



## *ARL Bimonthly Report 220* **February 2002**

### **Promoting Open Access: Developing New Strategies for Managing Copyright and Intellectual Property**

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The advent of the Internet, the World Wide Web, and digital technologies has revolutionized scholarly communication. Creative applications of these technologies are leading to innovations in the conduct of research as well as in the conveyance of ideas to readers. And the growing availability and application of these technologies has dramatically altered how readers may discover, gain access to, and use information.

As positive and liberating as these developments are for many researchers, authors, and readers, they have also accelerated the commodification of information and drives by some content industries to make their channels of information distribution more secure. As a result, changes are taking place in copyright, license/contract, and related laws that govern the management and use of intellectual property. For the most part, the changes result in more limited access and more restrictive uses for copyrighted material. It is no surprise then that, as the laws change to secure content for publishers, there is a negative impact on those in the educational and research communities where the creation, dissemination, and use of intellectual property is expected and, in fact, forms the very core of learning and research.

Historically, the library and academic communities looked to copyright law as the policy framework for balancing competing interests of creators, publishers, and users of copyrighted works. To achieve its constitutional purpose to promote the progress of science and the useful arts, copyright law provides a copyright owner with a private monopoly to reproduce, distribute, perform, display, and revise a work, while simultaneously providing exceptions for the special circumstances of education and libraries. This balance has been significantly eroded as copyright and other laws have been revised to apply in the digital and networked environment.

Changes in the laws have come from many directions but are largely driven by players who are part of a large and diverse commercial marketplace seeking changes in the legal framework in order to maximize their profits from e-commerce in publishing and entertainment. The rules promoted by these players to govern a sizeable, general marketplace

of users do not lend themselves well to the educational and research communities because, with a few notable exceptions, they do not provide for the special qualities and needs of education and scholarship. Even in licensing, where libraries have made some progress in negotiating broad uses for their communities, efforts to legitimize mass-market licenses could eliminate fair use and erode the willingness of providers to negotiate at all.

In the U.S. and Canada as well as other parts of the world, the library community has been actively engaged in policy debates as laws have been revised, consistently advocating the need to retain a balance among the interests of creators, owners, and users. Our involvement has been significant but these efforts have not been able to stop the economic and political forces of the marketplace that now so clearly dominate society. It is critical that library community advocacy activities be sustained so there is no further erosion of the balance of interests among creators, copyright owners, and users. At the same time, it is essential for the community to step back, assess the current reality, and consider additional strategies for achieving our commitment to "promote equitable access to and effective use of recorded knowledge in support of teaching, research, scholarship, and community service."<sup>1</sup> The current environment clearly favors commercial interests and thus mitigates against effective use of intellectual property for purposes of education and research. With this sobering assessment as a given, are there additional steps that the library community should take that could compensate for the restrictive environment faced by the educational and library communities?

After many years of the library community's struggle to retain the balance in copyright law, scientists and scholars have cast a new light on the debate. Researchers have come to depend on new technologies for rapid peer-to-peer communications and sophisticated searching and manipulation of data. They have begun to insist that publishers support articles with large datasets, image files, and simulations. And, as the original authors, they are demanding open, easy access to the literature as soon after publication as possible. Many scholars and scientists are promoting these goals through efforts such as PubMed Central<sup>2</sup>, the Public Library of Science<sup>3</sup>, and the Budapest Open Access Initiative<sup>4</sup>. Some publishers have been resistant to open access, fearing loss of revenues and loss of control over their content. To date, librarians have exhibited mixed responses to open-access initiatives. Some librarians, like their scientific and scholarly colleagues, see open access as an opportunity to exploit technology more fully in support of research and teaching; others express concern, particularly with the Public Library of Science, that some libraries will cancel journal subscriptions thereby motivating publishers to raise subscription prices and increasing the overall cost of access. Now is the time for librarians to fully embrace the goal of open access, and join with scholars, scientists, and their institutions in working toward this goal.

### **A New Vision – The Open Access Model**

Within ARL, the Working Group on Copyright Issues, the Scholarly Communication Committee, and the Information Policies Committee agreed that it was time to review ARL's strategy for managing intellectual property in the best interests of the academic community and the public. On 6 February 2002, representatives from these groups plus members of the ARL Board met as an ad hoc task force in a daylong retreat to undertake this charge. At the

core of the discussions was agreement that the circumstances called for fresh ideas and approaches. The task force developed both a vision of how we would like to see intellectual property managed in the future and strategies for the ARL programs to work toward this vision.

The task force is recommending that ARL's long-term goal in the area of intellectual property be to promote "open access to quality information in support of learning and scholarship." While "open access" was not explicitly defined by the group, the concept is generally understood as the free availability of literature "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." <sup>5</sup> Open access operates within the current legal framework of copyright law. Authors can transfer to publishers the right for publishers to post their work freely on the Web, or authors can retain the right to post their work on institutional or disciplinary servers.

Open access, in the terms of such efforts as the Public Library of Science and the Budapest Open Access Initiative, is focused on that literature that scholars give to the community without expectation of direct monetary return. It can include peer-reviewed articles, preprints, preliminary findings, data sets-works that scholars and researchers desire to share unencumbered with colleagues. These works often result from research supported by public funds.

