“Protecting” Our Works – From What?

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Academic libraries increasingly dedicate significant resources to providing information and guidance to their campuses about copyright, other kinds of intellectual property, and related issues. It seems likely that this trend will continue over the next several decades. Library workers are well-suited for this effort due to their library skills and experience, and many have developed significant additional relevant technical expertise. But we can be even stronger partners with academic creators by developing fluency in the many different ways copyright, intellectual property, and credit are discussed both within and outside the academy. This chapter explores one focus of that rhetoric: protection.

Why Libraries?

There are numerous ways in which library staff members are well-suited to supporting academic creators' information needs around copyright and other legal issues related to their research and scholarship. Library workers are not necessarily *better* suited to this work than others with related expertise, but we do offer some unique strengths.

One of those unique strengths is the broad and deep knowledge library staff members have of the ecosystems of research and scholarship. This expertise arises in part from the focus of library and information science as its own academic discipline: we study the systems of knowledge and information production, dissemination, use, and development across and within human social structures. But the deep and broad understanding of scholarly information systems that librarians and other library staff members have to offer also comes from the practice and experience of library work. Many academics have deep knowledge of the systems of a few particular fields of study, but because academic library staff members are usually called upon to work across more disciplines than the average academic, we have more opportunities to develop knowledge and experience of the similarities and differences across disciplines and fields.[1]

Reference interview skills are another unique strength of library professionals that influence our information interactions. Many fields have developed valuable techniques for drawing information and perspectives out of an interviewee; journalism, documentary art, sociology, anthropology, psychology, medicine, law, and many other disciplines all have their own valuable tools and approaches to interviewing. Law is a particularly apt comparison for the topics at hand, since creators with legal information needs often seek information from lawyers. Both legal interviewers and library staff members are likely to be aware that a client's initial inquiry may fail to fully communicate their actual information needs. A good legal interviewer will probably provide information and solutions that are at least as satisfactory to the client as those available through a library worker. But the practices tend to diverge around assumed knowledge outcomes. A legal interview may be predicated on the assumption that a satisfactory conclusion can involve unequal understanding. It is not uncommon for a legal interivew to be aimed at extracting information from the interview*ee* in order that the interview*er* can make expert decisions about how to proceed. Library interviews, by contrast, are often oriented to building a shared understanding of information needs and relevant systems or structures among participants, and usually aim at providing the information and support needed for the interview*ee* to proceed independently. The library-style approach is particularly well-suited to helping academic creators with legal issues related to their works, because academic creators may often need to proceed independently, and also because this approach shares some of the learning-and-discovery values of academia in general.

For all the unique strengths of a background in academic library work, solid support for academic creators requires in-depth knowledge of specific legal and policy trends, issues, options, and opportunities with respect to academic creations. When library workers put together our professional backgrounds in libraries with specialist knowledge on legal issues related to scholarship, we can build an especially deep understanding of the systems involved. Our unique backgrounds and strengths can bring clarity and build connections among the variety of goals academic creators may have for their

work, the variety of ways they may communicate about those goals, and the ways in which copyright law, other legal provisions, and legal and industry practices may or may not align with those goals.

Developing Rhetorical Competence

One area that library workers can explore to improve support for academic creators is the rhetoric of copyright, which shapes the mental models we all possess of the legal and practical issues at hand. Awareness of the various ways people talk about copyright is key to developing a better understanding of practices and structures, both inside and outside academia, and to helping creators make those connections. Library staff members who have built this awareness may be able to anticipate and address creators' preconceptions about how the law functions, and provide creators with new mental models that better reflect both their own expectations and the legal landscape.

Developing a better understanding of existing rhetoric around copyright can also help with opening new channels for discussion. Open licensing provides some highly relevant solutions in problem areas where academic creators' expectations and the provisions of copyright law conflict. However, it can be difficult to create dialogue about “alternative” options for academic creators when the alternatives conflict with creators' existing understandings of legal systems. Understanding existing rhetoric can help us deploy it to advocate for open or other alternative approaches where appropriate, and deconstruct it when that may improve communications with creators.

