

Do copyrights and paywalls on academic journals violate the US Constitution?¹

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Abstract

This article argues that paywalls and copyrights on academic journals are obstacles to the progress of science and the useful arts, thereby violating the copyright clause of the Constitution of the United States. They also detract from rather than promote the general welfare, violating the purpose of the US Constitution.

1. Introduction

What percent of authors of articles in refereed academic journals are motivated to write for the royalties they expect to receive from publication?

More specifically, do *any* refereed academic journals offer substantive payment for articles published? In rare cases, the author of this article has seen prizes for, e.g., best paper of the year. However, to the extent that this author's experiences are typical of academic publishing, no reasonable human would submit an article to a refereed academic journal expecting substantive income derived from copyright royalties. Instead, researchers write to be read and cited, to contribute to culture and the shared body of knowledge of humanity, and to build their reputations. Many also write in part because the criteria by which they are hired and promoted are based partly on publication records.

In contrast, for many refereed academic journals, authors are required to assign the copyright to the journal as "a work made for hire", even though it was *not* "made for hire." Prior to the Internet, that was justified to cover the costs of printing and distribution. Those days are past.

¹ A preliminary version of this is available on Wikiversity,

["Do copyrights and paywalls on academic journals violate the US Constitution?"](https://en.wikiversity.org/wiki/Do_copyrights_and_paywalls_on_academic_journals_violate_the_US_Constitution?) (https://en.wikiversity.org/wiki/Do_copyrights_and_paywalls_on_academic_journals_violate_the_US_Constitution%3F), accessed 11 November 2022.

2. Copyright Clause and Preamble of the US Constitution

The [Copyright Clause](#) of the US Constitution says, "The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries".² Moreover, the [Preamble to the US Constitution](#) says its purpose includes promoting "the general welfare".

People who submit articles to refereed academic journals do so to be read and to build their reputations. To the extent that this is accurate:

- Paywalls on academic journals are obstacles to "the progress of science and the useful arts". They are obstacles to promoting the general welfare, in apparent violation of the US Constitution.

3. Why is this part of US and international law?

Major media have a conflict of interest in honestly reporting on anything relating to copyright law. McChesney (2004, p. 233) wrote that the US "Congress initially called for copyright terms of fourteen years. From the beginning, prominent publishers such as Noah Webster worked to expand the length and terms of copyright. ... But the public benefitted tremendously from having limited copyright The balance between copyright and public domain began to change dramatically in the twentieth century with the rise of the corporate media system", with changes in copyright law underreported and approved by legislators, many and probably most of whom received "campaign contributions"³ from such media. Most of those legislators also doubtlessly knew that it would likely be political suicide to oppose the mainstream media.⁴ The Electronic Frontier Foundation recently asked supporters to "Stop copyright creep", noting that "an unconstitutional proposal and [bill] that no one in the public had ever seen before" made it into the 2020 year-end must-pass omnibus bill.⁵

One important US Supreme Court decision in this regard is [Eldred v. Ashcroft](#). That lawsuit challenged the [Sonny Bono Copyright Term Extension Act of 1998](#), which added 20 years to the terms of copyrights, including existing copyrights. That act has also been called the "Mickey Mouse protection act", because it extended from 1998 to 2018 the date at which the first commercially successful Mickey Mouse cartoon, released in 1928, entered the public domain. It is difficult to understand how extending the term of existing copyrights *retroactively* could "promote the progress of science and the useful arts". However, the Supreme Court insisted that Congress had the authority to make that judgment. [Lawrence Lessig](#), the lead attorney for the plaintiffs, said he lost that case, because he focused too much on law and too little on economics. Lessig wrote, "Of all the creative work produced by humans anywhere, a tiny fraction has continuing commercial value. ... But even for that tiny fraction, the actual time during which the creative work has a commercial life is extremely short. Most books go out of print within one

² [US Constitution, Article I, Section 8, Clause 8](#). See also the discussion in the Wikipedia article on "[Copyright Clause](#)".

