December 19, 2008

Scholarly Journals and the Open Access Conundrum

Colin B Sakumoto, American University

Available at: https://works.bepress.com/colin_sakumoto/1/
SCHOLARLY JOURNALS AND THE OPEN ACCESS CONUNDRUM

Colin Sakumoto*

INTRODUCTION ........................................................................................................................1

I. WHY IS OPEN ACCESS DESIRABLE FOR SCHOLARLY JOURNALS? ....2
   A. WHY IS OPEN ACCESS DESIRABLE? ...............................................................2
   B. WHY ARE SCHOLARLY JOURNALS GOOD CANDIDATES FOR OPEN ACCESS? ....4

II. THE INEVITABILITY OF OPEN ACCESS ...............................................................8
   A. IS OPEN ACCESS INEVITABLE? .................................................................8
   B. BARRIERS TO OPEN ACCESS .................................................................10

III. MOVING FORWARD .........................................................................................13

CONCLUSION ........................................................................................................14

INTRODUCTION

According to John Willinsky, “the founding of new universities represent[s] a particularly strong assertion of modern nationhood.”1 However, due to rising costs in maintaining scholarly journal subscriptions, the research capacities of universities in developing countries are significantly hampered. According to the World Health Organization (hereinafter, “WHO”), as of 2000, in the lowest income countries, 56% of research and academic institutions did not have a single subscription to international journals; 34% of the next lowest income countries also lacked subscriptions to international journals.2 Moreover, the most pressing information problem identified by developing countries was access to high-priced scholarly journals.3 As a result, in 2002, the WHO implemented the Health Information Network Access to Research Initiative (hereinafter, “HINARI”) to provide developing countries with open access to biomedical

---

* Author’s note.


3 Ibid.
research journals.\textsuperscript{4}

HINARI is but one example of open access alternatives improving access to scholarly journal literature through the use of the online environment. In fact, the sustainability of the open access publishing model can be seen in a growing number of e-print archives and open access indices.\textsuperscript{5} However, as of 2005, open access journals represented only 3-5% of the scholarly journal market.\textsuperscript{6}

This paper will attempt to examine the desirability and feasibility of open access scholarly journals with particular emphasis on the parties shaping the production of these journals. We will then examine how the current publishing model will shape the implementation of open access publishing while also focusing on the obstacles likely to hinder implementation. Finally, we will suggest a number of measures that can be immediately implemented to help build the momentum needed to one day realize a widespread open access publishing model.

I. WHY IS OPEN ACCESS DESIRABLE FOR SCHOLARLY JOURNALS?

In analyzing open access as an ideal publishing model for scholarly journals, it is important to explore the two composite questions inherent to the discussion: first, why is open access desirable; second, why are scholarly journals good candidates for open access? Yochai Benkler has developed a comprehensive framework for analyzing the first question\textsuperscript{7} and we will focus on the benefits of open access that most directly pertain to scholarly journals. We will then examine the desirability of the open access publishing model in terms of its compatibility with scholarly journal production and feasibility in light of current technological developments. This will provide a framework to analyze the inevitability of open access scholarly journals in the next section.

A. Why is Open Access Desirable?

In articulating what open access represents, Benkler identifies a set of public resources or commons which anyone can use at will and without payment.\textsuperscript{8} Because of these nonproprietary and non-exclusionary

\textsuperscript{5} Id. at pg. 28-9.
\textsuperscript{6} Id. at page 29.
characteristics, open access tends to conflict with the traditional exclusionary incentives to produce public resources, e.g., copyright and patent protection. As a result, the argument for open access subsidization traditionally arises when a public resource implicates the “basic instrumentalities of economic opportunity” and human development, and exclusion of that resource leads to a significant adverse impact on social welfare. As a social welfare safeguard, open access has played a central role in the access to knowledge movement by mobilizing agricultural innovation and improving software capabilities of developing countries.

