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The Business and Legal Obstacles to the Open Access Publishing Movement for Science, Technical, and Medical Journals

By Leslie A. Harmel*

I. Introduction

Taxpayers provide approximately \$45 billion in federal research funding every year.¹ However, the taxpaying consumer looking for information on the latest medical treatments and research will not be able to access such information without paying for expensive subscriptions or high per-article charges. This is because the majority of articles resulting from that research end up in for-profit publications.² As a result, taxpaying consumers actually pay for this research twice—once with their taxes to fund the research, and again for access to that same research when it is published in the traditional manner of expensive journals.³ With modern technology and the wide availability of information on the Internet, why should consumers have such difficulty accessing important medical and scientific research?

This comment will first discuss how a traditional publishing business model works compared to how an open access business model works, and why large commercial publishers are fighting open access. Next, this comment will explain the effects that current copyright and antitrust laws have in the publishing industry, and the recent policy by the National Institutes of Health on making taxpayer-funded research available for free. This comment will then

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¹ Rick Weiss, *A Fight for Free Access To Medical Research; Online Plan Challenges Publishers' Dominance*, WASH. POST, Aug. 5, 2003, at A1.

² *Id.* at A1.

³ Rick Weiss, *NIH Proposes Free Access For Public to Research Data*, WASH. POST, Sept. 6, 2004, at A21.

analyze the need for open access, why the current laws favor traditional publishing, and the likelihood that open access will succeed under the current status of the law. Finally, this comment will propose how laws and legal analysis should be changed to encourage the open access movement.

II. Background: The Traditional Method of Publishing and the Open Access Movement

A. Who is the Real Consumer?

Part of the problem in addressing traditional publishing versus open access publishing is defining who the real consumer is. There are—at least—four separate categories of consumers to consider. First, there are the “regular” taxpaying consumers with health concerns who are trying to obtain the latest research and information.⁴ Next, there are the researchers and physicians, who use the latest research and information to treat patients, to develop new methods of treatment, and to continue their own research.⁵ Another category of consumer is the library—be it an academic institution or a private corporation with a large research and development department.⁶ The researchers and the libraries play the largest “consumer” role because libraries pay the subscription fees while the researchers actually use the information. Last, the authors of the published articles can be considered consumers because they use publication as a means of disseminating their work and to fulfill tenure and promotion requirements.⁷ The traditional method of publishing primarily looks to the libraries to define its “consumers,” while the open access method focuses more on the individual consumers, researchers and authors.

⁴ Weiss, *supra* note 1, at A1.

⁵ *Id.*

⁶ Albert A. Foer, *Antitrust Perspectives on Mergers in the Academic Publishing Industry*, Symposium on Antitrust Issues in Scholarly and Legal Publishing in Washington D.C., at 12, available at <http://www.antitrustinstitute.org/recent2/377.pdf> (Feb. 11, 2005).

⁷ Theodore C. Bergstrom & Carl T. Bergstrom, *Will Open Access Compete Away Monopoly Profits in Journal Publishing?*, at 2 (May 2, 2004), available at <http://octavia.zoology.washington.edu/publishing/BergstromandBergstrom04b.pdf>.

B. The Traditional Method of Publishing

Traditionally, science, technical and medical (“STM”) journals publish research articles after peer review. Journals do not pay the authors; in fact, it is a normal practice to charge the author page fees and require the author to provide free refereeing services to the publisher.⁸ The journals then sell their publications, typically to libraries, at annual subscription prices between \$1,000 and \$5,000.⁹ Journal publishers may also sell copies of single articles to researcher or individual consumers, charging between \$5 and \$30,¹⁰ but individual purchases of single articles do not generate significant revenues for publishers.¹¹ Every journal publishes original research, which does not appear elsewhere.¹² Also, the publisher retains the copyrights to any articles it publishes,¹³ so the author is unable to publish his work in more than one STM journal. Researchers require as much information as possible, and libraries must try to supply as many journals as their budgets allow.¹⁴ As a result, each separate journal is necessary for researchers, even though the journals may cover the same any particular field.¹⁵

While most commercial publishers have pursued electronic publication of their journals,¹⁶ the sales of the electronic versions are

⁸ *Id.* at 2.

⁹ Weiss, *supra* note 1, at A1.

¹⁰ Marilyn Werber Serafini, *Who Owns NIH Research?*, NAT’L J., Dec. 4, 2004.