It is also important to recognize when the dominant rhetoric around copyright provides for useful communication with academic creators. Some academic creators may be working in situations very similar to those fields outside academia where copyright is relevant, and may be more interested in controlling their work or receiving royalties. Even in fairly traditional academic contexts, open licensing is not a perfect solution to all existing problems related to copyright. In some situations, being aware of rhetorical influences, and sometimes intentionally invoking them, can create opportunities for smoother connection with authors.

Finally, there are some times when creators' expectations do not match *any* existing legal

systems or tools. In such cases, the challenge for library staff may be to use their understanding of copyright rhetoric to help creators adjust their expectations to fit with reality.

"Protection" for Creative Works

It is very common for discourse about copyright to make reference to copyright "protecting" creative works. This kind of discourse is often about works with immediate commercial value that must be protected against unauthorized (and/or unrecompensed) use or copying. In addition to protecting *works*, this kind of discourse also often talks about protecting *creators*, or their interests, but frequently fails to acknowledge that creators of works with immediate commercial value often do not own or receive direct compensation for those works.[2] Sometimes, but not always, rhetoric about copyright as "protection" for works or creators is also associated with talk that characterizes unauthorized use as "theft" or "stealing."

Rhetoric about copyright as protection for works and/or their creators often appears in legislative or policy settings. The Constitutional clause on which U.S. copyright law is based does not mention "protection" (U.S. Constitution, Art. I, Sec. 8, Cl. 8), but the current U.S. statutory copyright law frequently does (17 U.S.C., inclusive). Legislative hearings on copyright issues often involve testimony from creators or industry organizations who celebrate the protections copyright provides to creators. For example, Metallica drummer Lars Ulrich provided testimony before Congress in 2000 of the importance of copyright to people at every level of the music industry. He said that "(t)he backbone for the success of our intellectual property business is the protection that Congress has provided with the copyright statutes. No information-based industry can thrive without this protection," and later equated unauthorized music downloading with theft (Ulrich 2000). More recently, musician David Lowery urged the House Judiciary Committee against any potential expansion of fair use, testifying that "our current copyright laws protect creators based on the notion that permission, or consent, is the foundation of civilization" (Lowery 2014).

The mainstream and popular media often employs similar rhetoric. One notable set of examples

includes advertising and public service announcement campaigns like “Home Taping is Killing Music,” as well as the “You wouldn't steal a [fill in the blank]” and ”Piracy is a Crime” videos. (British Phonographic Industry, 1980s; Motion Picture Association of America, 2004) Amusingly, the sometimes over-the-top rhetoric of copyright as protection for beleaguered artists and rightsholders has such widespread penetration in pop culture that parodies of this rhetoric are also widespread. The “Piracy is a Crime” and “Home taping...” anti-piracy PSA's are parodied in images and videos that rise high in search results for those phrases in a variety of online search engines. Both types of parodies have entries in the (not exactly authoritative, but certainly reflective of public interest) online compendium “KnowYourMeme.com.” “Weird” Al Yankovic also parodied overblown appeals to protecting recording artists’ interests in his song “Don't Download This Song.” Lyrics include, “Don't take away money from artists just like me / How else can I afford another solid gold Humvee?” (Yankovic 2006).

Copyright discourse that centers on the concept of “protection” also inherently implies the presence of a threat or threats from which protection is needed. There are different ways of characterizing that threat: unauthorized copying or use, un-paid-for copying or use, the person making unauthorized copies, the “thief” who will “steal” the work. But this inherent threat is one of the drawbacks of this form of copyright rhetoric: it inherently implies a fairly negative view of the ecosystems of creativity and expression. It also lends itself to expansionism: it is not hard to step from the idea that some copying is a threat, to the idea that most, if not all, copying is a threat. The extremist version of this rhetoric suggests that creators and/or rightsholders should have the right to authorize (or withhold authorization for) any and all uses. But although protection rhetoric can be associated with extremism, it is not inherently incorrect or universally inappropriate. It is one valid framing for discussion of the benefits and drawbacks of past, current, and possible future formulations of copyright and other intellectual property law and policy.

Protection Rhetoric in Academia

Some academic creators may follow the larger policy debates about intellectual property issues, but other than creators whose academic specialties are in related fields (and perhaps a small number of copyright dilettantes), it seems likely that many academic creators have been exposed to protection rhetoric more in mainstream media sources than in the policy arena.

