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# Academic Copyright, Open Access and the “Moral” Second Publication Right

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中南财经政法大学中意学院

Istituto Italo-Cinese

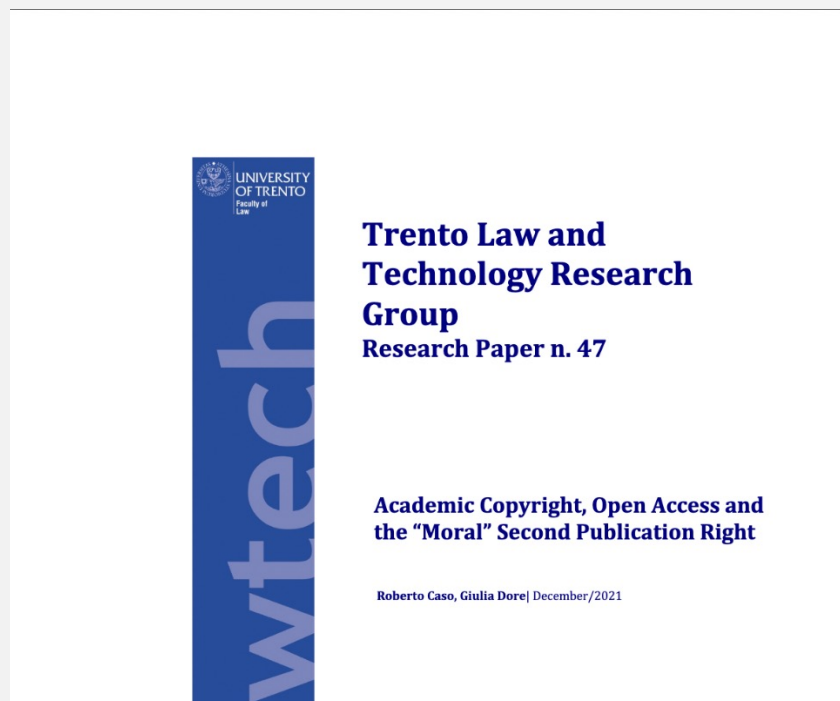
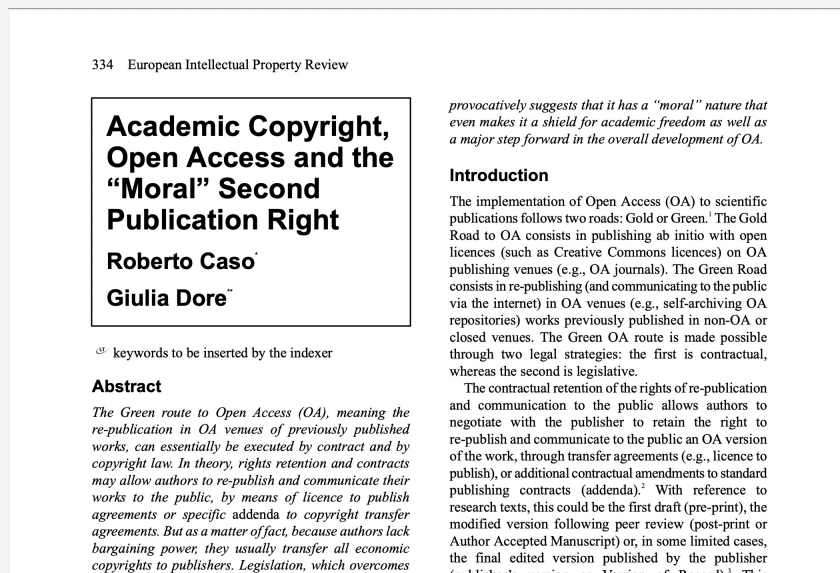
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# Main argument

- Open Science as public and democratic science is a fundamental achievement of human society
- Current Copyright Law as part of Intellectual Property Law collides with Open Science and Open Access
- Reconciling copyright with Open Science: many strategies
- One legislative strategy is to insert a second publication right in the copyright law

# R. Caso, G. Dore, Academic Copyright, Open Access and the “Moral” Second Publication Right, Trento LawTech Research Paper nr. 47, 2021, forthcoming, European Intellectual Property Review, 6/2022



# Outline

1. Some fundamental definitions: academic copyright, Open Access, Open Science
2. A virtuous circle: social norms, technology, copyright, publicity, peer review
3. A vicious circle: research assessment based on bibliometrics, technology, new copyright law, piracy and plagiarism, monopoly, privatization of science
4. Green Open Access and second (moral) publication right
5. Some conclusions

# 1. WIPO: Intellectual Property [exclusive rights]

- «What is Intellectual Property?
- Intellectual property (IP) refers to **creations of the mind**, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.
- IP is protected in law by, for example, [patents](#), [copyright](#) and [trademarks](#), which enable people to earn recognition or financial benefit from what they invent or create. By **striking the right balance between the interests of innovators and the wider public interest**, the IP system aims to foster an environment in which creativity and innovation can flourish».