¹¹ See Bergstrom & Bergstrom, *supra* note 7, at 2 (stating that journal publishers obtain most of their revenues from subscription fees); see also Press Release, Information Access Alliance, Information Access Alliance Will Continue to Push for Revised Analysis of Publisher Mergers Despite Justice Department’s Recent Approval of Cinven and Candover Purchase of BertelsmannSpringer (Sept. 9, 2003), available at <http://www.informationaccess.org/IAArelease91003.pdf> (stating that the primary market for STM journals is libraries).

¹² Weiss, *supra* note 1, at A1.

¹³ Weiss, *supra* note 3, at A21.

¹⁴ Thomas M. Susman & David J. Carter, INFORMATION ACCESS ALLIANCE, PUBLISHER MERGERS: A CONSUMER-BASED APPROACH TO ANTITRUST ANALYSIS, at 22, available at <http://informationaccess.org/WhitePaperV2Final.pdf> (June 2003).

¹⁵ Weiss, *supra* note 1, at A1.

¹⁶ Richard A. Danner, *Electronic Publication of Legal Scholarship: New Issues and New Models*, 52 J. LEGAL EDUC. 347, 352 (2002).

often bundled with the sales of the print journals.¹⁷ Some publishers have made electronic-only subscription packages available¹⁸; however, these electronic versions are often sold at a price nearly equivalent to the price of the print journals.¹⁹ Additionally, publishers use tiered pricing structures to sell their electronic versions, charging large university libraries substantially more than smaller institutions.²⁰ This price-discriminating scheme allows a publisher to set prices by determining the amount a purchasing library is willing to pay, rather than setting price based on production costs of the product.²¹

C. The Open Access Model of Publishing

On the other hand, an open access publisher charges the author to print his article, rather than charging subscribers.²² With an open access model, the author or his institution pays a fee to have his research posted on an Internet site after peer-review and editing, while researchers, individual consumers and libraries have free access.²³ The largest U.S. open access publisher is the Public Library of Science ("PLoS").²⁴ PLoS charges the authors a fee of \$1,500 to disseminate their work.²⁵ However, PLoS is additionally funded by a grant from the Gordon and Betty Moore Foundation, and it remains to be seen if the PLoS venture business model can continue to operate without grant money.²⁶

Although it is less expensive for an author to be published under the traditional method of publication, there are other incentives to publish in an open access forum. One incentive for authors to

¹⁷ Carl T. Bergstrom & Theodore C. Bergstrom, *The Costs and Benefits of Library Site Licenses to Academic Journals*, PNAS, vol. 101, no. 3, 897, 898, (Jan. 20, 2004) available at www.pnas.org/cgi/doi/10.1073/pnas.0305628101.

¹⁸ Danner, *supra* note 16, at 352.

¹⁹ Bergstrom & Bergstrom, *supra* note 17, at 898.

²⁰ *Id.*

²¹ *Id.* at 898-99.

²² Bernard Wysocki, Jr., *Journals Resist Free Access To Medical Data*, WALL ST. J., Oct. 28, 2004, at B1.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

publish articles in an open access model is to expand exposure and stimulate discussion about their work.²⁷ This expanded exposure not only increases the opportunity for other researchers to expand on the author's work, but the exposure also provides additional prestige to the author as his work is cited more often.²⁸ Also, with open access publishing the author is free to publish elsewhere because the author—not the open access publisher—retains the copyrights.²⁹

D. Why Traditional Publishers Oppose the Open Access Movement

Commercial publishers argue that the U.S. will lose a valuable export through open access because overseas buyers provide revenues.³⁰ Some non-profit publishers, which are typically specialized science societies that use journal subscriptions to fund research and scholarships, argue that open access publishing would threaten the existence of their societies.³¹ Publishers also argue that journal articles are “too technical” for the average consumer to understand, and therefore access to the information would provide only a small benefit.³²

Whether or not these arguments are significant reasons for publishers to resist open access, there is no doubt that publishers believe the open access model is a threat to their profits and operations. If research is published by traditional methods and through open access, researcher, individual consumers, and libraries will no longer have to pay high subscription prices or per-article fees. Commercial publishers would be unable to continue making large profits by limiting access because the information would be available elsewhere.

