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Responsibilities and rights: Balancing the institutional imperative for open access with authors' self-determination

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From their inception, open access[1] institutional repositories have been presented in largely utilitarian and pragmatic terms. Initially, institutional "archives" were conceived as a means of quickly and efficiently sharing scholarship whose dissemination was delayed by the traditional journal model (Okerson & O'Donnell, 1995; Tansley & Harnad, 2000). As the rationale for institutional repositories evolved, two parallel roles coalesced: the repository as a response to "the inertia of the traditional publishing paradigm" and the repository as a tool for building "institutional visibility and prestige" (Crow, 2002, p. 6). While accurately reflecting the current use of repositories, this framing is inherently problematic—it situates the institutional repository as the solution to a problem. Whether that problem is the broken economic model of scholarly journal publishing, or the need for an institution to extend its brand and impact, presenting the institutional repository as a solution implies that other solutions may also exist—and immediately undercuts the unique institutional imperative for building and sustaining an open repository of scholarly work. Such an imperative *does* exist; however, it is not a pragmatic consideration, but rather a moral obligation rooted in the nature of created knowledge and in the purpose and mission of universities. Aligning a repository program with this basic missional obligation can further strengthen the case for institutional repositories beyond any considerations of promotional value or impact on the scholarly publishing system. However, institutions that seek to frame their repositories in this way must also be mindful of a competing ethical responsibility—the respect for, and protection of, authors' intellectual property rights and agency in exercising those rights. The following discussion will explore the moral responsibility of

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[1] For the purposes of this chapter, 'open access' is used in the most inclusive sense—that is, it includes content that is publicly and freely accessible but may carry the full restrictions of copyright law with regard to use/re-use. While the 2012 Budapest Open Access Initiative recommendations call for content to be licensed using a Creative Commons-Attribution license or equivalent in order to be considered open access, there is legitimate debate as to whether it is necessary or appropriate to license all openly available institutional repository content in this way. (For further discussion, see: Poynder, R. (2014, August 31). The open access interviews: Paul Royster, Coordinator of Scholarly Communications, University of Nebraska-Lincoln. *Open and Shut?* Retrieved from http://poynder.blogspot.com/2014/08/the-open-access-interviews-paul-royster.html)

academic institutions to freely share locally-created scholarship and the tension between this obligation and the rights of academic community members to determine how and where their created knowledge should be shared.

Knowledge as a commons

As a precursor to examining the specific heritage and mission that compels universities to share the work of their scholars, it is helpful to consider whether there exists any general expectation for individual authors and researchers to share their work freely and openly with the public. Scholars have argued that knowledge should be considered a 'commons'—a "resource shared by a group of people" (Hess & Ostrom, 2005, p. 4) or a "kind of property in which more than one person has rights" (Hyde, 2010, p. 27). This view of knowledge as a commons available to all is based on two basic ideas. First, knowledge is necessary for basic human functioning; Willinsky (2006) states that there is "a human right to know" (p. 3). Second, the evolution of knowledge essential for advances in society, culture, and science "is almost always cumulative and collaborative" (Hyde, 2010, p. 179) and requires that knowledge be shared.

This shared nature of knowledge is privileged even when the commons is "stinted"[2]—when knowledge is converted by law into intellectual property and exclusive rights are given to a limited number of individuals (i.e., authors and creators) (Hyde, 2010). The copyright and patent clause of the U.S. Constitution (Article 1, §8, Clause 8) states that authors' exclusive rights in their original works are created and protected *for the purpose* of "promot[ing] the Progress of Science and useful Arts"—a construction that introduces the idea that knowledge is created to

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[2] For an excellent discussion of intellectual property as a stinted commons, see Hyde (2010).

serve the public good. This position is plainly stated in a U.S. House of Representatives report from 1988:

> "Under the U.S. Constitution, the primary objective of copyright law is not to reward the author, but rather to secure for the public the benefits derived from the author's labors. By giving authors an incentive to create, the public benefits in two ways: when the original expression is created and … when the limited term … expires and the creation is added to the public domain." (as cited in Hyde, 2010, p. 54)

It is evident both from the Constitution itself, and from this legislative interpretation, that a first principle of intellectual property law in the United States is that such laws are created to ensure that knowledge is accessible to the public. As Supreme Court Justice Louis Brandeis wrote, "The general rule of law is that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—became, after voluntary communication to others, free as the air to common use" (*International News Service v. Associated Press*, 1918).

