

University of Massachusetts Amherst

From the Selected Works of Laura Quilter

September 19, 2013

Copyright and Fair Use in Higher Education

Laura Quilter, *University of Massachusetts - Amherst*



Available at: https://works.bepress.com/laura_quilter/33/

Copyright & Fair Use in Higher Education

Laura Quilter / UMass Library
2013 September 19

?? ??

(c)

?? ??

- can a researcher download this database & analyze the articles?
- can a teacher scan these articles & post them in Moodle for their students?
- can the library copy VHS tapes for archival purposes or to stream to classes?

why do academics care about copyright?

- faculty & researchers are creators & owners of copyrights
- users of others' material in teaching
- users of others' material in research / publications
- librarians manage & access content
- changes in copyright law and publishing have turned academic copyright into an impediment to research and teaching

why do universities care about copyright?

- pay to create the copyrighted works:
 - (a) costs of supporting the researcher;
 - (b) support the researchers for peer review;
 - (c) page charges
- pay again to access the copyrighted works they paid to create:
 - journal subscriptions
 - licensing : document delivery & e-reserves & permissions for re-use for teaching or replicating
- *subsidizing profits for publishers*

“It's one of those life skills now, right? When you graduate from high school or college, you should know how to read a map, you should know how to use GPS, you should know a little bit about copyright. If you are somebody who is going to be in a field where you will encounter copyrighted materials all the time, you should know more. If you're going to be an artist or musician and you're getting a red-hot degree in the performing arts, you should know a lot. And I don't think that's quite the case—I don't think it's been built into curricula.”



Maria Pallante, Register of Copyrights, Ars Technica, July 13, 2011, <http://arstechnica.com/tech-policy/news/2011/07/new-register-of-copyrights-unfortunately-i-start-with-enforcement.ars>



part 2: you use copyrights.

is it fair use?



copyright controls *some* rights...

... but not *all* rights. Rights not controlled by copyright include:

- numerous specific statutory exceptions
- "de minimis" uses
- uses of non-copyrighted aspects (facts)
- first sale
- fair uses
- licensed uses [e.g., Creative Commons; library licensed; requested permission]

"What is 'fair use'?"



Bion Smalley, *American Libraries*, May 1977

what is fair use?

"A legislatively sanctioned element of 'gut instinct' lies at the core of every fair use determination." Julie Cohen, 1995

17 USC 107: "the factors to be considered shall include" ...

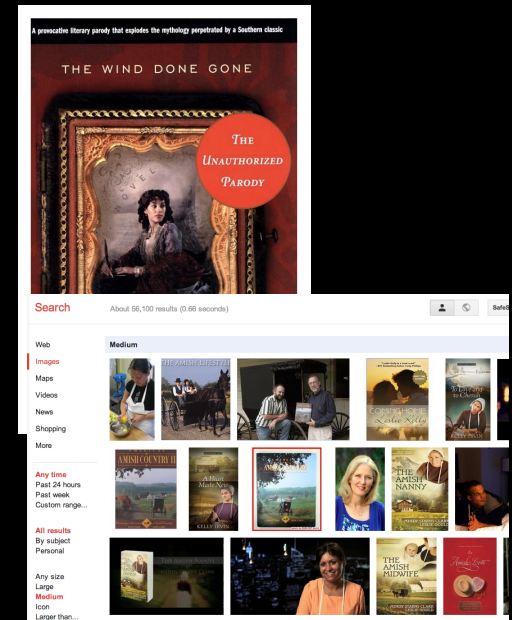
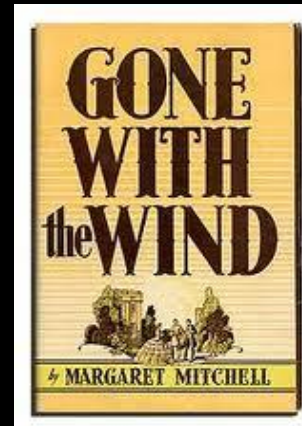
- * purpose /character
- * nature of the work
- * amount taken
- * effect on market