However, academics may have been exposed to and absorbed protection-oriented rhetoric from another source: many academic publishers and distributors produce information that employs similar language. ProQuest, for example, offers to register the copyright in theses and dissertations, explaining that "[f]or only $55, you can protect your dissertation or master's theses and become immediately eligible for statutory damages and attorney fees" (ProQuest 2015A). ProQuest also provides a more extensive explanation of the benefits of registration, covering the necessity of registering before filing a copyright lawsuit, the benefits of registration with respect to statutory damages and attorneys' fees, and the possibility that registration can help block importation of infringing copies of a work (ProQuest 2015B). ProQuest does not require dissertation authors to transfer the copyright to them, or provide exclusive licenses, so registration may indeed be a direct benefit for dissertation authors. But these resources do not notify authors that self-service registration is available via the Copyright Office for $35 for single works by single authors (Copyright Office, 2014), or acknowledge that lawsuits and customs actions are highly unlikely to ever be relevant to the dissertations penned by most student authors. Aside from these minor omissions, the information provided is accurate and largely neutral.

All of the "big four" academic publishers use some variation on "protection" to talk about copyright in information they provide for journal authors. They also all, in different ways, wedge additional issues into their explanations of copyright. Most of these publishers require copyright transfer or an exclusive license before they will publish a journal article – sometimes even for open distribution options.

- Elsevier: "Copyright aims to protect the specific way the article has been written to describe an experiment and the results. Elsevier is committed to its authors to protect and defend their work

and their reputation and takes allegations of infringement, plagiarism, ethic disputes and fraud very seriously. If an author becomes aware of a possible plagiarism, fraud or infringement we recommend contacting their Elsevier publishing contact who can then liaise with our in-house legal department" (Elsevier 2015).

- Springer: "Authors will be asked to transfer the copyright of their article to the publisher (or grant the publisher exclusive publication and dissemination rights). This will ensure the widest possible protection and dissemination of information under copyright laws" (Springer 2015).
- Taylor & Francis: "Copyright allows you to protect your original material and stop others from using your work without your permission. It means others will generally need to credit you and your work properly, increasing its impact." "Asking you to assign copyright means we are showing our commitment to:
  - Act as stewards of the scholarly record of your work
  - Defend your article against plagiarism and copyright infringement.
  - Enable you to share your article (using your free eprints and green open access at Taylor & Francis).
  - Assure attribution of your work, by making sure you are identified as the author." (Informa UK Limited 2015)
- Wiley-Blackwell explains to journal authors that their policy of requiring copyright transfer or an exclusive license "facilitates international protection against infringement, libel or plagiarism; enables the most efficient processing of publishing licensing and permissions in order that the contribution be made available to the fullest extent both directly and through intermediaries, and in both print and electronic form" (John Wiley & Sons, Inc., 2013).

Several of these publishers explain quite plainly that copyright transfers and exclusive licenses facilitate the publisher's distribution of the works - which is a true statement. But to varying degrees, most of these explanations also elide the fact that much of the "protection" that copyright provides for

works will, after a transfer or exclusive license, no longer accrue to the authors. Some even hide the ball on the "protection for whom?" question by raising a smokescreen of other issues like attribution/plagiarism (which are discussed in more detail later in the chapter), fraud, unethical behavior, and libel. Closely associating these concepts with copyright may suggest to some authors that copyright law has applicability to those issues, when it usually does not. It is true that, in Europe and the UK, where some of these publishers are based, attribution may have a direct legal connection to copyright, and there may be some legal protections for plagiarism that do not exist in the U.S. Conversely, protections for authors against claims for libel and defamation may be weaker in those jurisdictions than they are in the U.S. In any case, it will be a rare occasion when a publisher chooses to "protect" one of its authors on any of these points of concern, copyright-related or not, unless the author's interests are directly and completely aligned with those of the publishing company.