Clearly, there is a general expectation—however subverted it may be by the current application of intellectual property law—that, by its nature, knowledge is created as a contribution to the public good, not simply to serve its creator. And the most efficient way for knowledge to serve the public is for that knowledge to be made freely accessible.

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Feeding the commons: Reviving the university's mission

Although intellectual property law creates opportunities to sell knowledge (or individual rights associated with the use of that knowledge), there remains at least one sector of society in which the common, free nature of knowledge is respected and protected—or in which it *should* be. While the prevalence of technology transfer offices that facilitate licensing research discoveries and the willingness of faculty to author textbooks that students are unable to afford would indicate otherwise, colleges and universities have historically maintained a strong commitment to the open dissemination of knowledge created within their walls. Renewing the focus on this core attribute of higher education should provide institutions with substantial impetus to build and sustain open repositories.

Endowed for the common good

The collegiate ethos of promoting public access to knowledge saw some of its most profound expression in the United States in the 19th century. As the American education system had evolved from its predominately ecclesiastic and classical influences to embrace science and scholarship, a parallel emphasis developed on the public responsibility of colleges and universities (Rudolph, 1962). Joseph McKeen, the first president of Bowdoin College, declared in his 1802 inaugural address that "literary institutions are founded and endowed for the common good, and not for the private advantage of those who resort to them for education" (Rudolph, 1962, p. 58). The specific contribution that universities can make to the common good was later described by Daniel Coit Gilman, the second president of the University of California and the

first president of Johns Hopkins University: "[A]pply the double test, what is done for personal instruction, and what is done for the promotion of knowledge, and you will be able to judge any institution which assumes [the name of "university"]" (1898, p. 52). Gilman was an especially ardent believer in universities' responsibility to disseminate knowledge, reflecting on this obligation in multiple public addresses:

> "Universities distribute knowledge. The scholar does but half his duty who simply acquires knowledge. He must share his possessions with others. This is done, in the first place, by the instruction of pupils. […] Next to its visible circle of pupils, the university should impart its acquisitions to the world of scholars. […] But beyond these formal and well-recognized means of communicating knowledge, universities have innumerable less obvious, but not less useful, opportunities of conveying their benefits to the outside world." (*The Utility of Universities,* 1885 (Gilman, 1898, pp. 57-8))

> "The fourth function of a university is to disseminate knowledge. The results of scholarly thought and acquisition are not to be treasured as secrets of a craft; they are not esoteric mysteries known only to the initiated; they are not to be recorded in cryptograms or perpetuated in private notebooks. They are to be given to the world, by being imparted to colleagues and pupils, by being communicated in lectures, and especially by being put in print, and then subjected to the criticism, hospitable or inhospitable, of the entire world. […] Publication should not merely be in the form of learned works. The teachers of universities, at least in this country, by text-books, by lyceum lectures, by contributions to the magazines, by letters to the daily press, should diffuse the knowledge they possess.

Thus are they sowers of seed which will bear fruit in future generations." (*Higher*

Education in the United States, 1893 (Gilman, 1898, pp. 297-98)

Though Gilman was a firm proponent of formally published scholarship, he notes above that universities (and their faculty) should use *all* available means of communication to "diffuse the knowledge they possess." This need for alternative forms of dissemination outside of scholarly books and journals was recognized by the U.S. Congress in the Smith-Lever Act (1914), which required land grant institutions to develop "extension" programs "[i]n order to aid in diffusing among the people of the United States useful and practical information." While the Act called for "development of practical applications of research knowledge," "giving of instruction," and "imparting information [...] through demonstrations, publications, and otherwise," it seems reasonable that, were it written today, it would recommend the creation of online institutional repositories as one means of sharing knowledge created at these institutions. Indeed, prominent land grant institutions like Oregon State University (http://ir.library.oregonstate.edu/xmlui/) and Purdue University (http://docs.lib.purdue.edu/) host robust institutional repository collections that openly share work not only from their extension programs but from faculty and researchers across their universities. Even though they represent a small percentage of all higher education institutions, the 75 current land grant institutions in the United States are a significant example of the positive impact on the public good that universities can have by actively sharing the knowledge they create.