purpose or character of the use

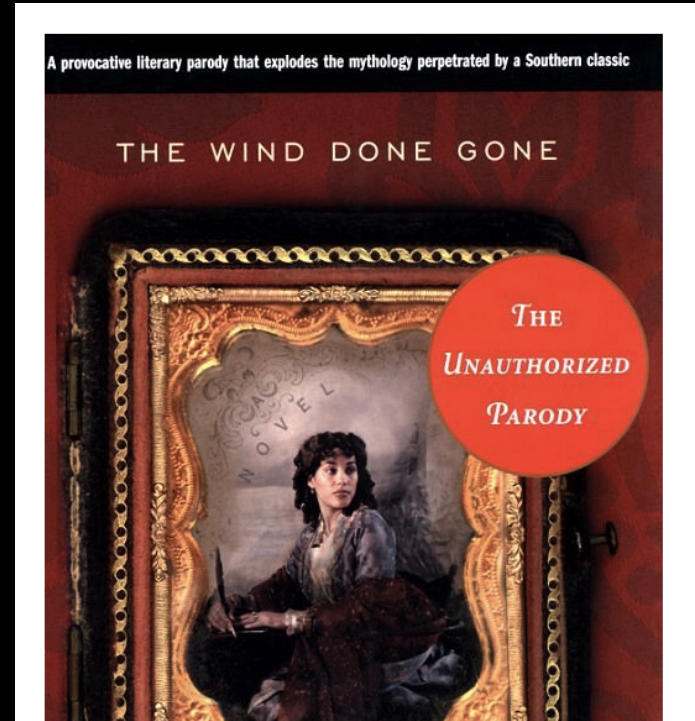
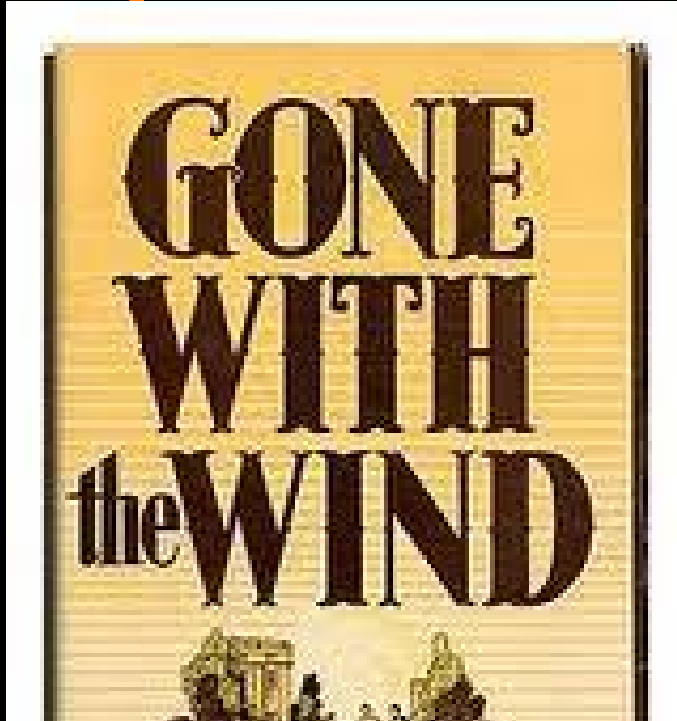
more fair

less fair

- transformative in character?
- substitutive
- commercial
- transformative purpose?
- non-profit educational?
(multiple copies for classroom use)



purpose or character of the use



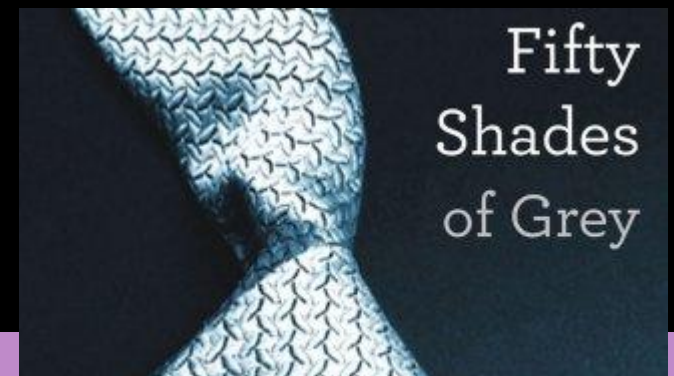
- transformative in character? or substitutive?
- transformative purpose? or commercial?