Open access, however, does not imply "without cost." Whether managing peer review and editing for an open-access journal or developing the infrastructure for an institutional repository, financial and human resources are essential. Author or institutional fees and grant support for dissemination have been proposed as possible alternatives to the traditional library subscription model for funding these costs. The library, their institutions, scholars and researchers, and scholarly publishers will need to work together if we are to find viable paths through the transition from the subscription-based model to sustainable, open-access systems.

By collaborating with the scholarly and scientific community to find sustainable systems to make their works publicly accessible, the research library community would take an important step toward creating a better environment for managing intellectual property-an environment that reflects the values of the research and educational communities. Implementing the researchers' vision would not be easy but it could have the benefit of bringing control to the academic community of some of its own intellectual property; moderating costs by breaking the monopoly-like control within science, technology, and medicine of a few large commercial publishers; and demonstrating to policy makers and legislators the economic and intellectual vitality of a system that more fully balances societal good with economic interests.

### **An ARL Action Agenda**

To create the desired outcome of "open access to quality information in support of learning and scholarship," the ad hoc task force developed a five-year action agenda for ARL. Activities

were identified in seven major areas: education, advocacy, legal, legislative, new funding models, global alliances, and research. The task force also identified current and potential partners that would be essential to engage in these efforts-these include scholars and scientists, the higher education and library associations, university counsels, scholarly societies, and numerous others.

In the area of education and advocacy, the group noted that it will be critical for ARL member-library directors to continue to be advocates on issues concerning intellectual property. Together with ARL staff, the directors will continue to educate library staff, campus administrators and trustees, university counsels, and faculty, encouraging them to take a more active role in intellectual property debates. Central to this effort will be the need to explain the impact of current trends in intellectual property and copyright on higher education if changes are not made.

In the legal and legislative arena, ARL will continue to work closely with its partners in libraries, higher education, industry, and others in the public interest sector to advance the interests of the community in ensuring access to quality resources for research and teaching. ARL will seek opportunities for proactive engagement, while continuing to focus on cases now in the courts as well as current legislation, such as UCITA [6](#), database protection [7](#), anti-circumvention proposals [8](#), and distance education [9](#).

ARL must commit to supporting projects that experiment with alternatives to the current subscription-based funding model or the current journals-based publishing model for scholarly communication. Projects undertaken or endorsed need not be perfect, but must purposefully advance the community's understanding and lead it closer to the goal of open access. Rigorous assessment of the costs/benefits of various models should be conducted along with an evaluation of the key characteristics desired in new publishing models. ARL should track member institutions' activities towards the goal-such as establishing institutional or disciplinary repositories-and provide opportunities for periodic reporting on these efforts.

ARL and its members must also become much more active in the global community. We need both to share with and learn from international colleagues in the areas of copyright and scholarly communication. For example, the Canadian government is expected to consider legislation implementing the WIPO treaties [10](#) by the end of this year. In the European Union (EU), countries will have five years to determine what limitations and exceptions they wish to apply to use of digital works and how these will be integrated into an anti-circumvention regime. ARL should be alerting our international colleagues to the problems caused by the anti-circumvention provision of the DMCA in the U.S. so that they may avoid our fate. At the same time, the economic benefits promised by the proponents of database protection in the EU have not materialized. It is important for the U.S. library and higher education community to be aware of this and continue to work towards narrowly tailored and balanced legislation while informing our international colleagues of our efforts.

Underlying all of these goals is the need for ARL to build a research capacity. Documentation and case studies of the negative impact of technological protection measures on the

advancement of knowledge are essential if the library community is to make its case to the Copyright Office, Congress, and international colleagues. ARL also needs a sustained effort to collect detailed pricing and holdings data to analyze the effects of publisher consolidation. In addition, an analysis of the economic impact of additional database protection on libraries and higher education as well as an analysis of the economics of new funding models that support open access systems are needed. To accomplish such an ambitious research agenda, ARL may need to develop internal expertise, but could also look to outsourcing to members, providing small matching grants as incentives. ARL will continue to use the new intellectual property clinics and other related centers on campuses as partners for conducting research projects.

By the end of the next five years, progress toward this goal should be evident by:

- the emergence of a system that provides few or no barriers to accessing scholarly works authored by faculty;
- faculty and administrators who more fully appreciate the importance of intellectual property and copyright as an issue and are actively engaged in the debate;
- the continued engagement of the library community in drafting and promoting legislation that supports its principles, including enhancing fair use and extending the public domain;
- the restoration of the balance of interests among creators, owners, and users of copyrighted works as embedded in the 1976 Copyright Act;
- the existence of many more nonprofit venues in which faculty can publish;
- an emerging consensus on the economic models that promise sustainable, cost-effective
- dissemination and use of information;
- collaboration between faculty and their universities in the collection and dissemination of the campus's intellectual assets;
- a new appreciation among faculty and administrators of how scholarly accomplishment can be judged in the electronic environment;
- the development of a comprehensive digital archiving strategy to ensure enduring persistent access of digital resources; and
- effective global collaboration on all of these issues.