Mission-driven dissemination

Lest the responsibility of universities to openly disseminate knowledge be deemed either the sole province of agricultural schools or an artifact of 19th century idealism, it is helpful to examine current positions—both collective and individual—regarding the role and responsibilities of the university. In 2009, the Association of American Universities (AAU), the Association of Research Libraries (ARL), the Coalition for Networked Information (CNI), and the National Association of State Universities and Land Grant Colleges (NASULGC) issued a report, *The University's Role in the Dissemination of Research and Scholarship—A Call to Action*, which included this "vision statement":

> "*The creation of new knowledge lies at the heart of the research university* and results from tremendous investments of resources by universities, federal and state governments, industry, foundations, and others. *The products of that enterprise are created to benefit society*. In the process, those products also advance further research and scholarship, along with the teaching and service missions of the university. Reflecting its investments, *the academy has a responsibility to ensure the broadest possible access to the fruits of its work* both in the short and long term by publics both local and global.

> Faculty research and scholarship represent invaluable intellectual capital, but the value of that capital lies in its effective dissemination to present and future audiences. *Dissemination strategies that restrict access are fundamentally at odds with the dissemination imperative inherent in the university mission*." (p. 1, emphasis added)

This statement directly echoes the themes present both in the constitutional construction of intellectual property and in early American educators' declarations of purpose for their institutions: created knowledge as a public benefit and open knowledge dissemination as a core component of a university's identity.

Examining the mission statements of individual American universities reveals parallel themes. For example, the Massachusetts Institute of Technology (2014) mission includes a commitment to "generating, disseminating, and preserving knowledge, and to working with others to bring this knowledge to bear on the world's great challenges." Brown University (n.d.) uses similar language—"The mission of Brown University is to serve the community, the nation, and the world by discovering, communicating, and preserving knowledge and understanding [...]"— while Columbia University (n.d.) makes explicit its responsibility to give its knowledge to the world: "[Columbia] expects all areas of the university to advance knowledge and learning at the highest level and to convey the products of its efforts to the world."

Certainly, not every institution includes specific language in its mission about its responsibility to disseminate knowledge to the world. For example, it is understandable that a university with a robust research program would be more likely to emphasize the external dissemination of knowledge than would a liberal arts college with a more inward focus on undergraduate teaching. However, even when a college or university's mission does not explicitly oblige it to freely share its knowledge with the global community, there is often a strongly-stated moral imperative that—if committed to fully—would compel the institution to do just that.

This implicit obligation is expressed differently by each college or university, but it usually includes similar themes: global citizenship, social justice, equality, and service. The California Institute of Technology's (Caltech) mission, for example, describes a responsibility "to expand human knowledge and benefit society through research integrated with education" (n.d.). The mission of an institution with a different overall scope, Earlham College, includes comparable language that stresses a responsibility to society at large—"At Earlham College this education is carried on with a concern for the world in which we live and for improving human society"—as well as an emphasis on "equality of persons" (n.d.).

For institutions similar to Earlham with a strong focus on undergraduate liberal arts education, the mission statement's moral themes are often framed in terms of student outcomes or attributes. Pacific University "inspires students to think, care, create, and pursue justice in our world" (n.d.), while Denison University (n.d.) "envision[s] our students' lives as based upon rational choice, a firm belief in human dignity and compassion unlimited by cultural, racial, sexual, religious or economic barriers, and directed toward an engagement with the central issues of our time." Even though the emphasis is on students, it seems reasonable to presume that if an institution wishes to instill specific values in its students—to "pursue justice" or to display "compassion unlimited by cultural, racial, sexual, religious or economic barriers"—the best way to do so would be for the institution and its faculty to tangibly model such behaviors.

