online (open) access to scholarly journal articles as civil disobedience, a heretical challenge to the orthodox ideology of intellectual property law and the tradition of copyright transfer to a publisher. The legal standing and carefully crafted rhetoric of the heretical leaders enables them to rightfully proclaim that the goals of the open access movement can be achieved in compliance with U.S. copyright law while exposing conflicting values and problematic assumptions in the law that portend reform. Meanwhile, much of the work that the heretics have made available open access breaches publisher policy and infringes copyright. In the absence of sanctions, these acts of ignorance, indifference or defiance could bolster the open access movement by further demonstrating that researcher interests are not well served by existing policy and law. Guided by the conscience of otherwise law-abiding citizens, the civil disobedience of the OA movement is morally justified.

According to the [Budapest Open Access Initiative](#), open access means

‘free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself.’ (2002)

The movement to provide open access (OA) to scholarly journal articles is a movement to create and sustain a universal public good by changing how research is conceptualized and treated.

The IAD (Institutional Analysis and Development) framework is appropriate for studying the OA movement because it was developed to study situations where technologies are rapidly changing and individuals are developing new rules and norms to guide their behavior (Ostrom and Hess 2005). The framework uses three clusters of variables to understand human behavior: (1) underlying factors, (2) action arenas and (3) outcomes. The first section of this article explores the underlying factors that motivate the OA movement. The action arenas and outcomes are explored in the two subsequent sections that address OA challenges to orthodox ideology and practice and the orthodoxy’s response to these challenges. The final section of the article addresses the ethics of open access and copyright infringement.

The motivations for open access

The OA movement was precipitated and continues to be driven by the capabilities of digital technology, the nature of scholarly journal articles and the rules that constrain their interaction. In the parlance of the IAD framework, the underlying factors are shared resources, communities of producers and users, and rules-in-use.

The shared resources that are the focus of the OA movement are electronic journal articles. Like all digital information, they are non-rivalrous and non-excludable. Non-rivalrous resources are undiminished by consumption. Non-excludable resources can be consumed by everyone and attempts to limit their consumption are largely ineffective (Suber 2009).

The communities of users and producers of scholarly journal articles are academic researchers. Academic authors publish articles primarily for academic readers. Traditionally, researchers produce new knowledge, express it in writing, at which point it becomes a copyrighted artifact, and then donate the article and associated copyrights to a journal publisher in exchange for broad dissemination of the work. Authors can afford to give their work as a gift because universities pay them salaries. They do not seek royalties for research articles, but rather recognition and esteem from peers. Scholarly journal articles are unique resources in the intellectual property landscape because they are copyright protected but royalty-free.

Between production and consumption stands a middleman, the publisher. Publishers receive the author's gifts (the work and copyright ownership of the work), facilitate peer review, then edit, publish and distribute the work through sales. This system worked well with print because the articles were expensive to copy and distribute. Electronic journal articles, however, are inexpensive to copy and distribute. But rather than leverage this capacity to broaden dissemination and lower prices, publishers created artificial scarcity and raised prices. Hyperinflationary price increases forced libraries to cancel journal subscriptions, limiting researcher access to needed materials and shrinking readership for their work. Meanwhile powerful publishers used digital technologies to exploit, expand and do an end-run around copyright law.

Publishers exploit copyright ownership by requiring permission to view electronic journal articles because viewing a digital work creates a copy of the work. By deploying digital rights management technologies, they use the anti-circumvention clause in copyright law to disallow fair use (Title 17). They end-run around copyright by licensing access to electronic journals, rather than enabling libraries to purchase them. Licensing circumvents the right of first sale that enabled libraries to collect and lend materials and to preserve the scholarly record. Licensing contracts trump copyright and can prohibit electronic journal articles from being used the way print journal articles were used, for example, in interlibrary loan. Furthermore, because publishers can add and delete journal titles from journal indexes, they have 'enormous power to shape the appearance and availability of research' (Hess and Ostrom 2003: 137). Clearly the rules are changing and many of the new rules are being determined by publishers.