nature of the copyrighted work

more fair

less fair

- factual?
- published?
- not commercially available at a reasonable price?
- creative (fictional, artistic)
- unpublished? * [not dispositive]
- commercially available?



amount & substantiality taken

more fair

less fair

- only as much needed?
- a small portion?
- a portion that doesn't substitute?
- more than needed?
- the whole thing?
- the heart of the work?

effect on the market

more fair

less fair

- does not substitute in the market?
- does not substitute for a derivative market?
- no licenses available
- substitutes in the market?
- substitutes for a derivative market?
- licenses available (reasonable \$\$)

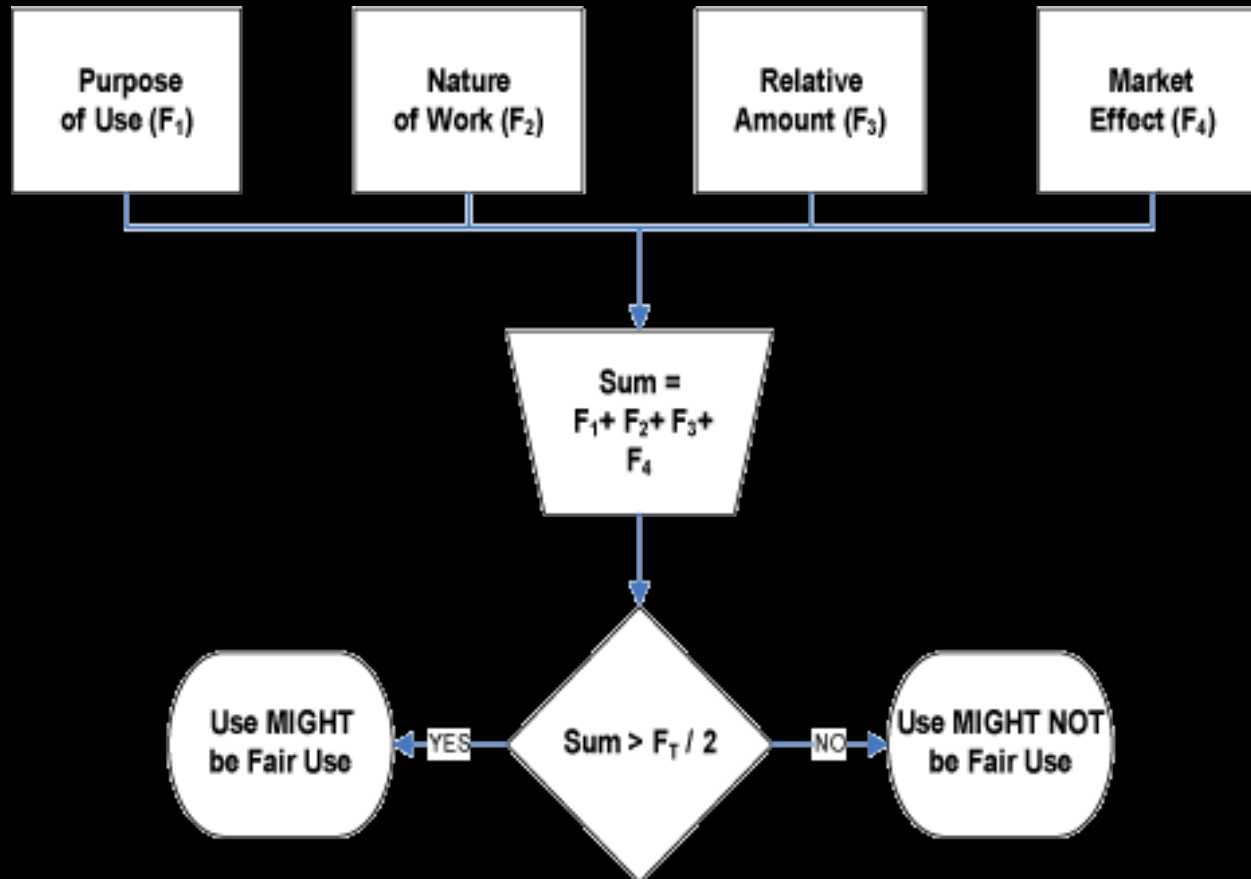
other factors to consider

more fair

less fair

- public benefit?
- benefits purposes of copyright?
- good faith?
- clean hands?
- attribution?
- no public benefit
- bad faith
- unclean hands
- no attribution