Given universities' identity as centers of knowledge and learning, one of the obvious areas for an institution to look to when seeking to improve human society, or to model justice, or to remove

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cultural or economic barriers, is the issue of access to knowledge. Even if the basic idea of

access to knowledge as a human right does not compel a university to move to address inequities

in access, it is impossible to deny that knowledge is a necessary prerequisite to individuals'

abilities to "defend, as well as advocate for, other rights" (Willinsky, 2006, p. 143). If a

university, or its faculty, supports gender equality, or intellectual freedom, or access to

healthcare, or political freedom, or is engaged in the struggles against food insecurity or religious

intolerance or *any* of the compelling human issues that confront its local, regional, and global

communities, then it is impossible for that institution to *not* support equitable access to the

knowledge that is needed in order for individuals who face these challenges to advocate for

themselves in an informed manner. And if necessary knowledge is being *created* at a university,

it should ensure that access to that knowledge is provided in a way that is just and does not

present economic barriers to those who could benefit from it.

Universities may, of course, dismiss calls for such engagement by observing that a mechanism

already exists for sharing the knowledge created by faculty and researchers: the scholarly

journal. However, not only do traditional scholarly journals offer a flawed, anachronistic means

of sharing scholarship (Preim & Hemminger, 2012), but subscription-based journals introduce

economic barriers to access for millions of scholars and public citizens in developing nations

(Dickson, 2012; Ezema, 2011). Although programs like *Research4Life*, which partners with

journal publishers to "provid[e] affordable access to critical scientific research" to developing

nations in the form of free or low-cost journal subscriptions (Elan & Masiello-Riome, 2014), are

helping to address this issue, the very existence of such programs is a tacit acknowledgment that

scholarly knowledge is economically inaccessible to many people. Even academic libraries in

some nations are unable to afford a fraction of the resources that are available to similar-sized institutions in the United States: the University of the West Indies, an institution comparable to ARL member institutions, is able to spend only 20% of what the average ARL library does per student on journals (Papin-Ramcharan & Dawe, 2006).

While knowledge sharing solely through traditional scholarly journals clearly damages universities' support for equal rights and desire to benefit human society, it also has a dampening effect on the open, broad exchange of knowledge that is vital for the progress of science. As Willinsky (2006) notes of traditional publishing, "scholars everywhere need to question their assumptions about what constitutes an adequate circulation of their and others' work" (p. 109). Even faculty who are publishing in reasonably priced journals should consider whether *any* subscription fee introduces an unnecessary barrier to wide visibility for their work. If the ultimate goal of scholarship (absent the tenure system)—and of universities—is to share knowledge, it would seem prudent to actively support mechanisms that best facilitate that goal. Open access publications offer one alternative to traditional journals, but the inherent issues of all scholarly journals are not altogether absent from open access journals—and the cost of author fees for some journals may be prohibitive for some scholars (and institutions). Institutional repositories offer a locally-controlled means of ensuring rapid, persistent dissemination of various forms of scholarship—whether white papers, article pre-prints, data sets, reports, and so on.—and are a logical way for universities to meet their missional and moral obligations to share knowledge. Indeed, the 2009 AAU/ARL/CNI/NASULGC report recommends "Where local dissemination infrastructure exists (such as institutional repositories), promote its use and expand its capabilities as required" (p. 4).

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An institution of individuals

Whether as historically founded, or as currently stated in their missions, universities clearly have a responsibility—even an obligation—to widely share the knowledge that they create. However, universities as monolithic entities do not create this knowledge; it is the product of communities of dozens or even hundreds of individual faculty members and researchers. And while their scholarship is made possible by virtue of their employment at a university, faculty scholars retain individual rights—especially intellectual property rights—that must be considered and respected when a university endeavors to make all faculty scholarship openly available through an institutional repository.[3]

Faculty members' rights in the intellectual property that they create are well-established and similarly circumscribed across most colleges and universities. While many institutions claim an interest (in the legal sense) in patentable intellectual property created by their faculty employees, faculty usually retain ownership and control over copyrightable works (Nelson, 2012). Beyond the legal assignment of copyright to faculty as the authors of their own original works, the standard of faculty ownership of "traditional academic works" (i.e., course materials and scholarly or creative works) is also grounded in the principle of academic freedom (American Association of University Professors [AAUP], 1999). As noted by the AAUP *Statement of Principles on Academic Freedom and Tenure*, "the free search for truth and its free exposition"

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[3] It is worth noting here that, while institutional repositories are also commonly used as a mechanism for the mandatory deposit and dissemination of student work (Kennison, Shreeves, & Harnad, 2013), such work (especially in the form of theses and dissertations) has a long and accepted history of compulsory distribution by the student's institution, often as a degree requirement. Given this, the issues surrounding the dissemination of student work are not addressed here.

are necessary attributes of higher education and, as such, faculty and researchers should be "entitled to full freedom [...] in the publication [of their scholarship]" (AAUP, 1940).