Enter the OA movement, the concerted, collective effort of researchers, librarians and others to provide free online access to scholarly journal articles. Scholars want OA because it increases the timeliness and impact of their work, gives them free and convenient access to other people's work, and facilitates collaboration and innovation. Librarians want OA to solve the financial crisis in scholarly journals and to overcome permission barriers to use. Developing countries want OA so that they can access currently unaffordable research and share their research efforts with scholars in developed countries. Tax payers want OA to government-funded research because they paid for it with their taxes (Suber 2004). OA is about changing the rules in order to return control of scholarly communication to the scholars who will stop the harm 'our present course inflicts on research, health care, the environment, public safety, and every aspect of life which depends on research' (Suber 2009).

Rules are shared normative understandings about what a participant may or must do and must not do. Rules that are known and enforced are rules-in-use that generate opportunities and constraints for participants.

Rules that are not known or enforced are only **rules-in-form** (Ostrom and Hess 2005). Rules may be independent of or overlap with laws (Posner and Rasmusen 1999). Sanctions are typically applied to those who break the rules. For example, copyright is a rule of law; those who infringe copyright can be punished. The tradition of transferring copyright ownership to a publisher who restricts access to paying customers is a rule-in-use. Publishers can refuse to publish the work of authors who will not transfer copyright ownership to them.

OA challenges to orthodox ideology

According to Paul R. Wolpe, an **ideology** is a discourse seeking to monopolize ways of speaking and thinking about the world. Ideologies compete for dominance. The winner becomes an **orthodoxy** institutionalized in formal and informal rules that constitute a cultural model of how the world works (Wolpe 1994). IP (intellectual property) law is an ideology. In the United States, the orthodoxy that dominates IP legislation is an economic model of incentives promoted by commercial interests. For centuries, orthodox practice has entailed transferring copyright ownership of scholarly research articles to journal publishers. The OA movement is addressing these two problems.

OA in Theory

According to Peter Suber, the legal basis of open access is the consent of the copyright owner (2004). Authors can legally make their work available open access by:

- Publishing in a journal that allows open access and depositing – self-archiving – the work on a website or in an institutional or disciplinary repository (green OA)
- Publishing in a journal that provides OA for a fee and paying the fee (gold OA)
- Publishing in an OA journal
- Successfully negotiating with a publisher to retain the necessary copyrights and self-archiving the work

Despite the legality, OA challenges the requirements of copyright transfer and restricted access to paying customers. Challenging the authority of tradition constitutes rebellion. (Wolpe 1994). Though many publishers appear to support OA, their support is reluctant if not disingenuous – a point I return to later in this article. Researchers have the right, as the original copyright owners, to resist requests to transfer their copyrights, but when they attempt to exercise this right, publishers perceive them as rebels wanting to expropriate what does or should rightfully belong to the publisher. Successful rebellion creates a new power structure, in this case a new norm whereby the author stipulates the terms of copyright transfer rather than the publisher. But rebellion alone does not create a new system. Only a successful challenge to the prevailing values and underlying assumptions of the orthodox ideology can create a new system (Wolpe 1994). Challenging prevailing values and underlying assumptions constitutes heresy.

The economic basis of open access is the nature of scholarly journal articles. Scholarly journals are controlled by the orthodoxy that promulgated the economic model of copyright. But, open access proponents explain, researchers donate their work to the common pool of knowledge. They are not paid by publishers, their rewards are not proportional to sales of their work, and copyright is not the incentive that drives them to create (Suber 2008). Research is funded, conducted and published for the public good (Harnad 2007). As it is currently cast, copyright is inappropriate and unnecessary for research (Harper 2009). This is heresy, a dissent or deviation from dominant, generally accepted belief or practice (2009).

‘Heresy is a form of civil disobedience,’ a defiant challenge to the rules and ideological substrata of an orthodoxy (Wolpe 1994: 1142). Civil disobedience is the deliberate, public and usually nonviolent breaking of a law or rule in order to call attention to its unfairness or undesirability and to influence public opinion about it (2006, 2009). Those who engage in civil disobedience refuse to comply on the grounds of conscience. Mahatma Gandhi, the political and spiritual leader of India’s movement for independence, pioneered

resistance through mass civil disobedience. Paraphrasing his insights in his autobiography, civil disobedience does not arise from disrespect for lawful authority, but in obedience to the higher law of conscience; it can be exercised only in respect to laws, rules or traditions that lend themselves to being disobeyed by the masses (1957).