Alternative And Complementary Copyright Rhetoric

Given the prevalence of rhetoric that frames copyright as "protecting" works and/or creators, it is useful to highlight copyright rhetoric that focuses on the law's benefits to creators without talking about protection. The intellectual property clause in the U.S. Constitution speaks only of giving creators "exclusive rights" for "limited times" (U.S. Constitution, Art. I, Sec. 8, Cl. 8). A focus on positive rights can be a bit less pessimistic than a focus on "protection." Rights *may* be violated, but there is not usually an assumption that they will be; "protection," by contrast, usually implies an inherent threat. Much copyright theory is framed in terms of the incentives (usually economic) and benefits that copyright provides to creators via their exclusive rights.

It is also worth noting that quite a bit of copyright discourse considers that the primary beneficiaries of the system of intellectual property law are neither creators nor rightsholders, but the public. The Constitution frames Congress's power to give time-limited, exclusive rights to creators as having the public-interest goal of "promot[ing] the progress of science and useful arts." In this framing, owner/creator rights are secondary, a means by which the primary public benefit is realized.

None of these forms of copyright rhetoric inherently exclude one another, unless they are very far to an extreme. But each has interesting effects on conversations around copyright. The rhetoric that frames copyright as providing protections for creators, while prevalent, is often quite out of step with the goals, practices, and expectations of academic creators. Sometimes, introducing other types of copyright rhetoric, or explicitly challenging the applicability of "protection"-oriented concepts, may enable the most robust and productive interactions between academic creators and library staff members.

Putting Rhetorical Understanding Into Practice

Communicating About Academic Commercial Interests

Legislative, pop-cultural, and publisher rhetoric about protection is often primarily concerned with the commercial exchanges that copyright facilitates. These commercial concerns are often not shared by academic creators. Many academic creators receive monetary compensation for their intellectual and creative work up front, in the form of a salary and/or research grants. But regardless of salary or grant status, few academics receive significant monetary compensation in direct exchange for the monographs or textbooks they produce. Almost no academics receive any monetary compensation for papers or journal articles – in fact, they may well be paying fees to support the publication of these works. Usually publishers receive payment for subscriptions, individual purchases or licensed reproduction of these works; they rarely send direct, use-based payments back to academic creators. Thus, although many academic works are of some commercial value to *someone*, that someone is rarely the creator of the work. Because the commercial value of authorized copies of the work does not accrue to its creators, much of the time those creators do not care on economic grounds about "protection" from unauthorized use or copying.

There are, however, situations in which academic creators do receive direct commercial benefit from their academic creations. While many textbooks do not make much profit, authors of very popular academic textbooks may receive significant monetary compensation for those works through upfront

payment, royalties, or both. Similarly, although many academic monographs are not particularly profitable, some outliers produce significant monetary returns for both press and author. Increasingly, some academic creators are finding varying commercial success self-publishing works via a wide array of ebook and print-on-demand outlets. Academic creators may also find direct commercial opportunities for creations other than textbooks or literary works; assessment and measurement instruments can be lucrative, as can patentable inventions or processes, and even sometimes curricula or other learning objects. Some academic creators on design and arts faculties create art as part of their academic work, and those works have as widely varied a likelihood of standalone commercial success as most other artworks.

Since patentable inventions are usually handled in a University technology transfer or "commercialization" office, it is less likely that academic creators will seek help about patent-related issues from their libraries.[3] But creators may seek help from libraries with other kinds of commercially valuable materials. In these situations, the rhetoric of protection so common outside of academia may be quite applicable, without any adjustments to mental models, to work produced inside of academia. Making use of this rhetoric when it is appropriate and relevant can be reassuring; evidence that libraries can and do provide information relevant to an individual's commercial interests can help build trust.

As an illustration, academic creators often request information about "protecting" forms, assessments, or measurement instruments. At first blush, it may not be clear that the motivating forces behind these inquiries can in some ways be quite different from those behind questions about books and journal articles. An open-ended, "reference"-style interaction can reveal that compensated, commercial use is a possibility creators are considering, which can explain why these creators are often more concerned than usual with wanting to know how to "own" their works. Sometimes these creators are familiar enough with copyright issues to bring up registration, but sometimes they operate from near-zero background knowledge; in these latter cases, creators often find it reassuring to hear that, if their work is copyrightable at all, the copyright came into existence as soon as the work did.[4] When

their worries about “protection” are allayed, creators may be better able to consider the pros and cons of registering their work: while registration can be beneficial, and is not difficult to undertake, it does cost money, and is not a necessary step towards owning a copyright in a work.