Implicit in the idea of "full freedom" in the distribution of their scholarly work are two faculty rights: the right not to be censored in sharing their knowledge and the right to choose how and where their knowledge will be shared. In practical terms, this latter right gives faculty the ability to select where, and under what terms, their scholarship will be published. These choices will vary by individual, and are influenced not only by personal preferences but also by disciplinary norms: every disciplinary culture has accepted modes of discourse, which include the ways in which ideas are argued and presented (Hyland, 2000). These cultural approaches to information sharing extend beyond accepted rhetorical practices to include modes of sharing knowledge. For example, within the physics community, sharing pre-publication research manuscripts in the arXiv disciplinary repository is a commonly accepted (and even expected) practice. As universities develop institutional repositories, they must be mindful of the fact that institutionally-based dissemination may conflict with existing disciplinary practices that are important to faculty (Cullen & Chawner, 2011)—whether those focus on centralized subject repositories like arXiv or on more traditional forms of communication.

Modeling balance: Open access policies

Perhaps the predominant traditional form of scholarly communication—and the example most frequently mentioned here—is the scholarly journal article. While certain disciplines prize the scholarly monograph as the ultimate expression of knowledge, all disciplines participate in

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journal publishing to some extent. This, coupled with the fiscal issues created by commercial journal publishers, has led to a conflict between the broad dissemination mission of universities and the narrower distribution of subscription journals. An increasingly common response to this conflict is an institutional open access policy. Open access policies (or "mandates") offer an excellent model for how an institution can respect faculty authors' individual agency while also pursuing the comprehensive dissemination of knowledge created within the institution.

An important attribute of most university open access policies is that they are faculty-driven and faculty-approved. Unlike a top-down approach, with the institution decreeing that all faculty must contribute their articles to an open access repository, a faculty-driven policy that is debated and approved through a faculty governance system recognizes the importance of faculty rights. Beyond this procedural aspect, most open access policies include three key elements that balance the institutions' ability to disseminate knowledge with authors' rights to choose where their work is published. First, the policy requires a non-exclusive license from faculty to allow the institution to distribute their articles through an institutional repository. This license acknowledges faculty ownership of their work (Harvard Open Access Project [HOAP], 2014), allows them to retain all rights associated with that work, and yet makes it possible for the institution to openly share the work. Second, the policy is an "opt-out" rather than an "opt-in" policy; this places the emphasis on open dissemination of knowledge, but still respects faculty agency by providing a way to decline participation if necessary. Finally, the "opt-out" nature of the policy is made possible by offering waivers—exemptions to the default action of sharing an article—if a faculty member's publisher will not permit it. The waiver option ensures that authors have the ability to publish in whatever journal they choose, not just those that are

amenable to the terms of the institution's open access policy (HOAP, 2014). By framing open dissemination of scholarly articles as the default action, while at the same time ensuring faculty authors' continued ability to choose publishing venues that are appropriate for them as individuals and members of a discipline, universities are effectively using open access policies to both fulfill their missions and respect faculty rights.

Finding balance beyond the article

While open access policies and publicly available repository collections of scholarly articles are a significant contribution to universities' obligation to share their knowledge, they do not on their own meet an institution's responsibility to the common good. As Daniel Coit Gilman noted, there are many modes of publication and "innumerable less obvious" forms of "communicating knowledge"—and this is even truer today than in the 19th century. If a university wishes to openly disseminate the entirety of the knowledge created within its bounds, it needs to think beyond the article to consider the other ways in which its faculty communicate their knowledge. And, of course, it must explore the dissemination of these other forms of scholarship—and any proposed open alternatives—with the same respect for individual rights that is present in open access policies for journal articles.