After centuries of transferring copyright ownership to journal publishers who sold access to their work, OA proponents have adopted an ideology of retaining necessary rights and providing open access to their work. Open access competes with toll access. To make OA the new norm for scholarly journal articles, advocates must draw attention to inconsistencies, anomalies and policy failures in the orthodox ideology and elevate them to crisis proportions. The first (rebellious) challenge is to the tradition of copyright transfer. The second (heretical) challenge is to the underlying values and assumptions of copyright law. The movement distances itself from the orthodoxy by distinguishing between royalty-free content, the scholarly journal articles at issue, and royalty-producing content, the focus of copyright law. Appeals to fairness to taxpayers, broken publisher promises to provide the broadest possible dissemination, the importance of access to innovation, the need for equitable access across the globe, and knowledge as a public good fan the flames to crisis proportions.

The success of the OA movement hinges on unveiling the underlying values and assumptions of the orthodoxy and divesting it of its 'cultural prerogatives' (Wolpe 1994: 1143). When researchers argue that for-profit publishers do not speak for them or serve their interests, they expose conflicting values and problematic assumptions. Their heresy threatens the legitimacy of the 'cultural model itself by making explicit its embeddedness in its social environment, an environment that the orthodoxy has tried to portray as having little or no influence on the validity of the cultural model' (Wolpe 1994: 1140). Heresy is political and every heretic a leader of insurrection.

OA in Practice

Researcher participation in the open access movement is both the key to the success of OA and the biggest barrier to achieving success. Voluntary participation has been slow, perhaps because researchers do not understand the benefits of OA or because they are too busy or lack the know-how to make their work available OA. In a case study of Carnegie Mellon faculty, 32% of the faculty had self-archived 34% of the journal articles cited on faculty websites; 77% of the articles cited on their websites could be self-archived in compliance with publisher policy and copyright law (Troll Covey 2009). Table 1 shows the significant variation in practice across the disciplines.

Table 1. Carnegie Mellon faculty self-archiving of journal articles.

College	Articles		Faculty	
	Total	OA	Total	OA
Business and economics	1,415	16%	90	46%
Computer science	2,340	55%	205	67%
Engineering	4,713	24%	179	30%
Fine Arts	200	17%	184	3%
Humanities and social sciences	2,419	40%	148	34%
Public policy and management	380	26%	54	17%
Science	3,414	41%	158	31%
TOTAL	14,881	32%	1,018	34%

According to the IAD framework, negative outcomes interact with underlying factors to drive analysis and change (Ostrom and Hess 2005). Advocates of OA developed strategies to address the slow uptake of OA, most notably institutional and governmental mandates, like the NIH (National Institutes of Health) mandate (2008). In a study conducted by Alma Swan and Sheridan Brown, the vast majority (81%) of researchers indicated that they would comply with mandates that made OA a condition of funding or employment (2005).

A more recent strategy, subsidizing publication fees in OA journals, attempts to level the playing field for OA journals and to help publishers convert from toll access to open access (COPE 2009, Shieber 2009).

An issue seldom addressed in the literature on open access is that many faculty make their work available OA in breach of publisher policy and copyright transfer agreements. They infringe copyright to their own work. Copyright infringement is use of a copyrighted work without the permission of the copyright owner that does not comply with an exemption codified in the law. In the Carnegie Mellon study, 38% of the OA articles were not aligned with publisher policy. The publisher either prohibited self-archiving on websites or prohibited self-archiving the particular version that the faculty had made available OA. Table 2 shows the significant variation across the disciplines. If the analysis had included the maintenance required by many publisher policies, such as linking to the publisher website, displaying explicit text, or removing particular versions at particular points in the life cycle of the work, the percentage of articles that breached policy and law would be significantly higher (Troll Covey 2009).

Table 2. Alignment with publisher policy.

Not shown: 4% of articles where the publisher policy was unclear about the version allowed.

College	Policy unknown	Aligned with policy	Not aligned
Business and economics	13%	67%	18%
Computer science	8%	53%	31%
Engineering	7%	56%	35%
Fine Arts	15%	24%	58%
Humanities and social sciences	8%	21%	63%
Public policy and management	19%	29%	45%
Science	5%	65%	29%
TOTAL	8%	50%	38%

To my knowledge, no sanctions have been levied by publishers or universities against faculty who provide open access to their work in breach of publisher policy and copyright law. It appears that when faculty infringe copyright to their own work, policy and law are merely rules-in-form, not rules-in-use.