Creators of specialized assessments or forms also often see a narrow, specific audience for their work; sometimes, after an extended interview, they independently conclude that commercial distribution does not seem like the most effective way of getting their work into the hands of their perceived audience. At such times, recognizing and acknowledging the creator's possible commercial interests has sometimes been the key factor allowing the interaction to extend to the potential of open distribution.

At other times, acknowledging potential commercial interests can help creators articulate that they have broader information and support needs related to business development – at which point they are often happy to hear a suggestion to pursue formal legal representation, talk to a business expert, or be referred to a technology transfer office. At least once, a creator I had referred to tech transfer subsequently returned with a different question about an academic creation, and directly referenced his positive experience in previous interactions at the library as a reason for his return.

Recognizing and supporting creators' commercial interests in situations where they *are* relevant may foster increased respect for the knowledge and skills of library staff members and, as discussed below, encourage return inquiries for more traditional academic works. Supporting creators' commercial interests may also foster receptivity to considerations a library staff member may seek to present that diverge from, but complement or supplement, commercial models.

Non-Commercial Threats From Which Academic Creators May Seek Protection

Outside academia, “protection” of works is often discussed in connection with commercial interests, but there are some alternate interests of academic creators for which “protection” may also be sought. While many of these interests are not well protected by current legal systems, alternative

systems may actually address some of these concerns in more robust ways.

Lack Of Attribution

As we saw above in the information some academic publishers provide to their journal authors, it is not uncommon for copyright, plagiarism, and attribution or credit to be conflated rhetorically. This conflation is also common in the minds of academic creators across many different groups.[5] There are many fundamental concepts, such as authorship, creativity, and justice, that do span all of these issues, so the conflation is understandable.

It is also not uncommon for academic publishers in particular to suggest that copyright provides "protection" in all of these areas, as we saw above. It is true that legal protections around plagiarism, attribution, and credit may be tied to copyright in some jurisdictions outside the United States, but such protections are much weaker in the U.S., and where they do exist they are not usually related to copyright. Other than provisions in the Visual Artists Rights Act (VARA) (17 U.S.C. § 106A (1990)), which do in fact create a right of attribution (and disattribution) for creators of certain very specific types of visual artworks, there is no explicit provision in U.S. copyright law for a right of attribution.[6] To the extent that attribution rights exist in U.S. law outside of VARA, they are considered to be addressed in trademark law, defamation law, and/or law around fraud and unfair competition.

Attribution and credit are some of the most deeply resonant forms of "compensation" academics receive for their work, so it is not at all surprising that publishers invoke those issues when discussing "protections" for authors. But taking basic practicalities into consideration, it remains a bit odd that so few academic authors realize that attribution has little connection to copyright ownership; academic authors frequently transfer legal ownership of their works to publishers, and yet in almost any form of academic citation, attribution is provided to the authors regardless of rights ownership. This practice alone should make it clear that copyright ownership and attribution, whether or not they are both addressed by statute, are separate issues.

Nevertheless, the association of copyright with attribution/credit persists, and persists strongly, for many academic creators. I learned more about this association in research I pursued with faculty members at the University of Minnesota a few years ago (Sims 2011). I knew from experience that academics care quite a lot about attribution and citation, so I drafted a survey question that asked whether authors had legal rights to attribution and control after transferring their copyright away. Eighty-nine percent of faculty respondents, and seventy-nine percent of library employee respondents, believed that a legal right of attribution persists after copyright transfer. Academic norms around attribution are strong enough, and carry such moral weight [7], that I was not surprised respondents failed to distinguish between a legal right and a moral imperative.

What did surprise me was that in open-ended interviews, when faculty members were asked to identify legal considerations relevant to using material that belonged to someone else, they raised credit or attribution before *any other* considerations. Similarly, a separate survey included a series of questions intended to assess whether respondents could identify legal considerations relevant to use of third-party material, and even when attribution and credit were not among the pre-populated response options, respondents *wrote them in*. Notably, on one question with 51 total responses, 10 of the 11 respondents who used the write-in field referenced citation or attribution.