The ad hoc task force looks forward to presenting the detailed action plan at the ARL May Membership Meeting and welcomes comment in the interim. Members of the group that met include Shirley Baker (Washington University in St. Louis), Marianne Gaunt (Rutgers

University), Frances Groen (McGill University), Fred Heath (Texas A&M University), Graham Hill (McMaster University), Paula Kaufman (University of Illinois at Urbana-Champaign), Carol Mandel (New York University), James Neal (Columbia University), Brian Schottlaender (University of California, San Diego), and Ann Wolpert (Massachusetts Institute of Technology). ARL staff participating included Prue Adler, Mary Case, and Duane Webster. Rick Johnson of SPARC also attended.

## Conclusion

In many respects, the current environment for managing intellectual property is largely being shaped by interests at odds with the values of the library and educational communities. Efforts to ensure access to quality resources by reducing prices, influencing legislation, and exploiting the full power of the new technology have been thwarted by some content owners who have convinced legislators of the need for greater control in the era of e-commerce. Research libraries, in collaboration with their partners in higher education and scholarly publishing, need to continue to work with scholars and scientists to develop scholarly communication systems that serve the educational enterprise rather than exploit it.

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## Footnotes

1. From the ARL mission statement. For the complete mission statement, see the [ARL Program Plan 2002](#) (Washington, D.C.: Association of Research Libraries, 2002): 3. [back to text](#)
2. PubMed Central is a digital archive of life sciences journal literature managed by the National Center for Biotechnology Information at the U.S. National Library of Medicine. Access to PubMed Central is free and unrestricted. Participation in PubMed Central is voluntary and journal articles can be deposited by publishers at any time. For more information, see <http://www.pubmedcentral.nih.gov/>. [back to text](#)
3. The Public Library of Science is a grassroots initiative created by life scientists to encourage publishers to deposit their journals in central archives, like PubMed Central, within six months of publication. These scientists believe that information from multiple sources stored in a common format in central repositories can significantly enhance their ability to search across collections, manipulate data, and develop tools to integrate the literature with a variety of other information resources. While over 29,000 scientists from around the world have signed a petition not to publish in, review or edit for, or subscribe to publications that do not submit their content to a central repository, publishers have been slow to respond. The key leaders of the Public Library of Science movement are now developing their own nonprofit scientific publisher. For more information, see <http://www.publiclibraryofscience.org/>. [back to text](#)
4. The Budapest Open Access Initiative is a statement of principle, strategy, and commitment to making research articles in all academic fields freely available on the Internet. The Initiative arose from an international meeting convened in Budapest by the Open Society Institute (OSI) in December 2001. The Initiative has been signed by the meeting participants and a growing number of individuals and organizations from around the world who represent researchers, universities, laboratories, libraries, foundations, journals, publishers, learned societies, and kindred open-access initiatives. For more information, see <http://www.soros.org/openaccess/>. [back to text](#)
5. Budapest Open Access Initiative <http://www.soros.org/openaccess/read.shtml> [back to text](#)
6. UCITA, the Uniform Computer Information Transactions Act, is a proposed state law that would legalize

shrink-wrap and click-on non-negotiated licenses for computer software and digital information, thus permitting these licenses to override copyright exemptions. To date, UCITA has passed in only Virginia and Maryland. While it had been introduced in numerous other states during 2000 and 2001, it appears to have lost some of its earlier momentum. [back to text](#)

7. Over the past several years, major database owners such as Reed Elsevier, Thomson, and the National Association of Realtors, have made extensive efforts to secure passage of extremely contentious legislation that would protect their investments in databases. The legislation would provide protection of facts and control some downstream uses of information, including facts. Database legislation would bypass copyright law and create a new form of intellectual property protection for databases. [back to text](#)
8. The anti-circumvention provision of the Digital Millennium Copyright Act (Section 1201) prohibits the circumvention of a technological protection measure that effectively controls access to a work protected by copyright law. Content owners argued that this provision should have no effect on the ability to make a fair use of a work since fair use is only possible once a user has lawfully acquired the work. Since the law addresses only circumvention of measures to access the work, they argued that fair use of the work is unaffected. In practical terms, however, this provision eliminates fair use; sophisticated technological protection measures will in fact allow owners to control use by controlling access. [back to text](#)
9. The TEACH Act (Technology, Education, and Copyright Harmonization Act)-passed by the Senate in June 2001- substantially increases the circumstances under which copyrighted material could be used in online distance education while providing a number of safeguards against that material's misuse. The House Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, conducted a hearing and marked up the legislation in late June 2001, but there has been no further action since that time. [back to text](#)
10. In December 1996, the World Intellectual Property Organization (WIPO) adopted a copyright treaty establishing new intellectual property norms for the networked digital environment. The U.S. approved the treaty and, in October 1998, adopted implementing legislation-the Digital Millennium Copyright Act. Canada will be considering legislation implementing the treaty this year. [back to text](#)

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<<http://www.arl.org/newsltr/220/access.html>>.

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