add it up?



"Fair Use Visualizer" based on *Field v. Google*, Benedict.com

weigh it?

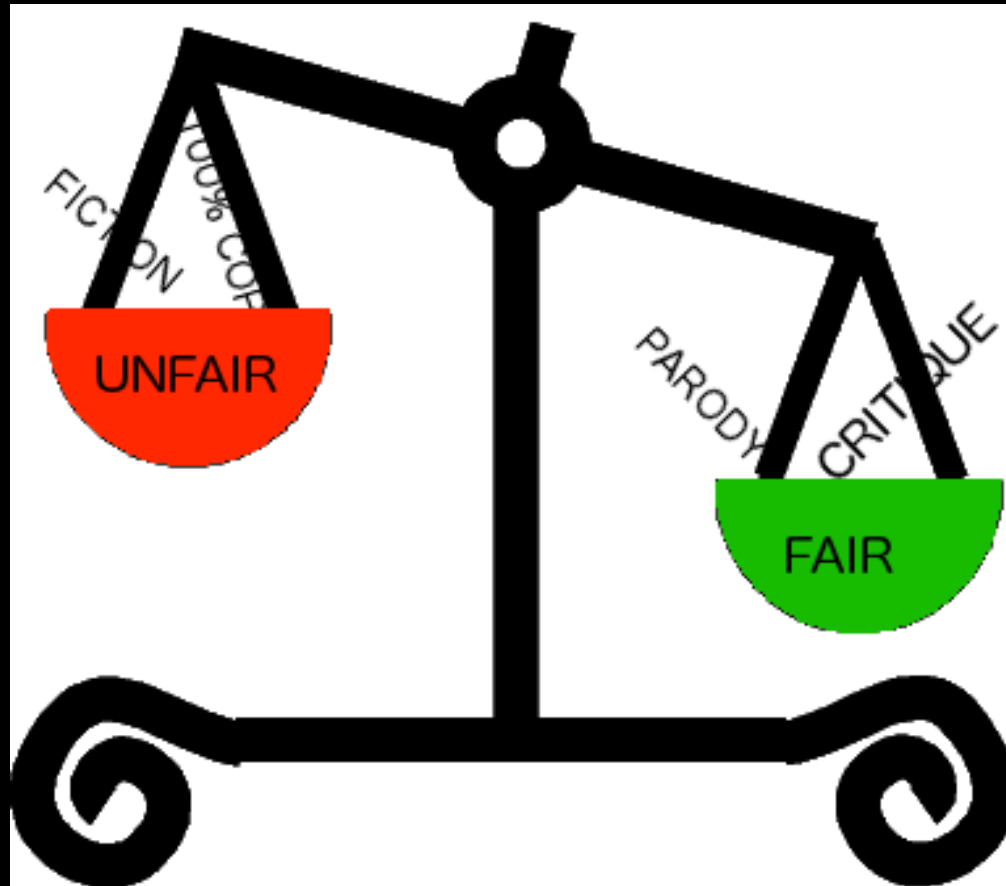


Table 6: Logistic Regression of the Outcome of the Fair Use Test as a Function of the Outcomes of the Section 107 Factors in 297 Dispositive Opinions

Dependent variable: Fair Use Found (1) $n = 297$
 Fair Use Not Found (0) Psuedo $R^2 = .872$

Log likelihood = -25.950 Correctly Classified: 95.6%

	Odds Ratio	Coefficient	Standard Error	P> Z	95% C.I.	
Factor One	15.005*	2.708*	.683	.000	1.370	4.047
Factor Two	2.702	.994	.772	.198	-.519	2.507
Factor Three	7.339*	1.993*	.743	.007	.538	3.449
Factor Four	39.167*	3.668*	.829	.000	2.043	5.293
Constant		.198	.389	.610	-.565	.962

* denotes statistical significance at the .05 level.