³ Political campaign contributions are not "bribes" under US law unless there is an explicit quid pro quo. However, their corrupting influence on US law has been extensively documented, though not widely reported, perhaps because the major media are a major recipient of the largess. See, e.g., Teachout (2014), Lessig (2011), Johnston (2007). Stern (1992) documents multiple cases where major campaign contributors got over \$1,000 return for each \$1 invested in political campaigns.

⁴ e.g., McChesney (2004). See also Rolnik et al. (2019).

⁵ Electronic Frontier Foundation (2022).

year. The same is true of music and film."⁶ Might it have been easier for Lessig to have won that case if relevant empirical economics research had been more substantive and more available? For example, what is the implied discount rate for investments in copyrights, and how might that be impacted by different copyright terms?⁷

Similar issues are raised by the current [Publishers' lawsuit](#) against the digital lending program of the [Internet Archive](#), where digitized copies of books in that online library can be checked out for an hour at a time from anywhere in the world with an Internet connection.⁸

In [Free Culture](#), Lessig argued that a major obstacle to the evolution of culture is the provisions of copyright law requiring payment of royalties for "derivative works". A natural experiment in this regard compares the "[Manga](#)" comics industry in Japan with the rest of the world. Lessig wrote that in Japan, "Some 40 percent of publications are comics". He claims that a similar comics industry is not feasible in the US and many other countries, because most of those comics might be considered "derivative works" of previous works, requiring prohibitive copyright permissions prior to publication. Even the first successful [Mickey Mouse cartoon](#) might not have appeared under current copyright law, because it might have been challenged as a "derivative work" of an earlier [Buster Keaton film](#). The written law in Japan is similar to the US in this regard, but the Japanese largely ignore the provisions for "derivative works".⁹

Returning to the primary question of this article, are there *other* justifications for paywalls and copyrights held by academic journals?

In particular, are copyrights and paywalls on academic journals *accidents*? Are they due to failures of the US Congress to fully consider the ramifications of what they've enacted? Or are they monuments to political corruption?

⁶ Lessig (2004b). This book documents how excessive copyright terms are obstacles to documenting and understanding of the evolution of culture. Many old films are physically decaying beyond use in private archives generally inaccessible, even to scholars. This practice protects copyright revenues from the very few films that still have value, far beyond the planning horizon of any rational investor.

⁷ "Pricing risky corporate bonds" seems like a similar issue, discussed by Baaquie and Karim (2022). Studies of the political economy of copyright law could benefit from similarly considering intellectual property law more generally, especially patent law. For a brief overview of the impact of patent law on public health, especially infectious diseases, see Graves and Samuelson (2022).

⁸ See the section on "[Publishers' lawsuit](#)" and references cited therein in the Wikipedia article on [Internet Archive](#), accessed 12 November 2022.

⁹ Lessig (2004a, p. 24). See also the Wikipedia article on "[Free Culture \(book\)](#)".

4. What to do?

To the extent that copyrights and paywalls on academic journals are obstacles to "the progress of science and the useful arts", there are things that individual researchers, academic administrators, and the public can do to help overcome these obstacles:

- **Researchers** can submit their work only to open-access journals and refuse to submit their work to journals that will put their work behind a paywall. (No one who wants to be cited wants their work behind a paywall if there is a reasonable alternative, because the paywall would likely reduce their audience.)
- **Administrators** managing research that produce articles for academic publications can insist that their researchers submit their work only to open-access journals. (Anyone wanting to build the reputation of their research wants their publications to be read. Paywalls and copyrights are obstacles to that.)
- **Citizens** should demand that their elected officials enact two reforms affecting copyrights:
 1. All government funded research should be freely available, not behind a paywall, and should either be in the public domain or with a license no more restrictive than the [Creative Commons Attribution-ShareAlike \(CC BY-SA\) 4.0 International license](#).¹⁰
 2. Copyright law should be changed to *forbid* restrictive copyrights on "works for hire" when they are *not* actually written with a plausible expectation of receiving substantive income derived from copyright royalties. This would leave in place current practices for publications other than academic journals.

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¹⁰ Available from Creative Commons website (<https://creativecommons.org/licenses/by-sa/4.0/>).

¹¹ Full disclosure: The author has read only the freely available title and abstract of this article. The full article is behind a paywall. Present purposes seem to justify this citation without the expense in money and time needed to review the entire article.

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