²⁷ Laura N. Gasaway, *Copyright Ownership & the Impact on Academic Libraries*, 13 DEPAUL-LCA J. ART & ENT. L. POL'Y 277, 297 (Fall 2003).

²⁸ Foer, *supra* note 6, at 14.

²⁹ See, e.g., PubMed Central Overview, <http://www.pubmedcentral.gov/about/intro.html> (last visited May 15, 2005) (finding that it is generally the policy of open access publishers to let the individual author or the journal publisher to retain any copyrights).

³⁰ Wysocki, *supra* note 22, at B1.

³¹ Serafini, *supra* note 10.

³² *Id.*

III. Discussion of the Current Status of the Law and Journal Publishing

A. Copyright Law

In traditional publishing, the STM journals hold copyrights to the articles,³³ and so the author is unable to publish his work elsewhere. If the author also provides access to his published article in an open access model, he would infringe upon the copyrights of his STM journal publisher, who could in turn bring suit against the author for copyright infringement. This scenario would significantly hinder the author, whose career often depends on publication in journals for tenure, prestige and promotion.³⁴

The most recent challenge to copyright law was heard last year by the Supreme Court in *Eldred v. Ashcroft*.³⁵ The Supreme Court held that the Copyright Term Extension Act did not violate the First Amendment, and that Congress did not exceed its power under the Copyright Clause when it enlarged terms for future and previously published works by twenty years.³⁶ This case indicates the Court's willingness to defer to Congress in matters relating to copyright legislation.³⁷ The Court stressed "it is generally for Congress, not the courts, to decide how best to pursue the copyright Clause's objectives."³⁸ As such, it is unlikely that courts would be willing to allow an author to infringe on a publisher's copyright, even though the article was written by the author, who simply wants the public to have access to his work.

B. Antitrust Law

Horizontal mergers have played a large role in traditional publishing of STM journals. The number of STM publishers, as well as academic publishers in general, has become much more

³³ Weiss, *supra* note 3, at A21.

³⁴ Bergstrom & Bergstrom, *supra* note 7, at 2.

³⁵ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

³⁶ *Id.* at 198.

³⁷ *Id.* at 204.

³⁸ *Id.* at 212.

concentrated in recent years.³⁹ Mergers go relatively unchallenged because the Department of Justice uses a narrow definition of the market based on similar content of each journal, and seeks only divestiture where the content of journals overlaps.⁴⁰ Between 1997 and 2002, at least five major commercial publishers were acquired by competitors.⁴¹ The price increase of library subscriptions to STM journals between 1991 and 2000 was 158%, more than six times the rate of inflation.⁴² With less competition and the opportunity to bundle more titles,⁴³ publishers are able to increase prices without much fear of having subscriptions cancelled.⁴⁴ The ability of a publisher to bundle many titles not only gives the publisher power to control prices, but also gives the publisher power to exclude competition.⁴⁵

A typical example of how a publisher merger plays out in the United States can be seen in the 1996 merger between Thomson Corporation and West Publishing Company.⁴⁶ The merger made Thomson/West the largest legal publisher in the United States.⁴⁷ Lexis-Nexis, a division of Reed Elsevier, Inc. and the second largest legal publisher in the United States, moved to intervene as one of the parties opposing the merger on the theory that it represented the public interest and would suffer injury if the merger went forward;

³⁹ See Foer, *supra* note 6, at 3 (explaining that the top ten STM publishers account for 63.4% of the industry revenues, with the three largest commercial publishers accounting for 45.3% of the industry revenues).

⁴⁰ Susman & Carter, *supra* note 14, at 23.

⁴¹ Foer, *supra* note 6, at 3.

⁴² *Id.* at 4.

⁴³ For an in-depth discussion on the practices of journal bundling and its anticompetitive effects, see Aaron S. Edlin & Daniel L. Rubinfeld, *Exclusion or Efficient Pricing? The "Big Deal" Bundling of Academic Journals*, 72 *Antitrust L.J.* no. 1, 128-159 (2004).

⁴⁴ Foer, *supra* note 6, at 6.

⁴⁵ See *id.* at 14 (stating that larger publishers may be able to squeeze out smaller ones).

⁴⁶ The Thomson/West merger affected legal publications; however, the example is analogous to STM publisher mergers. See Susman & Carter, *supra* note 14, at 2, 26 (observing that legal publications serve similar functions as STM journals and that the similarities between the two markets suggest the same concepts can be applied to both).