Barton Beebe, "An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005", 156 *Pennsylvania Law Review* 549 (2008)

fear, uncertainty & doubt

- fair use is vague
- vagueness accompanied by high damages & risk lead to fear, uncertainty & doubt ("FUD")
- FUD leads to permissions culture
- permissions culture leads to
 - \$\$\$
 - erosion of fair use

remedies?

risk assessment

- is it possible to reduce risk of litigation to zero? NO
- weigh litigation risk against mission risk
- get-out-of-jail free cards in education
- reduce risk through use of fair use and best practices

get-out-of-jail-free cards

- sovereign immunity (state-institutions)
- section 504(c)(2) - good faith "fair use" defense; damages shall be remitted (nonprofit educational institutions, libraries, archives)
- section 108(f) - unsupervised copying equipment (libraries & archives)



... discipline-specific guidance: "Best Practices in Fair Use"

- Media Studies Publishing
- Teaching for Film & Media Educators
- Media Literacy Education
- Scholarly Research in Communication
- Documentary Filmmakers
- Music Scholarship
- Dance-Related Materials
- Poetry
- Visual Resources Association
- Story Arts
- User-Generated Video
- Academic & Research Libraries



CODE OF BEST PRACTICES IN
**FAIR USE FOR
SCHOLARLY RESEARCH
IN COMMUNICATION**

JUNE 2010
COMMUNICATION ASSOCIATION



ARL
Association of Research Libraries

CODE OF BEST PRACTICES IN
**FAIR USE FOR
ACADEMIC AND
RESEARCH LIBRARIES**

JANUARY 2011

STATEMENT OF
**BEST PRACTICES
IN FAIR USE OF
DANCE-RELATED
MATERIALS**

RECOMMENDATIONS FOR
LIBRARIANS, ARCHIVISTS, CURATORS,
AND OTHER COLLECTIONS STAFF

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CONGRESS ON RESEARCH IN DANCE
DANCE HERITAGE ASSOCIATION

FAIR USE: IT'S THE LAW



**EXERCISE YOUR COPYRIGHT
RIGHTS IN THE CLASSROOM**

Timothy Vollmer, <http://www.flickr.com/photos/sixteenmilesOfString/2596569134/>

the year of academic litigation (2012)

- *Authors Guild v. HathiTrust*
- *Cambridge Univ. Press v. Becker* (Georgia State Univ. reserves)
- *AIME v. UCLA* (videostreaming)

GSU e-reserves case:

Cambridge Univ. Press v. Becker

- case-by-case assessment
- academic use is an automatic plus
- academic works are an automatic plus
- no licenses available? no economic harm
- quantities? no classroom guidelines but use your own guidelines

upshot? only 5 / 100 claims were infringing,
and attorney's fees were awarded to GSU

Authors Guild v. HathiTrust

- indexing for search and text analysis is fair use
- providing copies for disabled patrons is fair use
- replacement copies for libraries is fair use

"I cannot imagine a definition of fair use that does not include the transformative uses made ... [and would] terminate this invaluable contribution to the progress of science and cultivation of the arts"

the year of academic litigation. 2.0

- *Authors Guild v. HathiTrust*
- *Cambridge Univ. Press v. Becker* (Georgia State Univ. reserves)
- *AIME v. UCLA* (videostreaming)

2013

- replays of GSU & HathiTrust
- *AIME v. UCLA* - settled
- *Kirtsaeng v. Wiley* (first sale vs. import) !!!
- *Authors Guild v. Google* (BookSearch)
- *ReDigi* (electronic first sale)
- Copyright Office "next Great Copyright Act"?