# 1. WIPO: Copyright

- «Copyright is a legal term used to describe the **[exclusive] rights** that creators have over their literary and artistic works. Works covered by copyright range from books, music, paintings, sculpture and films, to **computer programs, databases**, advertisements, maps and technical drawings».

# 1. Copyright and scientific publications (papers, essays, books etc.)

- Usually the scientific author **transfers her economic copyright** to the publisher without negotiation; usually
- He/she has subject to the publisher **bargaining power** → reputational power (e.g. a scientific journal with high Impact Factor)
- Closed access databases → licenses (subscriptions, Big Deals) → libraries

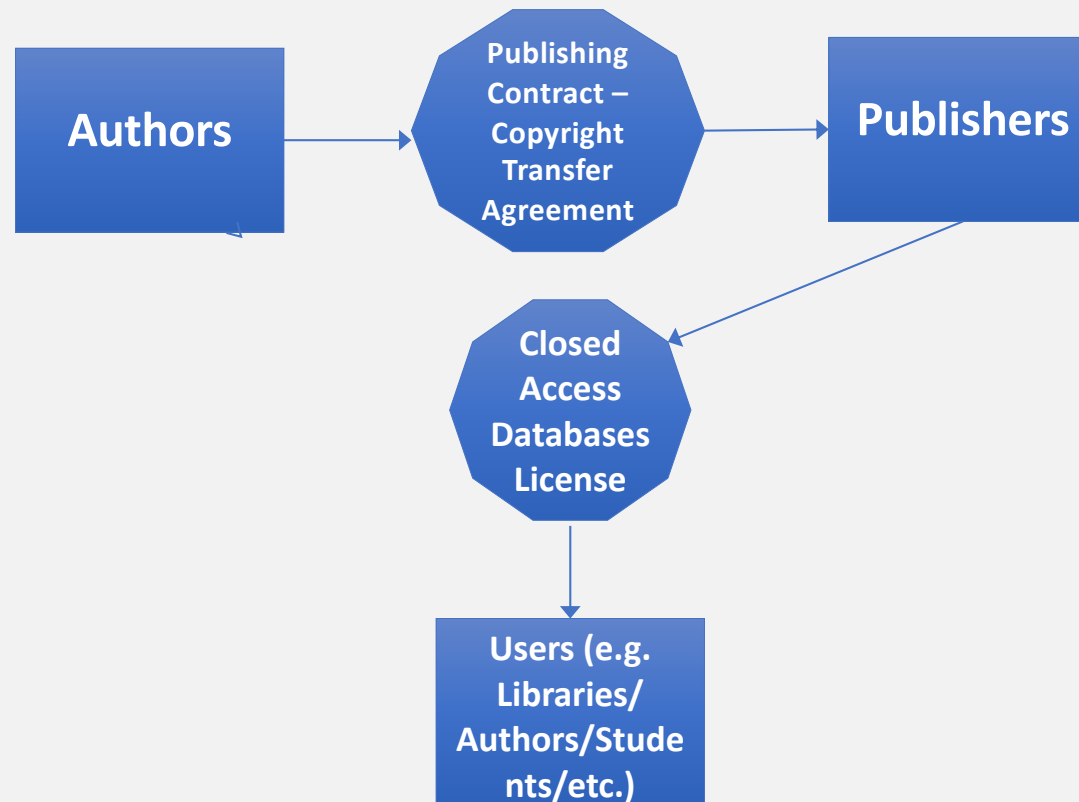
# 1. Copyright transfer agreement

For instance, the clause of the contract for the transfer of economic copyrights on a scientific article could be formulated in the following terms:

**«the author fully and definitively transfers to the publisher all economic copyrights on the scientific article».**



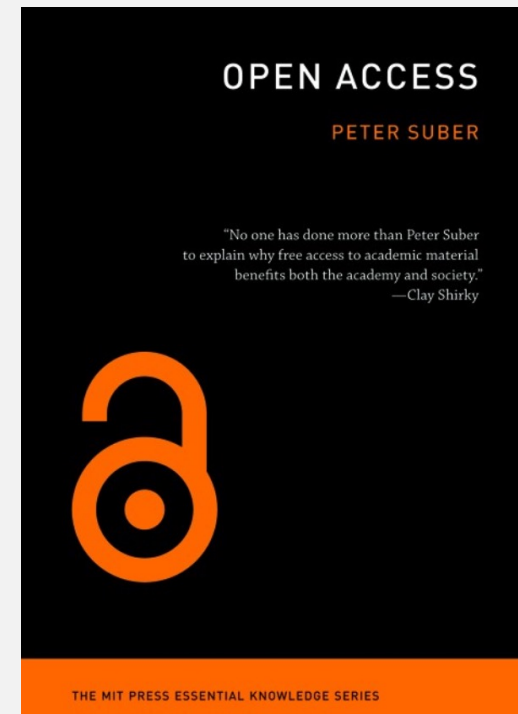
# 1. Copyright and scientific publications' market



# 1. Open Access: Peter Suber 2012

“Open access (OA) literature is

- digital,
- online,
- free of charge, and
- free of most copyright and licensing restrictions”



# 1. Open Access: Gold and Green

- Green Open Access consists in re-publishing (and communicating to the public via the internet) with open licences (such as Creative Commons licences) in OA venues (e.g., self-archiving OA repositories)

E.g.:

- PubMed <https://www.ncbi.nlm.nih.gov/pmc/>
- Zenodo <https://zenodo.org/>

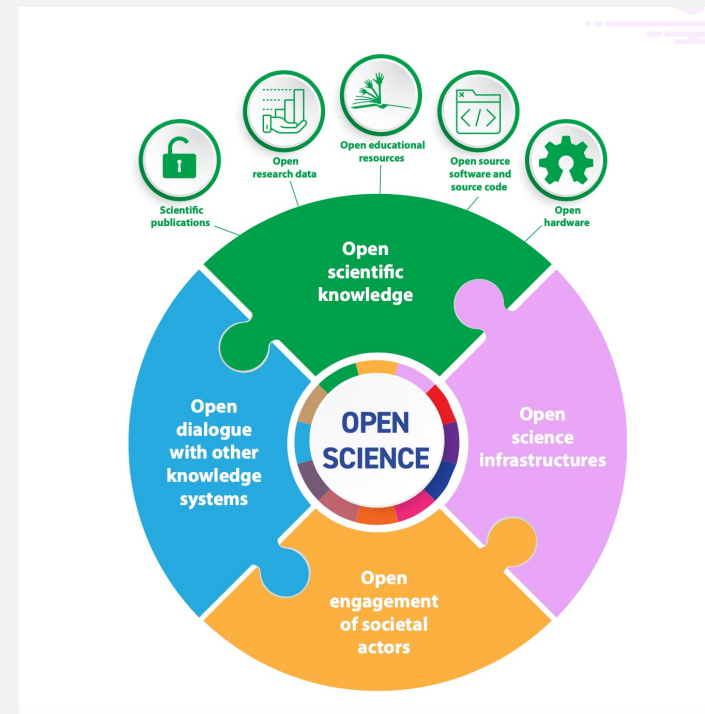
- Gold consists in publishing ab initio with open licences (such as Creative Commons licences) on OA publishing venues (e.g., OA journals)

E.g.:

PLOS <https://plos.org/>

# 1. UNESCO Recommendation on Open Science 2021

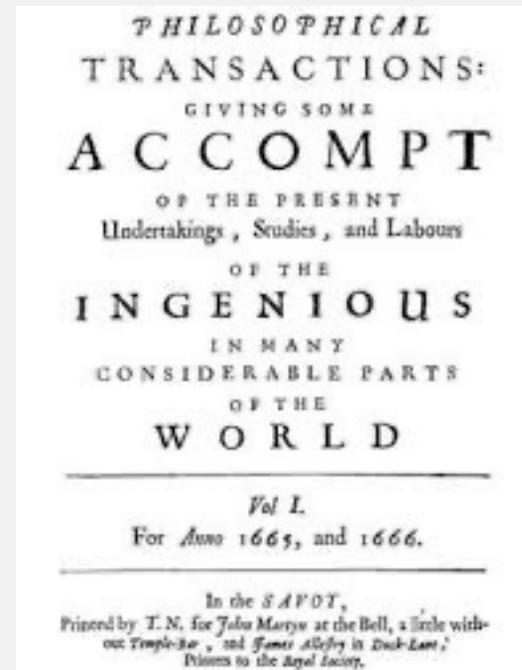
**Open Science** is defined as an inclusive construct that combines various movements and practices **aiming to make multilingual scientific knowledge openly available, accessible and reusable for everyone**, to increase scientific collaborations and sharing of information for the benefits of science and society, and to open the processes of scientific knowledge creation, evaluation and communication to societal actors beyond the traditional scientific community.