Besides safeguarding social justice concerns, open access is also desirable because it enables broad public dissemination which mobilizes critical thinking. It was an out of print, public domain mathematics textbook stumbled upon by Srinivasa Ramanujan that laid the foundation to some of the greatest achievements in the field of analytical number theory. The idea that open access extends the “freedom to participate in the tugging and pulling at the…creations of others” implicates not just the rare genius, but society as a whole. Benkler asserts that open access produces culture less distorted by mass media and therefore “more democratic: self-reflective and participatory.”

Open access has also gained appeal through its emergence as a sustainable economic model in light of recent developments in technology. The traditional economic argument against open access presumes that freely available goods lack production incentive according to the free rider problem. However, because wide public dissemination of a resource can be a production incentive, in and of itself, the feasibility of open access turns on minimizing production and distribution costs of the resource. Because open access resources are presumptively non-rivalrous, the cost of consuming the resource does not include a marginal cost of restocking the resource in lieu of depletion. With the advent of digital technology, reductions in the marginal costs of reproducing and distributing knowledge based resources have made the costs of sustaining open access increasingly realizable. As a result, if a producer derives sufficient value from wide public dissemination or if he loses sufficient value from the proprietary exclusion of his work, the costs of implementing an open access strategy are offset making implementation desirable.

---

9 Id. at 13.
10 Ibid.
11 Id. at 14.
12 Id. at 15.
13 See generally G.S. Carr Synopsis of Elementary Results in Pure Mathematics (1856).
14 Benkler, The Wealth of Networks 15
15 Ibid.
Open access can also be desirable when production interests do not specifically include wide public dissemination, but are indirectly furthered by it. In the context of scholarly journals, research impact is a valuable interest motivating the author to publish his work.\textsuperscript{16} Research impact quantitatively depends on, among other things, the number of times the author’s work is cited by others, i.e., citation counts. It is well established across the majority of academic disciplines that open access journals generate significantly larger citation counts than their commercial counterparts.\textsuperscript{17} By publishing in an open access journal, wide public dissemination increases the visibility of the author’s work which adds intrinsic value to the work as others are able to build upon it. As explained in the next section, the economic characteristics shaping the production of scholarly journals make the open access publishing model particularly appealing.

\textbf{B. Why are Scholarly Journals Good Candidates for Open Access?}

The knowledge disclosed in a scholarly journal is not a true public good because it is non-rivalrous but partially excludable. Upon creation, the author implicitly retains a pseudo-right against plagiarism. This is important to keep in mind, especially with scientific journals, because the exclusionary mechanism of copyright does not protect research, facts, or truths uncovered.\textsuperscript{18} The threat of plagiarism, on the other hand, protects both the author’s prestige and propriety interest in the work by imposing severe repercussions for the slightest unattributed taking which trivializes the threat of copyright infringement.\textsuperscript{19}

Keeping that in mind, it is also important to point out that journal contributors, i.e., authors, editors and peer reviewers, almost never receive royalties or other financial remuneration for their contributions to a journal.\textsuperscript{20} Instead, journal publishing garners prestige for these contributors, an incentive in and of itself, which indirectly leads to financial gain in the form of research grants, promotions or tenure. Journal contributors, therefore, belong to a privileged group (in the economic sense of the term) because they derive an intrinsic benefit, i.e., prestige, from the production of a (nearly) public good, i.e., scholarly knowledge.\textsuperscript{21}

\textsuperscript{17} Ibid.
\textsuperscript{18} Id. at 43.
\textsuperscript{19} Ibid.
\textsuperscript{20} Id. at 49.
Accordingly, the production of scholarly knowledge overcomes the free rider problem without having to also provide journal contributors with any extrinsic incentive such as copyright protection or financial remuneration. This is particularly important in light of conflicts of interest because all extrinsic incentives, especially financial ones, have the potential to taint the creditability of the contributors as well as the legitimacy of the scholarly work.\(^\text{22}\)

Having established a potential niche for open access based on an absence of extrinsic incentive behind contributions to scholarly journals, we must now examine the desirability of open access in light of faculty publishing preferences. According to Ithaka’s 2006 study of faculty publishing preferences:

> The foremost priority for faculty, in every discipline and every size institution, is in having their work seen by their peers within their field...[a]udiences in the general public or the developing world may benefit from access to the work, but such considerations are second priorities at best.\(^\text{23}\)

As we mentioned earlier, the desirability of open access hinges on whether wide public dissemination either directly or indirectly serves a valuable interest of the producer. While wide public dissemination leads to increased citation counts, it is of little value if research impact turns on other factors. Based on Ithaka’s findings, research impact emphasizes qualitative factors, i.e., who is disseminating the work, over quantitative factors, such as citation counts.

These findings do not suggest that open access is generally undesirable, but rather incompatible with the current publishing model. The current publishing model supports a counterintuitive notion that increasing a work’s visibility with the general public does not generally lead to visibility within an author’s field of study. This is because of a correlation between a journal’s visibility and its market saturation within the author’s field of study for the majority of disciplines. Without transgressing too far into the next section, it is sufficient to note that this correlation is artificial and attributable to historical developments rather than an intrinsic dependency between a journal’s quality and its economic success. As a result, established subscription-based journals continue to garner more attention than open access journals because academics tacitly reinforce this artificial correlation through their publishing preferences.

Without this artificial correlation and absent an established hierarchy for scholarly journals, a natural correlation would arise between a work’s

---

\(^{22}\) Willinsky, The Access Principle 44.

availability in multiple sources and its visibility within the author’s field of study. Because an author’s work would be intrinsically available when cited in the works of others, it would behoove the author to publish his work in an open access journal, or at least maintain a copy of his work in an open access repository. Commercial publishers have traditionally prevented the later from happening using the exclusionary mechanisms of copyright to control access over the contents of their journals. But because authors lack an established hierarchy for inferring a journal’s qualitative value, commercial journals would not have a reputational advantage needed to extract the author’s copyright; some other incentive is needed to prevent the author from publishing in an open access journal.

At the same time, however, universities and governmental agencies funding the author’s work have become increasingly critical of the practice of authors “turn[ing] the results of publicly funded research over to some private corporation on an exclusive, monopoly basis.” As a result, agencies such as the National Institutes of Health have required authors to make all funded research freely available within twelve months of publication. Based on these observations, open access appears to not only be the natural publishing tendency for authors but for historical developments shaping the current scholarly journal hierarchy, but also the intended publishing model according to the parties funding the author’s work.

Having established that open access is generally compatible with the preferences of the funding and contributing parties behind scholarly journals, we must now examine the feasibility of open access publishing in light of current technological developments. Willinsky offers a variety of open access and partial open access publishing models, but in terms of having a sustainable open access electronic journal employing peer-review that does not depend on concessions from established subscription based journals, the “author fee open access” model appears to be the most desirable. In the author fee open access model, a professional or scholarly association charges an author a flat fee to have his work edited, peer-reviewed and published in an open access online journal. Willinsky estimates that the fee charged to authors can be anywhere between $500 and $3,000 depending on whether the professional or scholarly association

---

25 Id. at 47.
26 Id. at 42.
27 Benkler, The Wealth of Networks 324.
28 Willinsky, The Access Principle Appendix A.
29 Ibid.
subsidizes their journals with membership fees. Currently, the Public Library of Science charges authors $1,500 to have their work published and we will use this figure as the expected fee per published article to sustain the average open access journal.

According to Ithaka’s 2006 study of faculty publishing preferences, the second most important concern for surveyed faculty was “publish[ing] articles for free, without paying page or article charges.” This finding appears to refute the desirability of an author fee open access model from the perspective of contributing faculty, but it does not explain how these publishing fees were envisioned by the faculty surveyed. For example, publishing fees could be accounted for in research and institutional grants. Universities and governmental agencies could set aside a $1,500 reimbursement award within the research grant that an author could choose to elect provided that he publishes in an open access journal. This $1,500 publishing fee does not have to be an out of pocket expense for the author.