There *are* some situations in which legal systems provide recourse for academic creators whose work is copied or referenced without credit. Such a situation may arise, for instance, if the lack of credit meets the legal definition of fraud. Usually, fraud requires intentional deceit, so while failure to provide credit due to accident, error, or sloppiness may well be academic misconduct, it is not fraud. Even if lack of credit is sufficiently deceitful to count as fraud, in the U.S. legal redress for fraud is primarily oriented to restitution for financial harm, so *authors* will often have difficulty proving they suffered the kind of harm that a civil case for fraud could address. Their publishers may actually have better legal standing in cases like this.

Copying another's work without credit may also sometimes rise to the level of copyright

infringement, regardless of the copier's intentions.[8] Because there are provisions in most legal systems allowing some unauthorized copying by scholars, researchers, and teachers, unethical academic copying will usually have to be fairly egregious before it can plausibly be argued to be infringing. But extensive unauthorized copying may indeed be copyright infringement. If an author has transferred copyright to a publisher, only the publisher will have the right to bring a complaint, or to receive damages if infringement is found; an author who retains copyright ownership may sometimes find copyright an avenue of legal redress for uncredited copying of her work.

It can be quite challenging to convince academic creators that, in the U.S. at least, there is no standalone legal basis to require or control attribution or credit. Once convinced of this, some creators seem to equate the idea that there is no legal protection for attribution via copyright law with the idea that there is no protection for attribution at all. Many creators who are upset at this proposition also resist suggestions that the normative, extralegal enforcement mechanisms of the academic community[9] seem to be doing a fairly good job of ensuring appropriate attribution. Nevertheless, many creators do seem to respond positively to the suggestion that the imposition of a legal system of enforcement of these norms might end up worse than the existing extralegal system. It can be particularly helpful to remind creators of the persnickety standards of legal citation (or outline the common practices, if they are not familiar), and then suggest that judges might impose the attribution standards with which they are most familiar.

One very legitimate point academic creators sometimes raise about the insufficiency of the existing extralegal systems enforcing attribution and academic ethical norms is that redress is not equally available to all members of the community. It is sadly true that junior scholars, less "prestigious" scholars, scholars in the developing world, and others may have more limited ability to seek redress through the systems of the academic community for unattributed uses of their work. However, most of the creators who raise this point already understand, or easily recognize when it is pointed out, that there is little likelihood that a legal system of enforcement, with court costs and

attorneys' fees, could provide any *improved* availability of redress to disempowered participants.

Misuse

There is one threat from which academic creators articulate a need for protection that is not present in most of the mainstream "protection"-oriented copyright rhetoric, or even in the information academic publishers provide--the threat of use by individuals, or for purposes, that the creator would not want to authorize. Often, these concerns are expressed in terms of responsibility or ethics: creators worry that their research subjects may have their privacy violated or be portrayed in disreputable ways, that their research may be cast in a harshly negative light or be put to harmful or destructive use. Very infrequently, creators express these concerns in terms of wanting to control any and all discussion of their work, and to bar any negative or critical use.

In general, a scholar's ethical responsibility to protect research subjects must be dealt with prior to publication – information that may violate an obligation to research subjects if released is very hard to put back into a box, post-publication. And although it is often painful to receive criticism or negative feedback, most academic creators are fairly committed to the free exchange of ideas, and would consider a scholar's attempt to deploy legal mechanisms against valid criticisms of her work, however unkindly framed, incompatible with academic values. Nevertheless, some academic creators seek to deploy copyright as a protection against these kinds of concerns.

Whether the desire to protect against misuse arises from a sense of responsibility and ethics, or from a wish to censor, the idea that copyright provides any sort of protection in this arena again reflects some major misconceptions. Use of a work in ways that cast negative light on its creator may possibly be addressable through defamation or libel law, but in the U.S. that requires proving that the negative commentary was both factual (as opposed to an opinion) and untrue. Negative commentary within the bounds of normal scholarly exchange may be an unpleasant experience for an author, but it will rarely be actionable as defamation. And copyright is quite definitely not an alternate avenue to bar use of a work simply due to a distasteful user viewpoint. U.S. courts have frequently stated that copyright is not

intended to be employed for purposes of censorship.[10] "[W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act" (*Campbell*, 1994); "copyright does not immunize a work from comment and criticism" (*Suntrust* 2001). So this threat, along with several others of concern to many academic creators, is not particularly aligned with the protections offered by statutory law.