## 2. Open Science as Public and Democratic science

- The **public nature of scientific dialogue** is a fundamental aspect of the scientific community
- From Gutenberg onwards, talking about public dialogue means **publishing** printed works
- Printing reduces time and distance; it also helps accumulating scientific knowledge

## 2. Open Science as Public and Democratic science



## 2. Galileo Galilei's letter to Belisario Vinta of 1610 on «Sidereus Nuncius»

- «Parmi necessario, per aumentare il grido di questi scoprimenti, il fare che con l'effetto stesso sia veduta et riconosciuta la verità da più persone che sia possibile»
- «To increase the cry of these discoveries, it seems to me necessary to ensure that by the same effect the truth is seen and acknowledged by as many people as possible»

## 2. Open Science as Public and Democratic science

- **Publicity** through printing is an essential element of modern democracies
- The **democratic** or republican nature of science is intimately linked to the practice of printing the outputs of scientific research

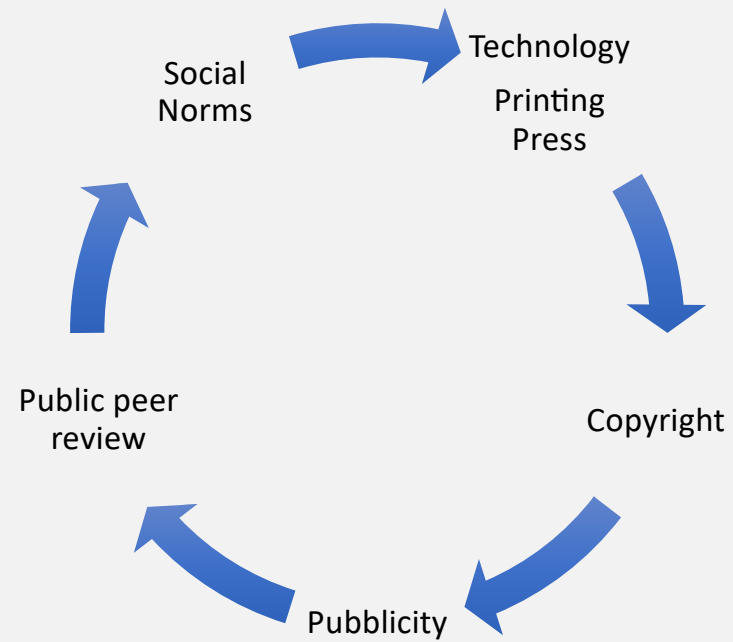