⁴⁷ See *United States v. Thomson Corp. and West Publ'g Co.*, No. 96-1415 (PLF), 1996 U.S. Dist. LEXIS 14819, *2 (D.D.C. Sept. 25, 1996).

however, its motion was denied.⁴⁸ The merger was approved after Thomson and West agreed to divest certain assets and products, and the Department of Justice was given a continuing role in approving purchasers of those divested assets and products.⁴⁹ Interestingly, all of the divested assets and products were sold to Lexis-Nexis, the main competitor.⁵⁰ Lexis-Nexis, which at first argued against the merger, now supported the merger and contended that competition would be enhanced by this bulk sale of Thomson/West products to a single entity, itself.⁵¹ After the merger, the average price of Thomson/West titles increased more than twenty percent.⁵²

The last STM publisher merger approved by the U.S. Department of Justice was Cinven and Candover acquisition of BertelsmannSpringer and its merger with Kluwer Academic Publishers.⁵³ The new entity, re-named Springer, is the second largest publisher of scientific journals in the world, second to Elsevier Science.⁵⁴ The former chief executive of Elsevier was appointed as the new chief executive of Springer.⁵⁵

Looking at just the biomedical field, significant price increases resulted after ten of eleven publisher mergers in the past decade.⁵⁶ Most publishing mergers face little scrutiny, and mergers have continued at a rapid pace.⁵⁷ The biomedical journal market

⁴⁸ *Thomson Corp. and West Publ'g Co.*, 1996 U.S. Dist. LEXIS 14819, at *3-4.

⁴⁹ *United States v. Thomson Corp. and West Publ'g Co.*, No. 96-1515 (PLF), 1997 U.S. Dist. LEXIS 1893, at *1 (D.D.C. Feb. 27, 1997).

⁵⁰ *Id.* at *1.

⁵¹ *Id.*

⁵² *Susman & Carter*, *supra* note 14, at 20.

⁵³ Press Release, Information Access Alliance, Information Access Alliance Will Continue to Push for Revised Analysis of Publisher Mergers Despite Justice Department's Recent Approval of Cinven and Candover Purchase of BertelsmannSpringer (Sept. 9, 2003) *available at* <http://www.informationaccess.org/IAArelease91003.pdf>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Susman & Carter*, *supra* note 14, at 4; Mark J. McCabe, *Journal Pricing and Mergers: A Portfolio Approach*, 92 AM. ECON. REV. 259, 265-67 (Mar. 2002), *available at* <http://www.prism.gatech.edu/~mm284/AER.pdf>.

⁵⁷ Mark J. McCabe, *The Impact of Publisher Mergers on Journal Prices: An Update*, 207 ARL, at 1 (Dec. 1999), *available at*

illustrates the pace and impact of mergers. In 1991, Reed Elsevier purchased Pergamon and added 57 biomedical journals to its existing catalog of 190 biomedical journals.⁵⁸ This 1991 merger resulted in a ten percent price increase over the average rate of price increases in the market for the journals of the merging publishers.⁵⁹ In 1997 and 1998, Harcourt acquired two other publishers with 44 biomedical journals, increasing its catalog to 162 biomedical journals.⁶⁰ In 1998 Wolters Kluwer purchased three other publishers, adding 100 titles to its catalog of 112 biomedical journals.⁶¹ In 2001, Reed Elsevier purchased Harcourt, giving Reed Elsevier a total of 409 biomedical titles.⁶² The 1997-1998 purchases by Harcourt and the 1998 purchases by Wolters Kluwer resulted in average journal prices that were six percent higher than pre-merger levels.⁶³

C. Recent NIH Policy

Last year, the National Institutes for Health (“NIH”) proposed that taxpayer-funded research should be made available to the public through the Internet.⁶⁴ Under the NIH proposal, an electronic version of a researcher’s article would be made available to the public free of charge through the digital archives of the U.S. Library of Medicine after the article has been accepted for publication in a journal.⁶⁵ The original policy required researchers to make their articles available for posting within six months of its publication in a scholarly journal.⁶⁶

However, the policy as approved merely requests that researchers make their articles available for posting—participation is voluntary—within twelve months of final publication.⁶⁷ After the

<http://www.arl.org/newsltr/207/jrnlpriees.html>.

⁵⁸ McCabe, *supra* note 57, at 262.

