

Promises Made, Promises Kept

Open Access as a Tool for Breaking Barriers to Research Publications

(A Review of John Willinsky, *Copyright's Broken Promise: How to Restore the Law's Ability to Promote the Progress of Science* (MIT Press, 2022))

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The promise made in the constitution of intellectual property law (specifically in this book – copyright) is for it to be a vehicle that promotes the progress of science and the useful arts. This promise is argued to be failing (or rather, broken) in its objective by John Willinsky in his book *Copyright's Broken Promise: How to Restore the Law's Ability to Promote the Progress of Science*. Willinsky makes a compelling case, through convincing arguments and illustrations, for a need to reform US Copyright Law to achieve universal open access to research and scholarship. Willinsky builds his argument by exposing the limitations of existing copyright framework where research publications are treated as just-another-literary-work, which creates a barrier around such publications through exclusive rights and paywalls, which inevitably forces the user-in-need to adopt means of circumvention that are inadequate, and often illegal. Willinsky argues, and rightly so, that existing copyright understanding is incompatible with the concept and purpose of academic research, which is to enrich public knowledge for the betterment of society. Willinsky proposes '*research publications*' as a new and distinct category of work in copyright.

Willinsky's proposal finds its context in the Covid-19 pandemic, which exposed the fault line of the copyright regime, whereby its stakeholders (publishers, research organisations, libraries, funding agencies, and governments) realised the limitations and value of the regime vis-à-vis open access. Willinsky relies on the example of consensus reached amongst the stakeholders for

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providing open access to the Covid-19 related research publications and data, either by suspending the copyright temporarily or by waiving the restrictions, to achieve the desired openness for scientific advancement in the face of global health crisis. He relies on a wealth of examples from different fields of science, which reiterates the same finding that the existing system acts as a hindrance to dissemination, collaboration, and innovation, all of which is essential for scientific progress.

Willinsky takes readers on the journey of the open access evolution over the last three decades and talks at length about the achievements and shortcomings of existing regimes from different stakeholders' perspectives. Relying on examples, he talks about how researchers like the idea of open access in principle, but their experience differs across disciplines as the practices are varying. This is illustrated by how open access is supported by federal agencies as a public access policy, and how university libraries have advocated for more access at affordable pricing. It is further illustrated by the way publishers attempted to foster open access by adopting different licensing models, despite facing criticism and competition. Society also has polarised views on open access, which is directly attributable to their economic and cultural situations. Willinsky draws attention to a general consensus amongst various stakeholders that open access supports further research and innovation. He then defines the slow, unsteady, and expensive progress in that direction, alongside the statutory hindrance of the copyright regime, as a market failure.

In response, he proposes borrowing the '*statutory license*' model from the music industry and cable television and applying it to '*research publications*'. This requires publishers to make the work available through open access immediately upon publication, as they continue to receive royalty payments from institutional users (*e.g.* universities, industries, research institutes) and funding agencies. He proposes the development of new norms and practices among researchers to share their work with others through open access. For the purposes of royalty payments to publishers, he proposes the matter to be taken up by copyright royalty judges, who would set the rate based on fair market value and public interest criteria. With all the apprehensions raised by Willinsky, the proposal, along with the benefits that it offers, seems workable, especially against the backdrop of the failure of the scholarly publishing market.

Willinsky's proposal is supported by arguments based on judicial decisions, legal scholarship, economic theory, and several personal anecdotes. He believes that, even though the adoption of the proposal has certain limitations, specifically from an international implication perspective, it offers a vehicle for global public good and enhances collaboration, innovation, education, democracy, and justice.

The book provides a clear and concise overview of the relationship between copyright law and scientific development. Its arguments are backed by constitutional, legal, economic, and historical analysis, as well as Willinsky's own experience (which, in my opinion, are shared experiences of most researchers). The book would appeal to a wide audience: from policymakers and practitioners to scholars and students. The language used is clear and made more accessible through use of tables, charts, graphs, and other informational sources for those interested in further readings. Without being dogmatic or dismissive, Willinsky adopts a balanced tone throughout, acknowledging the merits and challenges of opposing views.

Willinsky's book is an invaluable contribution to the ongoing discourse on open access and copyright reforms. While the biggest challenge, in my view, still lies in the global adoption of the proposals on new forms of work and the statutory licensing regime, the feasibility of this solution, for a long-standing problem, makes it worthwhile to explore the same further. The book challenges readers to rethink their assumptions and expectations of copyright law. Particularly, it questions how the law should support research and scientific advancement, by modifying its original jurisprudential boundaries to meet the needs of the digital age.