## 2. Open Science as Public and Democratic science. R.K. Merton



- Communism
- Universalism
- Disinterestedness
- Organized skepticism

## 2. A virtuous circle



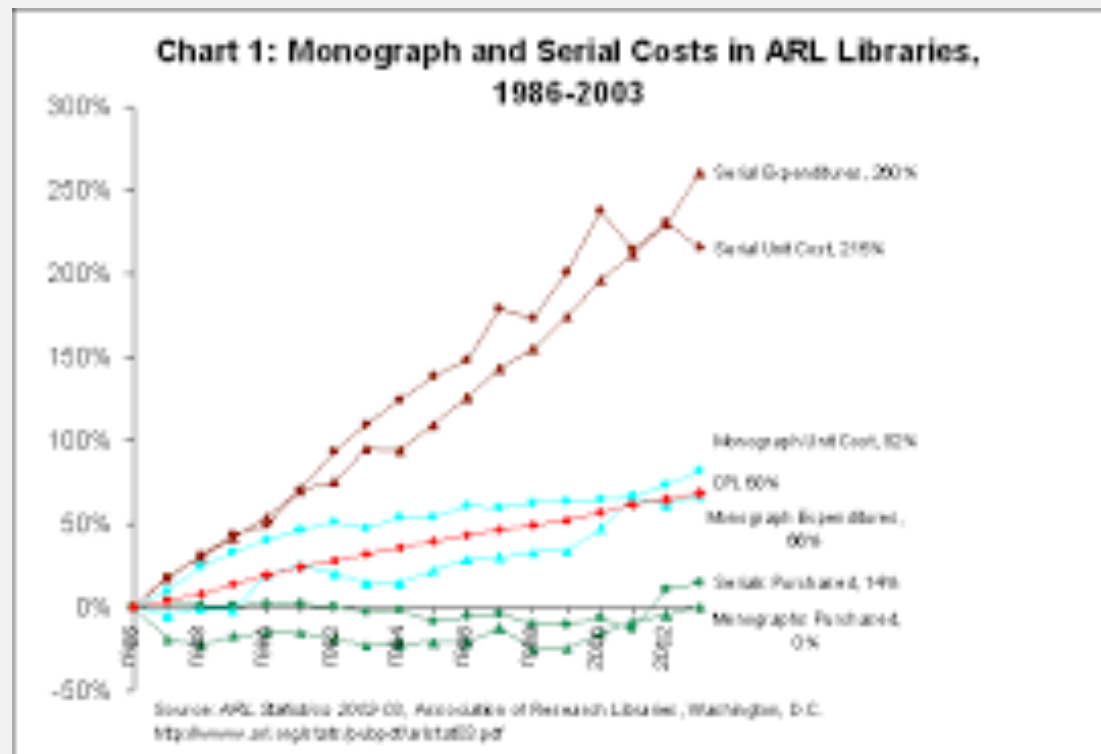
### 3. Commodification of science, academic capitalism, «governance by numbers»



### 3. Bibliometrics

- Citation indexes
- E.g.: Impact Factor (IF) which measures how much the “average” article of a journal is quoted in the two years preceding the measurement
- Core journals → monopoly

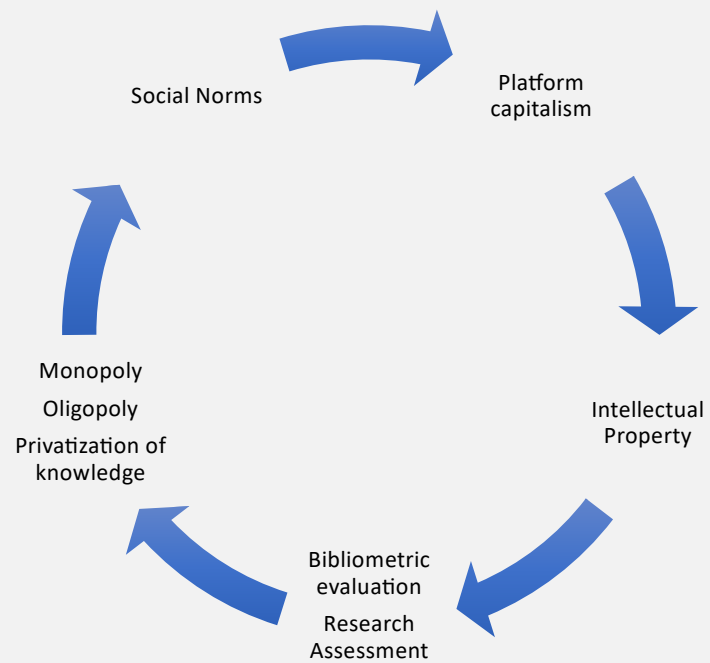
### 3. ALR Statistics: «Serial crisis»



### 3. E.g., Edwards & Roy, 2017, perverse incentives

- «Over the last 50 years, we argue that incentives for academic scientists have become increasingly perverse in terms of competition for research funding, development of quantitative metrics to measure performance, and a changing business model for higher education itself»
- Gaming metrics, scientific frauds (e.g., plagiarism)
- Patenting and conflict of interests

### 3. A vicious circle



## 4. When Open Science and IP (copyright) collide

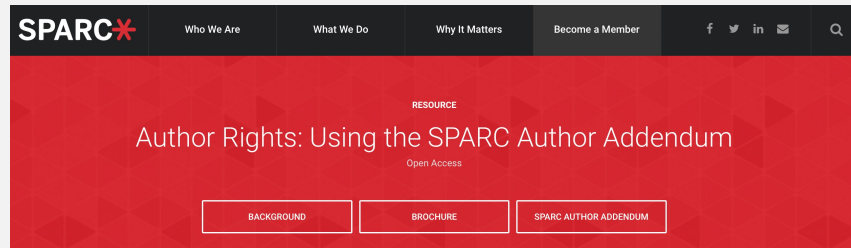
E.g.:

- Paul David, «The Republic of Open Science The institution's historical origins and prospects for continued vitality» (2014)
- Jerome Reichman and Ruth Okediji, «When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods on a Global Scale» (2012)
- Richard Gold, «The fall of the innovation empire and its possible rise through open science» (2021)



## 4. Republishing strategies: contractual

- The contractual retention of the rights of re-publication and communication to the public allows authors to negotiate with the publisher to retain the right to re-publish and communicate to the public an OA version of the work, through transfer agreements (e.g., licence to publish), or additional contractual amendments to standard publishing contracts (addenda)



## 4. Republishing strategies: legislative

- Recently some European legal systems starts to provide a **digital second publication right**
- Germany 2013
- Austria 2015
- Netherlands 2015
- France 2016
- Belgium 2018
- Italy 2018 → Bill (proposal) → not yet approved

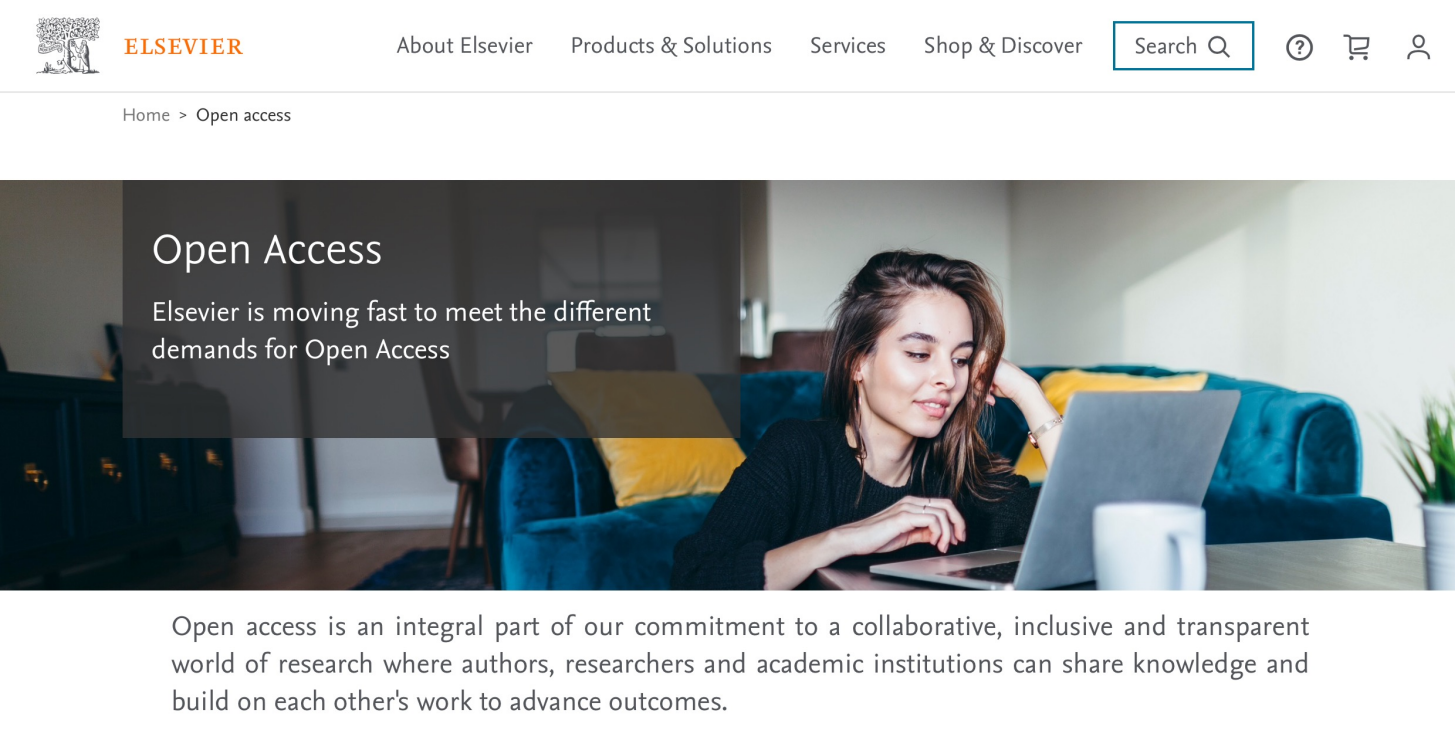
## 4. Moral rights

- Some European legal systems (e.g. France, Italy) tend to protect moral rights in an absolute way and recognise their **perpetuity and inalienability**
- Article 6-*bis* of the Berne Convention
- Right of paternity
- Right of integrity