A Threat Academic Creators May Fail To Recognize

There is nothing incorrect about rhetoric that speaks of copyright protecting works, creators, and rightsholders against the threat of unauthorized uses. As discussed above, however, academic creators' concerns often diverge from the economic concerns reflected in much protection-oriented rhetoric. These areas of divergence can mean that copyright itself *actually poses a threat* to academic creators. For many academic creators, one of their most important goals is that their work be widely disseminated and used. But because copyright applies automatically to all works, and because most potential users assume that copyright requires payment (or at least permission) for use, copyright actually creates barriers to achieving the widest possible dissemination of a work.

Recent research has demonstrated ways in which copyright is sometimes a threat to distribution and use of a work. In two related papers, Paul Heald explored commercial availability of out-of-print but in-copyright books. He found both that "[c]opyright correlates significantly with the disappearance of works rather than with their availability" (2013), and that there is quite likely demand for out-of-print, in-copyright books that is not being supplied in print or electronic form by the publishing industry (2014). Heald does suggest that some of the lack of availability of in-copyright books is simply due to short-sightedness on the part of the book-publishing industry; older popular music appears to be more available than older books. But Heald also suggests that divergent court opinions about translating existing works to new formats, as well as the higher cost of digitizing books, may explain the differences in availability (2014).

Academics are by no mean the only creators who seek widespread dissemination of and access

to their work, nor are they the only creators who sometimes value distribution over remuneration. Fred Rogers, the children's television personality (who, notably, was also the head of the production company for his shows), testified in the copyright case establishing the legality of VCRs that unauthorized home taping of his shows was a "real service to families" and not anything he would want to prohibit (Rogers testimony, quoted in *Sony*, 1984.) But academic creators as a group may be more likely than other groups of creators to value distribution above remuneration, and thus be receptive to communications that highlight and acknowledge this drawback inherent in "protection."

Thankfully, despite the threats posed by copyright to dissemination and use of creative works, there are legal tools that seek to ameliorate these problems. "Free" and/or "open" licensing has existed in the world of software development since at least the 1980s (Vaidhyanathan 2001, 155), and open licenses custom-crafted for creative works have existed since at least 2002 (Creative Commons, date unclear).[11] Creative Commons licenses are probably the most widely-used and robustly-tested open content licenses available today. They work by offering a license that may be taken up by any member of the public, that pre-authorizes certain types of uses. If a user wants to make a use that is not pre-authorized by the Creative Commons license, they can still rely on any of the exceptions to copyright law (such as fair use), or ask the rightsholder for permission. Creative Commons also offers a different legal tool, CC0, which allows rightsholders to relinquish, or waive, as many rights as possible.[12]

In parallel with the development of open content licenses, many academic creators also explored free and open distribution of their publications. The arXiv, one of the oldest established venues for authors to provide free online distribution of their academic works, was founded in 1991 (arXiv 201?). Some of the foundational definitions of "open" distribution of academic work require not just that the work be accessible at no charge online, but that reuse of the work be unrestricted. The Budapest Open Access Initiative wrote in 2002 that:

> By "open access" to this literature, we mean its free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of

these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself.

To many academic creators, however, access is more important than reuse rights: some consider research that is simply accessible online, free of charge, to meet the definition of "open access." Today, many academic distribution venues that are wholly "open access" require the use of open licenses--usually, Creative Commons--but many others do not require particular licenses, only that works be made freely available. PLoS takes the former approach: "Open Access (OA) stands for unrestricted access and unrestricted reuse" (2015). ArXiv takes the latter, stating in their Operating Principles that "[a]ccess to arXiv content via arXiv.org is free to individual end users" but omitting any mention of licensing or reuse (2012).