⁵⁹ *Id.* at 264.

⁶⁰ *Id.* at 262.

⁶¹ *Id.*

⁶² Foer, *supra* note 6, at 3.

⁶³ Susman & Carter, *supra* note 14, at 19.

⁶⁴ Wysocki, *supra* note 22, at B1.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Lila Guterman, *Critics and Proponents Debate NIH’s Plan to Free Access*

period for public comment ended, NIH modified its proposal to *request*, rather than *require*, researchers to make articles available *twelve months after publication*.⁶⁸ The policy as approved requests NIH-funded researchers to submit an electronic version of their research articles for posting on the Internet, providing free access to the public, within twelve months of its publication in a scholarly journal.⁶⁹

IV. Analysis: Why Open Access Faces a Difficult Challenge

A. The Need For Open Access Publishing

Advances in science and medicine depend on research information, and STM journals are how that information is traditionally disseminated.⁷⁰ Without broad distribution, there is less information for consumers and other researchers to work with, and this inhibits progress in science and medicine.⁷¹ On the other hand, quick dissemination of new science promotes progress in science and medicine. The latest medical information could help patients with rare diseases who are considering treatment—but only if those patients have access to that information.

Because the cost of these scholarly journals is so expensive (between \$1,000 and \$5,000),⁷² and libraries cannot provide complete access due to their budget constraints,⁷³ the latest scientific findings are not available to the average taxpayer. The original NIH proposal would have created “open access” to the general public of the otherwise virtually unattainable taxpayer-funded research in areas such as cancer treatments. The benefit to these individual consumers of open access is that the information is available faster, not only to the individual consumers themselves, but also to their physicians

to *Scientific Materials*, CHRON. OF HIGHER EDUC., Jan. 7, 2005, at 28.

⁶⁸ *Id.*

⁶⁹ Policy on Enhancing Public Access to Archived Publications Resulting From NIH-Funded Research, 70 Fed. Reg. 6891-01 (Feb. 9, 2005).

⁷⁰ Susman & Carter, *supra* note 14, at 1.

⁷¹ *Id.* at 12.

⁷² Weiss, *supra* note 1, at A1.

⁷³ Serafini, *supra* note 10.

(who are helping them make their treatment decisions) and other researchers (who can build on that information to discover other possible treatments). In particular, consumers and physicians in smaller communities without access to research libraries would benefit from open access.⁷⁴ Without timely access, research is insufficient and incomplete, and progress does not occur as efficiently as possible.

The individual consumers, who are also taxpayers, actually pay twice—once with their taxes to fund the research, and again for access to that same research published in a journal.⁷⁵ These single-article charges add up quickly, limiting access to information that an individual consumer might feel is necessary to make an informed decision about his health. Better and timelier access of the latest medical research would be available directly to individual consumers and their physicians. With that research more readily available, individual consumers can make better-informed decisions about their healthcare and medical options.

B. The Current Status of the Law Strongly Favors the Traditional Method of Publishing

The type of bundling and price discrimination practiced by commercial STM publisher is common in the market for electronic publications.⁷⁶ Bundling decreases competition because a large publisher can bundle many titles and tie up significant purchasing library dollars.⁷⁷ This forecloses any smaller publisher from competing because it does not have the wider range of titles, and the library's budget is tied up purchasing the bundle.⁷⁸ There is no money left over in the library's budget to purchase journals outside the large publisher's bundle. Because demand for STM journals is inelastic, commercial publishers are able to raise prices without much fear of losing business because their audience, mostly libraries, is a captive one.⁷⁹ In addition, STM publishers have the ability to create a market for any new journals they want to sell by including the new journal in

⁷⁴ Weiss, *supra* note 3, at A21.

⁷⁵ *Id.*

⁷⁶ Susman & Carter, *supra* note 14, at 30.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Danner, *supra* note 16, at 351.

the bundled package. A library may prefer to spend money on continuing a subscription to a particular publication, or simply have no need for the new journal, but is forced to purchase the new journal because it is included in the bundle offered by the publisher.

Another reason that publishers are able to increase prices dramatically is that the STM publishing industry, as well as academic publishing in general, has become much more concentrated.⁸⁰ Mergers go basically unchallenged due to the narrow definition of the market, which is based on similar content.⁸¹ Where content of journals overlaps, the Department is likely to seek some type of divestiture.⁸² However, as seen in the Thomson/West merger example, the divested titles are often purchased by another large publisher.⁸³ This approach does not take into consideration that journals with similar content are not substitutes for each other, like other tangible consumer products are.⁸⁴ Journals with similar content do not contain the same research articles; therefore, one journal cannot really substitute another.