Interviews conducted with Carnegie Mellon faculty in 2006 suggest that faculty infringement of copyright to their own work occurs on a continuum (Troll Covey 2006). Less than half (45%) of the faculty were confident that they understood their rights. Over a third (36%) volunteered what they would do with their work without the publisher's permission; 8% said that they would ignore the copyright transfer agreement if it did not allow them to provide open access to their work. In short, some faculty are unaware of their infringement because they do not know their rights. Others know their rights, but don't care about infringement. Still others are defiant; they knowingly and willingly infringe copyright. Conscientious faculty who unknowingly infringe might behave differently if their rights were brought to their attention. Those who are indifferent will remain so as long as there are no sanctions for their behavior. Those who are defiant might remain so even if sanctioned. The absence of sanctions could encourage indifference or defiance. Indifference is not a strong political position, but defiance is. Those who knowingly challenge copyright law are rebels, if not heretics.

Orthodox responses to OA challenges

U.S. copyright law is framed to protect royalty-producing content based on the belief that copyright royalties provide the incentive to create. The orthodox ideology, the cultural model, is shaped and preserved by the powerful lobbying of copyright owners motivated by the potential for profit. 'The orthodoxy is bound both by their allegiance to their ideology and by their self-interest as elites' (Wolpe 1994: 1138). The authority of the orthodox perspective derives from the public's acceptance of the validity of the model.

'If the elite can successfully argue that the cultural model itself is not in crisis, then the heretic can be portrayed as disgruntled, unqualified, deluded, looking for publicity or in error. Then the orthodoxy need not directly respond to the content of the heretical claims.' (Wolpe 1994: 1141)

However, a movement with enough power to seriously challenge the orthodoxy will be identified as a threat. Threat necessitates 'a full scale retaliation' (Wolpe 1994: 1143).

When publishers realized that the rebels and heretics were not going to modify their position on OA, many of them compromised and adopted OA policies. Currently 62% of publishers included in the SHERPA / RoMEO database allow authors to self-archive some version of their work (<http://www.sherpa.ac.uk/romeo/statistics.php>). However, the tedium and high maintenance required by many policies suggest that publisher support for OA is disingenuous and their respect for authors tenuous (Troll Covey 2010). The problematic policies are actually an attempt to subjugate self-archiving authors as a niche community 'under the auspices of orthodoxy' (Wolpe 1994: 1144). Nevertheless, the compromise indicates a weakened orthodoxy scrambling to diffuse a serious threat.

To retain institutional power and protect the economic model of copyright, publishers must maintain the illusion that they speak for authors and share and serve their best interests. So despite the compromising OA policies, they attack OA challenges by posturing to defend values at the heart of the academy and the nation. For example, they claim that there would be no peer review without them, that government mandates will lead to censorship, and that open access threatens national security. In 2007 a group of scientific publishers hired a public relation's expert to spin the political media rather than engage in intellectual debate, a clear sign that truth and integrity were not on their side (Giles 2007).

Often 'orthodoxies overestimate their power to suppress heresy, and attempt to do so only to be forced into compromise later on' (Wolpe 1994: 1143). This is what happened with the NIH mandate. Though efforts continue to try to overturn that legislation (H.R. 801) and to block the proposed Federal Research Public Access Act (S.1373) that would spread OA mandates to other U.S. government agencies that fund research, many publishers now offer to deposit NIH-funded articles in PubMed Central as part of their fee-based gold OA service (NIH no date).

Publishers have been competing with authors for control of scholarly publishing for years. Competition is an interim state of affairs. The OA movement has prolonged the competition by securing the support of taxpayers who are not copyright owners of scholarly journal articles. The orthodoxy continues to plan and implement strategies to contain the OA movement and to defend its values and assumptions from attack. But prolonged competition is a sign of a weakened orthodoxy (Wolpe 1994).

The Ethics of Open Access and Copyright Infringement

Heresy – civil disobedience – threatens the orthodoxy by exposing the unquestioned assumptions of its ideological base. A triumphant heresy changes social norms, if not laws. Triumph is unlikely if the heretical agenda is extreme or rejects too many basic values of the orthodoxy. Heretics who push too far, for example, by lobbying to abolish copyright for academic work or to abolish copyright altogether (Shavell 2009, Boldrin and Levine 2008), can be ignored as fanatics. Triumph is more likely if the orthodoxy is weak, if the discourse is acknowledged to be in a state of crisis, or if heretics can find political allies. The OA movement has succeeded at weakening the orthodoxy, elevating the issues to a crisis level and finding political allies. According to Peter Suber, 'There's no going back' (2004: 23).

