John Willinsky, *The Intellectual Properties of Learning: A Prehistory from Saint Jerome to John Locke* (Chicago: University of Chicago Press, 2018).

OPEN ACCESS FINAL DRAFT

Epilogue

The "final draft" of this chapter has been made open access through a special arrangement with the University of Chicago Press, reflecting their interest in exploring the access themes raised in the book.

Note that the final draft, which has benefited from rounds of peer review and revision before being accepted for publication by the press, differs at a great many points from the published text of the book. The book benefited from the press' excellent copyediting, as well as my revisions and proofreading (with the help of colleagues) in that process. Those who are unable to obtain a copy of the published book from which to cite may wish to quote from and reference the final draft of this chapter as follows:

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Epilogue

Although this history of learning's intellectual properties concluded with the Statute of Anne 1710, it has a contribution to make, I hold, to today's discussions of open access to research and scholarship. With the world's embrace of the digital, publishing is facing myriad changes, not least of all within scholarly communication. Our efforts to sort through these changes can be assisted by what happened with learning, from the medieval to the early modern period, in the monasteries, schools, and universities. The digital era does seem to hold great promise for learning, and in ways reminiscent of the earlier translation movements, the initiation of the universities, and the advent of printing. These prior breakthroughs opened access to a broader literature, new methods of inquiry and scholarly standards, and different forms of sponsorship. This time the increases in access are not only to learned works, but to data, sources, archives, and instruments on a global scale, all of which speak to a far more open and collaborative commonwealth of learning.

What is missing today, however, is what learning had achieved by the end of this book. Learning held a place of honor at the birth of intellectual property law. This may well have been something of a cover for Stationers' Company interests, yet learning was still more than a front for this legislation. The learned author, book, and reader were recognized as the reason for such a statute. Their interests were protected in the authoring of such works, and in their pricing, importing, depositing, and printing. Today, learning's earlier legal prominence has been overshadowed by the economic engines of corporate patents and commercially exploited copyright. Something of this market logic has also invaded the universities, particularly in the sciences (as reviewed in the opening chapter).

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The question is how, within the prevailing climate, do we – to borrow a phrase or two – promote the progress of science and the useful arts for the encouragement of learning? In response to this question, I do no more in this epilogue than briefly suggest what might be considered in light of this history, using the examples of intellectual property law reform, the financing of scholarly publishing, and the consequences of open access.

More than once in this book, I have set out how works of learning have been treated as if they represented a different order of goods, whether in their origin, intention, or use. By the High Middle Ages, monasteries were supported for their production of works that were as learned as they were pious; kings and queens provided such books with tax and toll exemptions; and public and private libraries opened their doors to scholars. Thus my first suggestion is that serious consideration be given to creating a distinct legal class or category for the intellectual property associated with learning. Today's legal system offers learning a ragbag of copyright and patent exceptions, exemptions, embargoes (also reviewed in the opening chapter). Much greater coherence and consistency can be brought to advancing the interests and value of learning by creating a distinct legal category for this class of intangible goods.

I am taking this idea of "tailoring of intellectual property rights" from the legal scholar Michael W. Carroll at the American University, Washington, who presents a generic case for it as a way to improve the return on the "copyright bargain" that a society makes in granting such privileges.¹ The creation of different legal categories of intellectual property, Carroll points out, is currently employed to separate inventions,

¹ Michael W. Carroll, "One Size Does Not Fill All: A Framework for Tailoring Intellectual Property Rights," *Ohio State Law Journal* 70, no. 6 (2009), 1376. Carroll lays out the social costs of having a uniform law compared to tailoring for greater efficiency and public benefit through legislation, which I focus on here, but as well through judicial interpretation and administrative rules, which are currently being applied to research and scholarship in what I argued in the first chapter was less than efficient.

which are covered by patents law, from expressions of ideas, covered by copyright. A second example is provided by musical compositions, which are licensed at a set rate to anyone who seeks to use the work, without having to apply for the right each time someone's song is played. A third instance, following from the Bayh-Dole Act of 1980 (introduced in the first chapter), narrowly applies to a segment of research by enabling patent protection to be sought for federally funded research to help realize greater public benefits from the results of that research. This opportunity to commercially exploit academic research, does include a safe-guard in the form of government "march-in" rights, as a check on undue exploitation or misuse of the patent.