It is also important to point out that this $1,500 publishing fee reflects the underlying costs in currently available technology. Open access publishing is in a state of infancy and there are substantial startup costs associated with remote staffing, software, web design, searchability and storage. Expected developments in open source journal software, ranging from editorial management tools to design layout templates, will directly reduce these startup costs for open access journals. Furthermore, by discarding the conventions of print journals which were designed to solve problems that do not exist in the digital environment (e.g., issuing individual articles immediately rather than modularly issuing a collection of articles, presenting journals as monthly indexes of article abstracts linked to an article repository rather than as a collective work of articles), open access journals will be able to reduce their operating costs by automating functions such as uploading, indexing and archiving published articles.

In analyzing the adaptability of open access with scholarly journals, three important observations can be made: first, open access is not fundamentally incompatible with scholarly journals because academics derive an intrinsic incentive from contributing to scholarly journals and do not depend on the exclusionary mechanisms of copyright to protect their interests at stake; second, faculty publishing preferences reinforce the

---

30 Ibid.
31 Ibid.
33 Willinsky, The Access Principle Appendix A.
34 Id. at 72.
35 Id. at Appendix C.
current publishing model which obstructs the transition to open access; third, the parties funding the contributions likely to be published in a scholarly journal, i.e., universities and governmental agencies, are resistant to the current publishing model and welcome the transition to open access. Although universities and governmental agencies can condition an author’s funding upon open access disclosure, it remains unclear whether such conditions have been imposed out of self-serving or paternalistic interests. If the motivation is predominantly self-serving, we can infer a limit in the amount of funding available to subsidize an author fee open access model. As such, the feasibility of open access scholarly journals turns on the publishing fee and the extent to which developments in technology will minimize it.

II. THE INEVITABLY OF OPEN ACCESS

In establishing a framework for achieving open access publishing given the constraints of the current publishing model, it is important to determine whether open access publishing is inevitable or if it can only be accomplished by undoing various obstacles inherent in its implementation. If the former, our actions moving forward will tend to be accommodations in preparation of open access publishing; if the later, long term plans must be made for the removal of existing barriers before an open access implementation strategy can be developed.

A. Is Open Access Inevitable?

The idea that open access scholarly journals will inevitably displace subscription based scholarly journals is a rather extreme argument advocated by Odlyzko. According to his projection, if the publishing enterprise was reengineered to take full advantage of the realizable technological developments in the coming years, the costs of running a peer-reviewed electronic journal could fall below $500 per published article. This is because a majority of the technological infrastructure, including servers, networking telecommunications, computers and support services, exists at the editor’s institution and can be freely used to host the journal. With the editor’s institution implicitly paying the infrastructure fees and the author’s institutional grant covering copyediting fees, open

---

37 Odlyzko, *Tragic Loss or Good Riddance?* 41-2.
38 Id. at 42-3.
access publishing of the electronic journal becomes feasible.\textsuperscript{39}

Odlyzko also asserts that open access journals do not need to have a long history in order to achieve the prestige as a high status journal.\textsuperscript{40} In the example of the Journal of the American Mathematical Society, high status was achieved right after the journal was published due to the prestige and policies of its editors.\textsuperscript{41} Accordingly, if arising open access journals can achieve prestige in a short period of time, they will displace established commercial journals because prestigious open access journals satisfy the preferences of both contributing faculty and their funding institutions.\textsuperscript{42}

Benkler, on the other hand, rejects this notion arguing:

\begin{quote}
\textit{[E]stablished journals…carry substantially more prestige than the new journals…and as long as hiring and promotion decisions continue to be based on the prestige of the journal in which a scientist’s work is published, the ability of the new journals to replace the traditional ones will be curtailed.}\textsuperscript{43}
\end{quote}