Norms are slowly changing. Providing open access to their work is (or is becoming) a norm for many faculty. They may be complying with a government mandate or an institutional policy or resolution, succumbing to peer pressure or exercising internalized values. The rewards for complying with the new norm are the benefits that motivate the OA movement (described earlier in this article). When providing open access

complies with publisher policy and copyright law, no sanctions are needed. However, when faculty provide open access to their work in breach of publisher policy and copyright law, sanctions are warranted. Yet they are not exercised. Lack of sanctions could encourage copyright infringement, decreasing respect for copyright law and demonstrating that existing policy and law do not serve researcher interests.

Historically, compliance with copyright law arose from the difficulty of violation and from respect for the law; the two were invisibly blended. Digital technologies separated the two by making violation easy. As a result, 'compliance is down. Way down' (Suber 2009). Enforcement of copyright "is, to a large extent, a matter of which social norms are accepted and will be accepted, and what is considered, by the average citizen, morally acceptable, or not' (Boldrin and Levine 2008: 296). Faculty, university administrators and the public are not outraged by faculty infringing copyright to their own work. It appears to be a socially acceptable practice in the context of the OA movement. Researchers may do it without guilt or shame or punitive sanctions. Peer pressure might attempt to deter them, but peer pressure to provide OA is likely stronger. If publishers are outraged, they choose not to charge faculty with copyright infringement for fear of losing author submissions or drawing unwanted government attention. Copyright infringement charges would expose the fact that their values and incentives are not shared by researchers. If the sanctions for violating a norm can be too weak to deter people from offending it (Posner and Rasmusen 1999), certainly the absence of sanctions cannot deter people from offending it.

According to the New Media Consortium's Horizon Project 2010 Edition Short List, one of the critical challenges faced by education is the public's diminishing perception of the value of copyright. New business models are needed to provide the broadest possible access without sacrificing legitimate copyright protections. According to Jessica Litman, we are in the early, pre-history stages of a major copyright reform that could take 20 years to become law (2009). The gravest danger facing copyright in the digital era is its bad reputation, which has been undermined by greed. Key to successful reform is rebutting the notion that publishers (subsequent copyright owners) speak for and share the interests of authors (original copyright owners). Advocates of the open access movement are actively engaged in addressing this challenge.

Ethics is the study of what is best for all concerned. Analysis entails examining intentions, foreseen consequences and hierarchies of value. For behavior to be ethical, intentions must be both self- and other-regarding. Foreseen consequences must be beneficial. Harmful foreseen consequences may be reluctantly accepted if the cost does not exceed the benefit. Reluctant acceptance is demonstrated in attempts to avoid or minimize harmful consequences. Intrinsic goods must not be sacrificed for extrinsic goods, for example, a public good must not be sacrificed for private gain.

Open access is an ethical movement. Authors who make their work available open access not only serve their personal interests, but contribute to the common pool of knowledge, a public good. The foreseen consequences include accelerating research and innovation and thereby contributing to the public welfare. Efforts to help publishers convert from toll access to open access indicate concern for potentially harmful consequences.

According to Gandhi, civil disobedience is

'essentially a weapon of the truthful.... It is only when a person has thus obeyed the laws of society scrupulously that he is in a position to judge as to which particular rules are good and just and which unjust and iniquitous. Only then does the right accrue to him of the civil disobedience of certain laws in well-defined circumstances.' (1957: 467, 470)

The heretics in the OA movement are law abiding citizens who have deemed ongoing compliance with certain rules and regulations to be unconscionable. They exercise civil disobedience of copyright law and publishing tradition in the context of scholarly journal articles and limit their disobedience to infringement of their own work. They do not pirate other people's work.

The success of the OA movement is likely due in large part to the carefully crafted rhetoric of Peter Suber and other leaders who calmly and respectfully talk about managing copyright (rather than abolishing it), the unique nature of scholarly journal articles, and the importance of global equitable access to facilitating innovation and democratizing knowledge. Like Mahatma Gandhi, Henry David Thoreau defends civil disobedience as the moral act of otherwise law abiding citizens whose conscience can no longer tolerate compliance with unjust or iniquitous rules. To paraphrase: in a democracy, when conscience and law clash we are morally justified, if not duty bound, to follow our conscience, not wait for the law to change (Thoreau 1849).

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