## 4. Academic freedom and second (moral) publication right

- Freedom of expression, academic freedom
- The right to make the work public is undeniably the core element of the protection of moral right
- The second publication right, as another facet of the act of publication, could have all the features of a moral right
- It would embody the utmost liberty of the scientific author to decide when and where to publish and give it back to the public that first funded the work

## 5. From closed access to commercial Open Access



The image shows a screenshot of the Elsevier website's 'Open Access' banner. The banner features a woman sitting on a blue sofa, working on a laptop. The text on the banner reads: 'Open Access', 'Elsevier is moving fast to meet the different demands for Open Access', and 'Open access is an integral part of our commitment to a collaborative, inclusive and transparent world of research where authors, researchers and academic institutions can share knowledge and build on each other's work to advance outcomes.'

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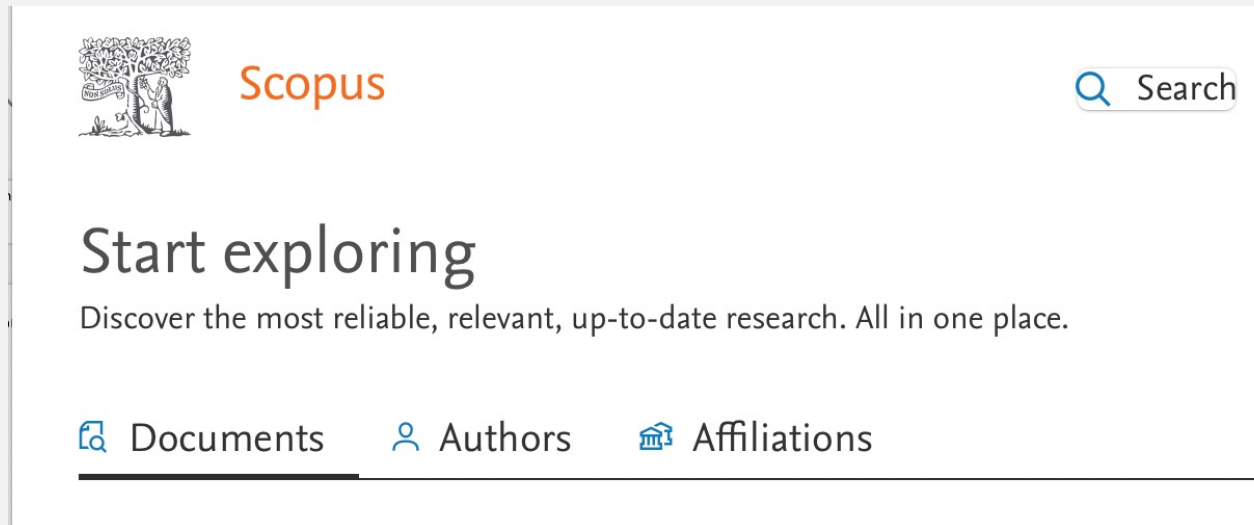
Home > Open access

### Open Access

Elsevier is moving fast to meet the different demands for Open Access

Open access is an integral part of our commitment to a collaborative, inclusive and transparent world of research where authors, researchers and academic institutions can share knowledge and build on each other's work to advance outcomes.