I am proposing something of a counter-measure to that, more broadly applied, in which the research and scholarship produced by those employed in public or nonprofit research and education institutions is legally recognized to constitute its own class of intellectual property. The legislation would have to be carefully crafted to advance learning's properties. It could require, for example, that a Creative Commons license be used to ensure communal access and enable a wide range of uses, while protecting the accreditation of the work. The law might consolidate and extend tax exemptions for this body of work to further encourage sponsorship; it might reinforce the autonomy of this work not only on matters of academic freedom, but around the author's intentions with it, to enable such Scholarly Stephens as Hawking and Greenblatt to publish best-sellers, or graduate students, such as Larry Page and Sergey Brin, to scale up a patent's public value through commercialization. Yet it could also protect public interest patenting, rather than leaving it on an ad-hoc basis, as happened with the Severe Acute Respiratory Syndrome

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(SARS) outbreak of 2003.² This tailoring of the law would formally recognize the extent to which research and scholarship has operated, in effect and often inefficiently, as a distinct class of intellectual property, while enhancing the value with which it serves as a public good.

This still leaves open a question of how to finance universal digital access to scholarly publishing. To begin with the dominant mode of the subscription journal, we might take a feather from Thomas Bodley's hat, in calling for a special arrangement in support of learning. In this case, however, libraries can actually offer the publishers and scholarly societies a better deal than Bodley negotiated with the printers in the seventeenth century. Rather than suggest that the publishers and societies deposit a free copy of what they print in the library, the libraries can offer the publishers and societies the equivalent of the subscription fees to make their journals open access. After all, libraries gain little advantage from the exclusive access offered by a journal subscription compared to an open access edition of the journal, while they have reason enough to support open access, as wider access improves the learning commons as a whole. As for the free-rider threat of libraries exploiting such a commons, there is evidence of a new generation of just such commons collaborations among scholars, presses, and libraries supporting open access initiatives.³ This cooperative spirit echoes the earlier scholar-in

² In this instance, the British Columbia Cancer Agency (BCCA), the Center for Disease Control, and the University of Hong Kong filed "defensive patents" on diagnostic tests and treatments utilizing the genetic sequence of the SARS coronavirus to ensure that what was patented remained open and available; Matthew Rimmer, "The Race To Patent the SARS Virus: The TRIPS Agreement and Access to Essential Medicines," *Melbourne Journal of International Law* 5, no. 2 (2004), 338. While the BCCA's policy is to support both "public use and commercial application" of its research, with SARS, the agency was "trying to pre-empt the nonsense that has gone on in the past" by "making sure the market is not cornered," according to Samuel Abraham, BCCA's vice president for research. Abraham is cited by Peg Brickley, "Preemptive SARS Patents," *Genome Biology* 4 (2003).

³ Examples of current cooperative publishing initiatives include the Library Publishing Coalition, with over a hundred libraries in the U.S. hosting over 400 open access journals, as well as SCOAP3, Open Library of

the-press-room ventures of Erasmus, Aldus, and Froben, as well as Laud's and Fell's efforts at Oxford to strike a deal with the Stationers' Company, all with the aim of increasing access to learning. As this history shows, it takes time to find learning's advantage amid changing technologies and markets, with that advantage reflecting a set of common principles and properties that hold through these changes.