Traditional antitrust merger analysis using the similar content approach to defining the market does not work because journals in a particular field are not necessarily substitutes. A thorough researcher needs all articles in his field, and therefore needs access to more than one journal subscription in a given field. This gives each publisher a higher degree of market power than in an industry where buyers purchase only one product.⁸⁵ Even though a merged publisher has market share below thirty or forty percent, it still has the power to substantially raise prices without losing market share,⁸⁶ because the publisher can charge what it thinks the library can afford.

Furthermore, this approach neglects to consider the way in which journals are actually purchased—mostly by libraries with limited budgets that compare items across a much broader spectrum than journal content—and the unilateral effects of close substitutes

⁸⁰ Foer, *supra* note 6, at 2.

⁸¹ Susman & Carter, *supra* note 14, at 23.

⁸² *Id.*

⁸³ Thomson Corp. and West Publ'g Co., 1997 U.S. Dist. LEXIS 1893, at *1.

⁸⁴ See Susman & Carter, *supra* note 14, at 23 (describing the example that if a consumer buys one brand of auto tires, he will not also need another brand of auto tires to ensure the safe operation of his automobile).

⁸⁵ *Id.* at 28.

⁸⁶ *Id.* at 29.

merging.⁸⁷ As a result, neurology journals compete with biochemistry journals due to the constraints of the library's budget.⁸⁸ When publishers merge, the profits from the neurology journal and the biochemistry journal now go to the same publisher. The publisher benefits by a raise in price of either journal or both journals, without fear of losing profits, because the library will still buy one or the other, or continue to buy both despite the price increase.

Current antitrust analysis also fails to recognize the other barriers to entry in STM journal publication, such as journal reputation, the high cost of switching subscriptions, and the fact that library purchasers tend to continue current subscriptions in order to keep the set of publications that have already been purchased up to date.⁸⁹

C. The Likelihood of Success of the Open Access Movement

A potentially huge factor in the success of an open access model is whether or not the open access publisher can provide prestige to the authors.⁹⁰ One of the keys to the likelihood of success of PLoS is that its founders, Harold Varmus, Patrick O. Brown, and Michael Eisen, provide immediate credibility to the project.⁹¹ Harold Varmus won a Nobel Prize in 1989 for work with cancer viruses and headed NIH for six years; Patrick O. Brown is a renowned genomics expert at Stanford University School of Medicine; and Michael Eisen is a biologist at the Lawrence Berkeley National Laboratory and the University of California at Berkeley.⁹²

Commercial publishers argue that the open access model, even where the author pays to have his work published, will not be able to cover the costs of publishing without continued support from grants or increasing author fees.⁹³ They argue that, without grant money, the funding for an open access business model cannot sustain

⁸⁷ *Id.* at 26.

⁸⁸ *Id.* at 26.

⁸⁹ Foer, *supra* note 6, at 4.

⁹⁰ Weiss, *supra* note 1, at A1.

⁹¹ *Id.*

⁹² *Id.*

⁹³ See Bernard Wysocki, Jr., *Journals Resist Free Access To Medical Data*, WALL ST. J., Oct. 28, 2004, at B1 (estimating that the costs of publishing, editing and archiving range from \$4,000 to \$6,000).

the publishing costs, and authors will submit their work to traditional publishers to avoid the increase in author fees. This argument assumes that authors pay the publishing fees out of their own pockets, and could not afford any fee increases. The reality is that traditional publishers also charge authors fees, and those fees are often subsidized by the author's institution or grant funding.⁹⁴ There is no reason that, just because an author chooses an open access publisher, that the author's institution or grant funding would no longer subsidize the author fees.

V. Proposal for Legal Changes to Promote Open Access

There are a number of ways which Congress and the courts can encourage open access publishing. With regard to copyright issues, Congress could expand the Fair Use Doctrine⁹⁵ to include posting of STM journal articles which are taxpayer-funded, so that the traditional publisher has no copyright infringement claim against an author who makes his work available through open access publishing.⁹⁶ A more dramatic approach would be for Congress to completely eliminate copyrights for research that is substantially funded by the federal government⁹⁷—the research and subsequent articles would go directly into the public domain without copyright protections. Either of these changes to copyright law supports the rationale that some information is so useful and important that it should not be subject to copyright protection.