## 5. Bibliometrics and data analytics



## 5. Brembs et al. Plan I (2021): «While public institutions hesitantly deliberate, commercial providers act»



## 5. SPARC Landscape Analysis 2019

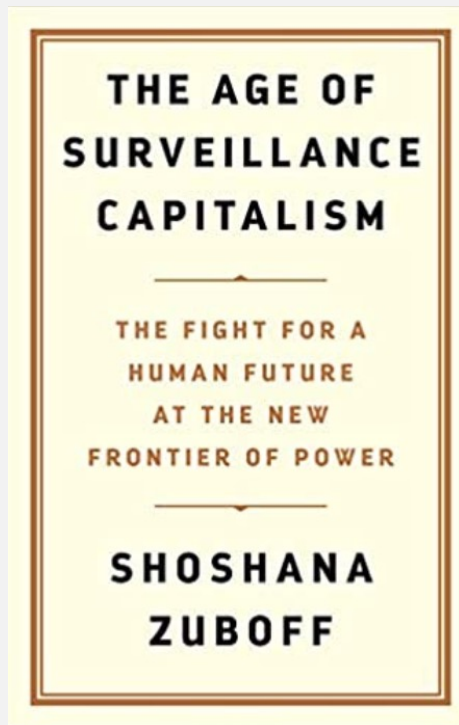
- «Academic publishing is undergoing a major transition as some of its leaders are **moving from a content-provision to a data analytics business**. This is evidenced by a change in the product mix that they are selling across higher education institutions, which is expanding beyond journals and textbooks to include **research assessment systems, productivity tools, online learning management systems** – complex infrastructure that is critical to conducting the end-to-end business of the university».



## 5. SPARC Landscape Analysis 2019

- «Through the seamless provision of these services, **these companies can invisibly and strategically influence, and perhaps exert control, over key university decisions** – ranging from student assessment to research integrity to financial planning. Data about students, faculty, research outputs, institutional productivity, and more has, potentially, enormous competitive value. It represents a potential multi-billion-dollar market (perhaps multi- trillion, when the value of intellectual property is factored in), but its capture and use could significantly reduce institutions' and scholars' rights to their data and related intellectual property»

## 5. Surveillance Capitalism, Surveillance Publishing



Surveillance Publishing

### Stop Tracking Science

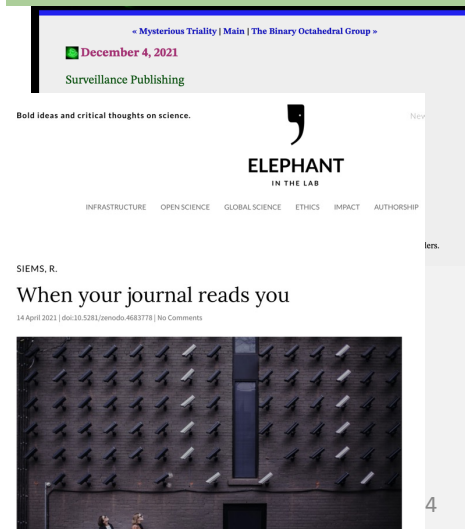
The major academic publishers have made collection and trading of data about the research interests of individuals, groups and research institutions their new business model. Data about your scientific activities are collected in real time across the research workflow. The publishers take notes and sell the knowledge about you to third parties. This business model is in direct opposition to academic freedom. We have to stand up against these corporations!

Stop Tracking Science!

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*A working paper, under review*



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## 5. Karen Maex (University of Amsterdam) 8.1.2021



- [...] And so private companies continue to enlarge their role while **the public character of our independent knowledge system is further eroded.**
- [...] What applies to the future of democracy applies equally to the future of universities and of independent education and research as vital building blocks for the organisation of knowledge. **We cannot simply leave the future of knowledge to the corporate boardrooms.**

## 5. Some conclusions

- Rethinking copyright law in order to promote Open Access and Open Science
- But it is only a small piece of a larger policy
- Research assessment, infrastructures, data

# Thanks!



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# References

- R. Caso, [The Darkest Hour: Private Information Control and the End of Democratic Science](#), Trento LawTech Research Papers, nr. 35, Trento, Università degli studi di Trento, 2018, in I. De Gennaro, H. Hofmeister, R. Lüfter (eds.), [Academic Freedom in the European Context. Legal, Philosophical and Institutional Perspectives](#), in [Palgrave Critical University Studies](#) book series (PCU), Springer Nature, 2022, 259-288
- R. Caso, [The academic copyright in the age of commodification of scientific research](#), in SCIRES-IT – SCientific RESearch and Information Technology, [Volume 10, Special Issue \(2020\) Open Science: New models of scientific communication and research evaluation](#), Issue edited by P. Gargiulo and Editors in-Chief V. Valzano and M. Cigola
- R. Caso, G. Dore, [Academic Copyright, Open Access and the “Moral” Second Publication Right](#), Trento LawTech Research Paper nr. 47, 2021, forthcoming, European Intellectual Property Review, 6/2022

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"è solo il mio modo di vedere le cose..."

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