While the assertions of Odlyzko and Benkler appear to be incompatible, Odlyzko offers an alternative open access explanation for the inevitable displacement of commercial publishers: “widespread distribution of preprints.”\textsuperscript{44} Odlyzko concedes, however, that although authors typically retain the right to archive a preprint copy of their work in a personal, university or open access repository, in most disciplines the right goes unexercised.\textsuperscript{45} Despite this reality, Odlyzko contends that the practice of archiving preprint copies will eventually spread and render expensive journals unsustainable.\textsuperscript{46} Conversely, Ithaka’s 2006 study of digital repositories reaches the conclusion that “in the absence of mandates or strong campus-wide leadership commitments, we do not foresee institutional repositories yielding a transformative influence on the business side of journal publishing.”\textsuperscript{47} Willinsky remains torn on this issue noting, “the eventual [pre]print archive buildup of articles…puts the association’s retention of the library’s subscription in jeopardy,”\textsuperscript{48} while also providing empirical data showing “[a]uthors who self-archive the work they publish do not appear to pose a threat to associations’ subscription lists.”\textsuperscript{49}

While there is an absence of corroborating evidence supporting

\begin{thebibliography}{9}
\bibitem{39} Id. at 44.
\bibitem{40} Id. at 46.
\bibitem{41} Ibid.
\bibitem{42} Ibid.
\bibitem{43} Benkler, The Wealth of Networks 324.
\bibitem{44} Odlyzko, Tragic Loss or Good Riddance? 45.
\bibitem{45} Ibid.
\bibitem{46} Ibid.
\bibitem{47} Housewright & Schonfeld, Ithaka’s 2006 Studies of Key Stakeholders in the Digital Transformation in Higher Education 24.
\bibitem{48} Willinsky, The Access Principle 60.
\bibitem{49} Id. at 63.
\end{thebibliography}
Scholarly Journals and the Open Access Conundrum

Odlyzko’s theory that open access journals will inevitably lead to the displacement of commercial publishers and subscription based journals, the possibility remains that open access publishing is an economic equilibrium for online journal production. Because commercial publishers leverage journal access for subscription fees, an open access equilibrium might arise if publishers cannot maintain exclusive control over journal access. If authors collectively exercise their right to archive their works in open access repositories, these works would no longer be exclusively accessible in commercial journals. But because it behooves all authors to archive their works in open access repositories in light of increased citation counts (which is always a benefit, marginal or otherwise), the fact that most authors do not suggests an inherent barrier to open access resulting from imperfect knowledge. There is strong evidence to suggest that most authors are either unaware of their archival rights or unaware of the benefits of open access archiving.

Throughout this section we have identified a variety of characteristics and dependencies inherent in the current publishing model which tend to support an argument for the sustainability of open access. However, we cannot conclusively show open access inevitability or open access equilibrium without encountering an obstacle that tends to maintain the status quo. As a result, we will turn our attention to barriers of open access in order to determine what types of remedial measures might be needed to make open access publication inevitable.

B. Barriers to Open Access

Because commercial publishers have shaped both the current journal economy as well as the current publishing model, their sustained impact since emerging after World War II represents a historical barrier to open access. As a result of increased governmental research funding leading to an unprecedented number of article submissions, commercial publishers were able to establish a variety of journals due to the inefficiencies of scholarly journals employing editorial peer review. Until the 1980s, commercial publishers kept their subscription fees competitive and focused on building up their journals’ reputation with faculty by publishing

\[ \text{Id. at 49.} \]
\[ \text{Id. at 52-3.} \]
\[ \text{John C. Burnham, The Evolution of Editorial Peer Review, 263 JAMA 1323, 1326 (1990).} \]
\[ \text{Theodore C. Bergstrom, Free Labor for Costly Journals, 15 Journal of Economic Perspectives 183, 188 (2001).} \]
their work or asking them to contribute as peer-reviewers or even editors.\textsuperscript{54} When commercial publishers eventually increased subscription fees, librarians turned to faculty regarding which journals they should keep and which journals they should drop due to budget constraints.\textsuperscript{55} Accordingly, libraries kept the expensive commercial journals and cancelled subscriptions with cheaper competing journals, while commercial publishers maximized their extractions from a library’s subscription budget through journal bundling practices.\textsuperscript{56} Ironically, the journals faculty asked for were the very journals they personally subscribed to.\textsuperscript{57} It is important to point out that commercial publishers were in essence pitting faculty against their institution’s best interests, which is not technically a conflict of interest, but certainly carries the undertones of improper influence.