Courts have traditionally been very reluctant to order the reversing of a merger, even when it turns out the merger resulted in significant anti-competitive behavior. Courts should be more willing to “unscramble the egg”⁹⁸ after a merger. The publishing industry provides a unique forum for this concept. Publishers are familiar with

⁹⁴ Serafini, *supra* note 10.

⁹⁵ The Fair Use Doctrine provides for the legal use of copyrighted material for the purposes of “criticism, comment, news reporting, teaching . . . , scholarship, or research” 17 U.S.C. § 107 (West 2005).

⁹⁶ See Darcy L. Jones, *As Congress Giveth, So Congress Taketh Away: The Supreme Court Assures Congressional Authority to Retroactively Extend Copyright Terms in Eldred v. Ashcroft*, 55 Mercer L. Rev. 779, 794 (Winter 2004) (predicting that public domain advocates will argue for an enlarged definition of fair use protections).

⁹⁷ Weiss, *supra* note 1, at A1.

⁹⁸ Foer, *supra* note 6, at 7-8.

the process of divesting assets and titles in order to have their proposed merger approved. Courts could maintain jurisdiction for a period of time after the merger, and if significant anti-competitive behavior results after a publishing merger, the courts could revisit the divestiture decisions. The goal in revisiting the merger would be promoting competition to keep prices down. This could include an approach where courts not only examine more carefully the effects of the merger, but also exercise heightened scrutiny in approving divestitures. Ordering a divestiture, but approving the sale of all divested titles to the merging publishers' biggest competitor should be viewed with strong skepticism, as such a divestiture increases the opportunity for competitors to collude and to raise prices.

Recognizing that reversing a merger is not always economically practical, courts could take other steps when analyzing publishing mergers. Government enforcement and the courts could chose to define the market according to the way libraries categorize journals during their purchasing process, since libraries are the main purchasers of academic journals.⁹⁹ In defining the market in this manner, the court would have a better picture of which journals are competing for limited budget dollars. If the journals of merging publishers compete for library budget dollars, then the courts should be more willing to block the merger.¹⁰⁰ Under this approach, the court would be able to better focus on the goal of disseminating as much information as possible to those end-users, the researchers themselves and consumers, who are not providing a significant portion of the publisher's revenues.

Another option in merger analysis is to consider lowering the threshold market power percentage to reflect actual market power by merging publishers. Because the characteristics of STM journal markets differ from traditional product markets, traditional market power analysis should not be used to analyze publisher mergers.¹⁰¹ A publisher with market share below thirty or forty percent still has significant market power to substantially raise prices without losing market share because researchers need all articles in a given field.¹⁰² Since journals with similar content do not contain the same articles, researchers cannot substitute one journal for another.

Last, the original NIH proposal requiring taxpayer-funded

⁹⁹ Susman & Carter, *supra* note 14, at 29.

¹⁰⁰ *Id.* at 32.

¹⁰¹ *Id.* at 32-33.

¹⁰² Bergstrom & Bergstrom, *supra* note 17, at 898.

researchers to submit their articles for posting on a government website within six months of publication should be considered again in the future. When searching for medical information, consumers should not have to pay additional fees for the latest research, which was already funded with their tax dollars. Also, in having at least some research openly available, the overall market would become more elastic. Individual consumers and researchers would at least have the choice to purchase a subscription or pay the per-article fee, or wait six months until the information was provided free of charge.

VI. Conclusion

The purpose of the traditional publishing model has become to increase profits, rather than to disseminate important research information. Given the rising costs of traditional publication, resulting in large part from the economics of publisher mergers, the open access movement will only become stronger as consumer demand for scientific and medical research becomes stronger. Eventually libraries and researchers will refuse to pay ever increasing subscription prices, and individual consumers will demand reasonable access to research information within a reasonable time period, particularly when their tax dollars fund the research. Of course, traditional publishing and open access publishing are not exclusive options.¹⁰³ What the open access model does is provide an alternative to traditional publishing, ensuring the wide dissemination of information needed to achieve new technologies and better medical treatments.

¹⁰³ Danner, *supra* note 16, at 360.