This concept of universal access to this distinct class of literature begs, I realize, a further, final question for this epilogue. What will it mean to make this body of work public on such a scale? If we open it, will they come? Following from the Latin translation movement, Aristotle and the Commentators rocked Europe, with their books making their way across the continent, filling the new universities that sprang up, in part, to teach them. What then should we expect of the digital era's great opening of this body of learning if not changes in how schools educate, professionals are trained, the media report the news, democracies deliberate, and states develop policies and laws. In the preface, I noted that I was set on this course by my own early experiment in bringing online research to the *Vancouver Sun*. Not long after, in 2000, JSTOR, the online archive of humanities and social science journal back-issues, undertook a two-year pilot with sixteen high schools for which they found "very positive impact on students scholarship," and I can still recall reading on its website of how a teacher discovered that this access refreshed his teaching of the Civil War.⁴

Since then, large-scale studies of what happens when research is made open

the Humanities, Knowledge Unlatched, OAPEN, and University of California Press Collabora. Also see the Open Access 2020 (OA2020) online, coordinated by the Max Planck Library. Our own modest efforts in this regard, through the Public Knowledge Project, are available online at the Open Access Publishing Cooperative Study.

⁴ "JSTOR Participation Information Meeting for Secondary Schools"; JSTOR, New York, online. A more recent example of what access can mean for such students is found in the high school sophomore, Jack Andraka, who discovered a remarkably effective and inexpensive pancreatic diagnostic; Jack Andraka, "Why Science Journal Paywalls Have to Go," *The Student Blog* (PLOS, February18, 2013), online.

access have shown that it leads to a substantial growth in readership, with some indications of increased use of the work by other scholars.⁵ In Latin America, where journals have generally been open access since shortly after the turn of the century, a quarter of the readers of this research come from outside the academic community.⁶ In the U.S., we found that only a third of the physicians and two-thirds of the public health staff in our sample sought research articles from the complete access that we provided them for close to a year.⁷ Still, the physicians who did turn to the research used it in their roles as clinicians, educators, researchers, learners, administrators, and advocates, suggesting both the value of increased access and the need among medical educators, for example, to better understand how it can become a greater part of professional practice.

It is clear that this coming wave of open access to research and scholarship is bound to inform and unsettle, as the tentativeness and conditional quality of this learning becomes part of the fabric of our lives. This access has the potential to excite and engage a broader segment of the population out of interest, curiosity, and learning for its own sake. It will be misunderstood and misused, derided and even defunded. It will inevitably create situations that demand strong and compelling defenses of learning's autonomy and value as such. And cases will arise that make it easier to call for increased support for research.

By reviewing the historical properties of learning in the West, this book has sought to inform the ways in which we move forward in a digital era given to the sharing

⁵ Steve Hitchcock, "The Effect of Open Access and Downloads ('Hits') on Citation Impact: A Bibliography of Studies," OpCit Project (2013), online.

⁶ Juan Pablo Alperin, "The Public Impact of Latin America's Approach to Open Access" (Ph.D. dissertation, Stanford University, 2015), online.

⁷ Laura Moorhead, Cheryl Holzmeyer, Lauren Maggio, Ryan Steinberg, and John Willinsky, "In an Age of Open Access to Research Policies: Physician and Public Health NGO Staff Research Use and Policy Awareness," *PLOS One* DOI: 10.1371 (2015), online.

of knowledge. If the history assembled here – inspired by questions of learning's properties and driven by the seeming potential of online access to enhance those properties – inspires a broader discussion about what matters for the future of scholarly communication in the digital era, what is at stake today in sorting out this civic and public good, then this labor has more than justified itself. For as much as I appreciate Erasmus' wit on editing Saint Jerome – "I had worked myself to death that Jerome might live again" – I can say that although I could but "make haste slowly" with this book, I had the time of my life that Erasmus & Co. might see again "between friends all [learning] is common."⁸

⁸ Erasmus' line is from his letter; "To Raffaele Riario, Cardinal of San Giorgio" in *The Correspondence of Erasmus*, *Letters 298 to 445, 1514 to 1516*, vol. 3, trans. R. A. B. Mynors and D. F. S. Thomson, annotator James K. McConica, *The Collected Works of Erasmus* (Toronto: University of Toronto Press, 1976), 90. The two adages, you might recall, are discussed in Chapter 8.