more information on fair & lawful uses in teaching & research

- UMass Scholarly Communication website
<http://library.umass.edu/sc/>
- UMass Library eReserves, <http://ereserves.library.umass.edu/>
- Center for Social Media, Best Practices in Fair Use <http://centerforsocialmedia.org/fair-use/best-practices>
- Kenneth Crews, TEACH Act (distance ed) <http://copyright.columbia.edu/copyright/special-topics/distance-education/>
- Copyright Office, DMCA Exemptions, <http://www.copyright.gov/1201/>
- STM Guidelines, <http://stm-assoc.org/permissions-guidelines/>



part 3: you own copyrights.

now what?



you own copyrights! (lots of them)

- any "original work of authorship"
- "fixed in any tangible medium of expression"
 - what does that mean ?
- you don't have to register or print (c) on the document (although it's helpful)
- the (c) extends 70 years after your death!

"fixed in any tangible medium of expression"

- what does that mean?
 - research articles
 - monographs
 - papers
 - photographs
 - unpublished manuscript
 - letters
 - emails
 - slide decks
 - scribbled notes on post-its
 - doodle



assigning your copyright


- When you assign your copyright to a journal, you no longer own the copyright to your article. You are now a legal stranger to your article* and may have to ask permission from the journal to reprint it, distribute it, or adapt it.
- Does the journal need you to *assign* your copyright to them to print it? NO.

* in most circumstances

why do universities care about copyright?

- pay to create the copyrighted works:
 - (a) costs of supporting the researcher;
 - (b) support the researchers for peer review;
 - (c) page charges
- pay again to access the copyrighted works they paid to create:
 - journal subscriptions
 - licensing : document delivery & e-reserves & permissions for re-use for teaching or replicating
- *subsidizing profits for publishers*

Scholarly Publishing, Today



Hub | **ScienceDirect** | Scopus | SciTopics | Applications

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Access Online Article

Open Access: Implications for Evidence-based Practice Original Research Article
Journal of Emergency Nursing, Volume 34, Issue 6, December 2008, Pages 561-563
Barbara A. Epstein [View Abstract](#)

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SAFE PRACTICE, SAFE CARE



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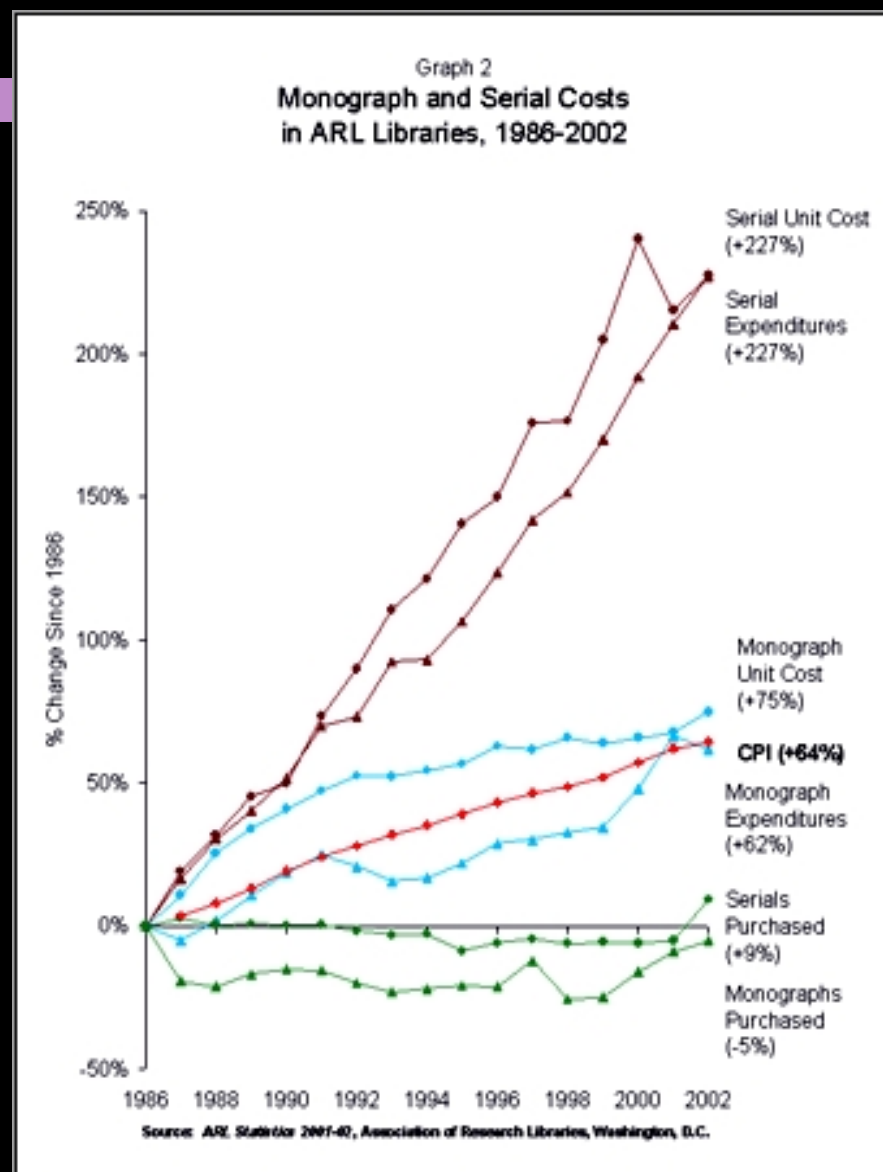
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subsidizing (for-profit) publishers