While libraries routinely expressed their frustrations with increasingly expensive journal subscriptions to faculty, little to no action was taken until 2003 despite cutbacks in book titles throughout the 80s and 90s.\textsuperscript{58} Moreover, in 2000, researchers were unwilling to support a boycott of expensive commercial journals by the Public Library of Science.\textsuperscript{59} Faculty were essentially complicit in enabling commercial publishers to secure corporate concentration over the scholarly journal market, prevent competing journals from emerging and establishing reputational assets, and raid the budget of their institutional libraries for over a period of two decades.\textsuperscript{60}

Because commercial publishers were essentially given free reign to entrench themselves in a relatively exclusive market, they were able to secure reputational advantages in not just their premier journals, but in their secondary bundled journals as well.\textsuperscript{61} Commercial publishers also increased their market saturation by acquiring other journals and merging with smaller publishers.\textsuperscript{62} Despite the backlash against exploitive pricing by universities in 2003, commercial publishers continue to maintain their prevalence by acquiring journals from scholarly societies which carry the intrinsic reputational benefits of the society as well.\textsuperscript{63}

A second barrier to open access arises from what Benkler describes as a “lack of autonomy” in which owners of infrastructure are able to exert

\textsuperscript{55} Id. at 24.
\textsuperscript{56} Ibid.
\textsuperscript{57} Ibid.
\textsuperscript{58} Id. at 25.
\textsuperscript{59} Id. at 21.
\textsuperscript{60} Id. at 25.
\textsuperscript{61} Id. at 17.
\textsuperscript{62} Id. at 18.
\textsuperscript{63} Id. at 56-7.
influence over its users by:

- Controlling and manipulating a user’s information environment to shape how they perceive their life choices in ways that make them more likely to act in a manner that the owner prefers.\(^{64}\)

Based on faculty publishing preferences, the qualitative value, i.e., visibility, of a journal depends on how many academics within a particular field of study perceive the journal as being valuable. Additionally, an academic’s perception of a journal depends on how he perceives his peer’s perception of that journal. Accordingly, a journal does not actually have intrinsic qualitative value which seems to be counterintuitive, but is nonetheless consistent if value depends on visibility.

Inherent in a faculty’s publishing preferences is this notion that a single journal will be the most visible and therefore the most valuable. As a result, a lack of autonomy is built into faculty publishing preferences leading to the observation that the more coordinated academics are within their field of study, the more they are susceptible to influence. Furthermore, because scholarly journals act as the infrastructure for communicating scholarly knowledge, commercial publishers are naturally put in an influential position over the academics in the journal’s field of study.

Based on these observations, it is unsurprising that faculty were so complicit in enabling commercial publishers to extract profits from their institutional libraries over a period of twenty years. It is also unsurprising that faculty are generally resistant to the open access publishing model and do not generally take advantage of self-archiving, as explained earlier, even though they would ultimately benefit from these measures. As a result, institutions need to play an increasingly paternalistic role in forcing faculty to adopt self-serving measures that tend to be against the interests of commercial publishers.

A third barrier to open access is the exclusionary mechanisms of copyright protection. Open access, by its very definition, precludes any notion of exclusion and is fundamentally incompatible with the exercise of copyright protection. Furthermore, as explained earlier, copyright protection does not have an incentivizing effect on scholarly journal contributors, but provides publishers with access control over a journal which is needed to generate subscription fees.