The guiding principle when considering how to encourage (if not compel) faculty to openly share knowledge that might otherwise be constrained by economic or technological barriers should be the same balance present in the copyright and patent clause of the Constitution: knowledge is created for the common good, and knowledge creation is stimulated by offering scholars a

certain (delimited) control over what they create. This balance recognizes that, while knowledge is a public good that should be shared freely, authors and creators are often motivated not simply by an altruistic desire to contribute to common knowledge, but by the assurance that they will receive some benefit—whether reputation, compensation, or advancement—for having made the contribution. By applying this principle, rather than simply compelling faculty to release their work to common use (or for the profit of the university, as is sometimes the case with online curricular materials [Butrymowicz, 2014]), universities are more likely to receive broader faculty support—and ultimately are more likely to come closer to the goal of sharing all knowledge created within the institution.

With that principle in mind, universities should examine the other traditional "closed" forms of scholarship outside of the journal article: scholarly monographs and textbooks. Similar to scholarship published in subscription-based journals, these forms of scholarship present economic (and sometimes technological) barriers to access. It would be unreasonable, of course, to suggest that faculty stop authoring scholarly books and textbooks. As noted earlier, there are strong disciplinary traditions that are centered on the monographic argument—not to mention the educational value of many books. There are also questions of economic, not simply academic, freedom that accompany books and textbooks. While it is not common for a faculty member to earn substantial sums from a scholarly text, some authors do earn a small royalty from sales of their work—and authors with a popular textbook may earn much more. Universities need to acknowledge this reality, and propose methods of openly sharing the knowledge contained in faculty-authored books that will provide alternative incentives for faculty. Such incentives could include, for example, special recognition in the promotion and tenure process for publishing a

monograph under an open access model, or stipends that would encourage faculty to create open

textbooks that can be distributed through the institutional repository rather than authoring

expensive commercial textbooks. Whatever incentives are offered, however, faculty must remain

free to share and publish their knowledge as they see fit. This means that even if a particular

press doesn't publish open access monographs, or allow self-archiving of chapters in a

repository, the faculty member must be free to choose that publisher—just as with the waiver in

open access article policies. Even in such cases, though, there are options a university can pursue

to make a book's content freely available. For example, adopting the model recently proposed by

AAU/ARL (2014) in their *Prospectus for an Institutionally Funded First-book Subvention* would

see an institution underwrite the costs of a faculty publisher of choice in order to make "a basic

digital edition" of the book openly available (including through the university's institutional

repository). These types of strategies—whether providing faculty incentives to create open

resources or funding the open publication of faculty work, through the allocation of resources,

will signal the university's commitment both to promoting knowledge and to respecting the

expertise and rights of their faculty.

Conclusion: Clarity and complexity

While universities' inherent imperative to share knowledge for the common good is clear, the

complexity of both the scholarly communication system and the intellectual property laws that

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govern it make meeting that responsibility much more challenging than it was in a pre-digital

era. Open institutional repositories should form the backbone of universities' knowledge

dissemination efforts, but creating the capacity to distribute (and ideally preserve) scholarly

works is only the beginning. Institutions must carefully examine the types of scholarship that are

created within each of their schools and departments and determine—in consultation with faculty

and researchers—how that knowledge can be best shared for public benefit. "Best" in this sense

may not always equal the same degree of openness across all disciplines. Certainly, economic

and technological barriers to access for students, independent scholars, and the general public

both domestically and internationally should be removed. But when contributing work to the

commons, institutions have a responsibility to ensure that their authors' rights—particularly their

moral rights—are protected; this may entail licensing some works more restrictively than others.

Similarly, sometimes certain rights must be asserted (and legally protected) when sharing

knowledge with the public in order to ensure that work intended for the common good is not

unduly commoditized by commercial interests (Hyde, 2010). By sharing knowledge in ways that

make it available to the public in perpetuity, and that respects the rights of its creators,

universities will ensure that their communities of scholars are encouraged to contribute to the

"common stock of knowledge"[4] for years to come.

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[4] With gratitude to Benjamin Franklin for this evocative turn of phrase.

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