- consolidation of scholarly journals into for-profit publisher's portfolios; consolidation of publishers into larger media corporations
 - e.g., Elsevier, 2010: 37% profit margin
- serials budgets swallowing monograph budgets, leading to decline of University & scholarly presses

crisis in scholarly communication

- “publish or perish” > more jrnls
- “profit or perish” > more \$\$\$
- more users & more uses
- *University bottom line: Pay, pay, pay, pay (research, publication, subscription, re-use)*



alternatives to assignment

- You can *license* some rights.
 - Publisher may only need non-exclusive rights
 - First publication; credit; rights to re-print.
 - Open Access ("OA") publications
 - Creative Commons licensing
 - CC-BY guarantees *attribution*



Creative Commons

License Features

Your choices on this panel will update the other panels on this page.

Allow modifications of your work?

☒ Yes ☐ No

☐ Yes, as long as others share alike



Allow commercial uses of your work?

☒ Yes ☐ No

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Attribute work to name

Attribute work to URL

Source work URL

More permissions URL

This work is licensed under a [Creative Commons Attribution 3.0 Unported License](#).

Copy this code to let your visitors know!

```
<a rel="license"
href="http://creativecommons.org/licenses/by/3.0/deed.
en_US"><img alt="Creative Commons License"
```

alternatives to assignment

- You can assign your copyright but retain some rights.
 - SPARC Addendum (attach it to your author agreement!)
 - YOU KEEP -- Rights to re-distribute (classroom use? faculty requests, include in other works), self-archive, archive in your institutional archive, adapt / translate

SPARC Author Addendum

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- improved citation indexes / h-index
- less hassle -- no permission requests & transactions for routine uses
- helps research & university budgets
 - cost of research... page charges... subscriptions... peer review... other uses


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Articles

Notes on the Impact of Research on the Development of eGovernment (Invited Article), *European Review of Political Technologies* (2007)

Institutional Development in the Virtual State: The Missing Link in Technological Perspectives on e-Government, *Politicheskaya Nauka* (2007)

Prospects for Improving the Regulatory Process using E-Rulemaking, *Communications of the ACM* (2003)

Paradoxes of Public Sector Customer Service, *Governance: An International Journal*



- Professor, Department of Political Science
- Director, National Center for Digital Government
- Director, Science, Technology and

<http://scholarworks.umass.edu/>

self-archiving

- Increasingly author agreements facilitate *self-archiving* on author websites or institutional repositories.
- If not, ASK. (SPARC et al)

If we don't provide faculty options, then:

- #PDFtribute for Aaron Swartz
- #ICanHazPDF (twitter hashtag)

federal government

- NIH Open Access Mandate - new enforcement mechanisms
- NIH Data Management plans

2013

- FASTR Act (Fair Access to Science & Technology Research Act)
- White House Directive on Open Access

The logo for the FASTR Act of 2013 is a green rectangular box with a white diagonal stripe running from the bottom left to the top right. The text is white and green. At the top, it says "Speed up Science" in a small font, followed by "TELL CONGRESS:" in a larger, bold, green font. Below that, it says "Support the" in a small font, followed by "FASTR Act of 2013" in a larger, bold, white font. At the bottom, it says "The Fair Access to Science and Technology Research Act" in a small font.