Keeping in mind that we are discussing the barriers preventing open access from becoming inevitable, it should be pointed out that removing scholarly journals and scholarly articles from the subject matter of copyright is sufficient, in and of itself, to bring about open access. Technological measures protecting scholarly journals would be

\(^{64}\) Benkler, The Wealth of Networks, 159.
circumventable if scholarly journals were not copyrightable. As a result, the absence of copyright protection would completely destroy the commercial publishing model which may not be desirable in light of scholarly associations. While an argument can be made that their membership fees should supplement open access journal publication, it should be pointed out that the activities of a scholarly society are traditionally funded with journal revenue. Instead of publishing journals with membership fees, a scholarly society might choose to drop its journals and use membership fees to fund its activities. As a result, members of the society would publish in other open access journals, but those journals would not benefit from the reputational gains of being sponsored by the society. While this may be an acceptable loss to some, it is nonetheless a social welfare loss as well as a social-autonomy loss due to the removal of a potential source of knowledge.

III. MOVING FORWARD

In devising solutions which might remove the barriers to open access journal publishing, it is important to remember that funding parties tend to desire open access implementation while faculty tend to resist its implementation. With this in mind, our first recommendation is for governmental funding agencies and academic institutions to take on a more paternalistic role with their faculty publishing policies. At the very least, funding must be conditional upon preprint archiving in an institutional or open access repository prior to publication. This would ideally lead to some sort of alternative framework for scholarly publishing, but we do not have any evidence to suggest that this would inevitably result. At the very least, authors would gain some exposure to open access, which may even lead to increased citation counts.

As a general practice, academic institutions should reexamine their tenure/promotion policies and consider de-emphasizing the criteria of being published in an established journal while re-emphasizing citation counts. Academic institutions should also consider ways of making research funding indirectly available to cover library subscription budgets which might incentivize faculty into only requesting journals they do not have personal subscriptions over and may even lead to faculty re-examining the subscription fees on the journals they ask libraries to carry.

65 17 U.S.C. §1201(a)(1)
67 Benkler, The Wealth of Networks 159.
Research grants should also include conditional funds covering publishing fees for authors choosing to publish in an open access journal. While it is unlikely that these provisions will be taken advantage of, they might help to encourage the development of author-fee-open-access journals as well as publicize the sustainability of open access publishing models.

Lawmakers should also consider a moratorium on scholarly journals and scholarly articles as copyrightable subject matter. One of the most efficient ways of encouraging faculty, publishers, associations and journals into thinking about the desirability and feasibility of open access is to simply force it upon them. There are potential infeasibility issues with TRIPS, specifically with Article 13, but a strong argument can be made under Article 9(2) that scholarly articles are mostly non-protectable subject matter in the first place. In any case, having a copyright moratorium on scholarly journals enables actual implementation of various open access publishing models that have failed to arise due to two decades of exploitive pricing by commercial publishers. Furthermore, such a moratorium would compensate the public domain for the suspect practices between faculty and publishers, which commercial publishers continue to benefit from today.

CONCLUSION

The idea that open access scholarly journals have human rights implications seems irrational given that the vast majority of scholarly knowledge is tailored to some form of a specialized audience rather than a public audience. Furthermore, the idea that most scholarly journals are published in English also tends to exclude most of the non-Western world. But intrinsic to the concept of open access scholarly journals is the idea that no one should be excluded from the production of knowledge because increased participation enhances the autonomy of society. Furthermore, wide public dissemination of knowledge allows ideas to be further developed by audiences with separate beliefs, backgrounds and applications for such knowledge.

But the realization of open access publishing has been hampered by decades of questionable business practices by commercial publishers who intend to secure their profit margins well into the foreseeable future. Further obstruction comes from the very contributors to scholarly journals caught in the rat race for academic tenure/promotion who tend to be general unconcerned with open access applications, even if they confer immediate career enhancing benefits akin to their self-interests. But there is movement

---

69 Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 9(2), 13.
afoot by libraries, universities and governmental agencies desiring change in the current publishing system and actively promoting measures that may one day break the corporate stranglehold over scholarly journals. Recent developments in technology seem promising as their application will continue to drive down the costs of open access publishing. The future of scholarly journals remains unclear, but there is hope it will someday fully embrace open access.

* * *