Speed up Science
TELL CONGRESS:
Support the
FASTR Act of 2013
The Fair Access
to Science and
Technology
Research
Act

White House Directive on OA

- Feb. 22, 2013
- Agencies w/ > \$100M research budgets: NSF, Ed, EPA, NASA, USDA, HHS, Commerce, Interior, Defense, Energy, Trans, DHS, Ag, State, Smithsonian; NEH? others?
- 12-month embargo

The screenshot shows the website of the Office of Science and Technology Policy (OSTP). The header includes the OSTP logo and navigation links: About OSTP, OSTP Blog, Pressroom, Divisions, R&D Budgets, and Resource Library. The main heading is "Expanding Public Access to the Results of Federally Funded Research", posted by Michael Stebbins on February 22, 2013 at 12:04 PM EST. Below the heading are social media sharing buttons for E-Mail, Tweet, Share, and a plus icon. The text of the blog post begins: "The Obama Administration is committed to the proposition that the scientific research their tax dollars have paid for. The Director John Holdren has directed Federal agencies to make the published results of federally funded research available to the public and requiring researchers to better access and use the results of federally funded research. OSTP has been looking..."

Below the blog post is a memorandum from the Executive Office of the President, Office of Science and Technology Policy, dated February 22, 2013. The memorandum is addressed to the Heads of Executive Departments and Agencies. It is from John P. Holdren, Director. The subject is "Increasing Access to the Results of Federally Funded Scientific Research".

1. Policy Principles

The Administration is committed to ensuring that, to the greatest extent and with the fewest constraints possible and consistent with law and the objectives set out below, the direct results of federally funded scientific research are made available to and useful for the public, industry, and the scientific community. Such results include peer-reviewed publications and digital data.

Scientific research supported by the Federal Government analyzes innovative breakthroughs that drive our economy. The results of that research become the basis for new insights and are assets for progress in areas such as health, energy, the environment, agriculture, and national security.

Access to digital data sets resulting from federally funded research allows companies to focus resources and efforts on understanding and exploiting discoveries. For example, open weather data underpins the forecasting industry, and making genome sequences publicly available has spawned many biotechnology innovations. In addition, wider availability of peer-reviewed publications and scientific data in digital formats will create innovative economic markets for services related to curation, preservation, analysis, and visualization. Policies that mobilize these publications and data for re-use through preservation and broader public access also maximize the impact and accountability of the Federal research investment. These policies will accelerate scientific breakthroughs and innovation, promote entrepreneurship, and enhance economic growth and job creation.

The Administration also recognizes that publishers provide valuable services, including the coordination of peer review, that are essential for ensuring the high quality and integrity of many scholarly publications. It is critical that these services continue to be made available. It is also important that Federal policy not adversely affect opportunities for researchers who are not funded by the Federal Government to disseminate any analysis or results of their research.

To achieve the Administration's commitment to increase access to federally funded published research and digital scientific data, Federal agencies investing in research and development must have clear and coordinated policies for increasing such access.

more information

- UMass ScholarWorks, <http://scholarworks.umass.edu>
- AAAS, Authorship Rights Report, <http://www.aaas.org/spp/sfrr/projects/epub/>
- US Copyright Office, <http://copyright.gov/>
- Create Change, <http://createchange.org/>
- Creative Commons, <http://creativecommons.org/>
- SPARC, <http://arl.org/sparc/>

more information

A decorative graphic consisting of a yellow L-shaped bracket on the left side, a horizontal bar with four colored segments (yellow, purple, yellow, red) extending from the top, and a vertical purple bar extending from the bottom left.

- lquilter @ library.umass.edu