Open access for academic creations does seem to mitigate some of copyright's "threat" to widespread use; several studies have shown that open access publications have increased citations, although the presence and size of the effect seems to vary across academic fields (Swan 2010). Open access may not even necessarily reduce the commercial value of academic publications, and it does seem to increase their accessibility and use (OAPEN-NL 2013).

Open licenses are not a perfect solution to the threat copyright poses to widespread distribution and use; they may not be supported in all of the most desirable publishing venues, and not every member of the hoped-for audience may be familiar with what open licenses permit. Creative Commons licenses do address one of the threats academic creators perceive that is not necessarily well addressed by existing law: they can create a binding *contractual* requirement of attribution, even in jurisdictions where *copyright* law does not much concern itself with the specifics of attribution and credit.

Many academic creators find the *idea* of open licenses appealing, but have some qualms about their breadth. They may express concerns that open licenses will encourage misuse of their work, or use by individuals they would prefer not to authorize (this category varies widely, and may include

commercial users, or competing researchers, or a number of other kinds of users). When consulting with a creator who is certain they want to make their work publicly available online, but is not sure they want to use an open license, I may remind them that, because the law already authorizes a number of uses without permission, they are already prevented from picking and choosing authorized users much of the time. Once the work is available online, the law will authorize some uses that the creator cannot control, and there will, quite likely, be some users who make unauthorized and/or illegal uses of their work.

While traditional approaches to copyright do not entirely preclude unwanted uses, open licenses may encourage *wanted* users; this idea can be quite exciting for some academic creators. In the absence of information to the contrary, some potential users whom the creator would like to authorize will assume that copyright prevents their use. For example, many academic creators would be very happy to have their work used in K-12 classrooms, but many K-12 teachers presume both that copyright prevents their use and that permission would require payment that they and their students cannot afford. When the work is licensed openly, these users can see that their use is not just permitted, but encouraged. Open licensing, when the creator has already determined that they *do* want to make their work available online, does no worse with respect to unauthorized and/or infringing users than no open licensing, and does better with respect to encouraging the kinds of users that creators may most want to attract.

It is worth noting that academic creators' hopes that their works be widely used and influential may at times be in conflict with another common goal of academic creators: that their works be received and evaluated in ways that will forward their careers. An academic blogger recently spoke of this as a tension between “academics” (i.e., career building) and “science” (i.e., knowledge building) (Carter 2015). His discussion focuses specifically on disciplines most would label “science” (as opposed to humanities, social science, or the arts), but the distinctions apply across most academic fields. Many existing means of evaluating research output give higher value to works published in

certain periodical outlets, or with certain academic presses. Many of the publishers whose publications carry these higher values can compel creators to transfer their copyrights, or grant exclusive licenses to those publishers. And the business models of many of those publishers depend on payment for access to the work, which necessarily requires some limitations on access. For many (but assuredly not all) high-value publishers, copyright's protections against unauthorized use are financially beneficial. But because academic creators' careers may depend on access to those high-value publishers, copyright's "protections" may threaten research goals even where they simultaneously forward career goals.

Some academic creators may also fail to recognize the full breadth of an open license. Academic authors may be surprised to find their open-licensed articles republished in compilation volumes whose editors never contacted the original authors. This type of use is entirely permitted by open licenses, assuming the conditions of specific license terms are met, but fairly far outside the norms of academic publishing. Some of these republications may be legitimate academic uses – for example, a few disciplines are developing "overlay" journals, which collect and publish selected works that have already been made openly available online. Other of these republications may be attempts to scam academic libraries by selling "monographs" made up of content that is already freely available. It seems likely that the unethical versions of this practice will sort themselves out over time, but the surprise of seeing one's work reproduced without prior communication may be quite an unpleasant shock for some academic creators. For creators surprised by such uses of their work, it may also come as a surprise that Creative Commons licenses are irrevocable. It is imperative that library staff members who provide information about open licensing to academic creators both acknowledge the realistic drawbacks of open licenses, and seek to avoid and combat misunderstandings that may be true sources of conflict for academic creators.

Open licenses may also create an opportunity to stymie misuse of works. Creators who wish to restrict questionable commercial uses of their work may find some peace of mind in attaching a "NonCommercial" clause to a Creative Commons license. More interestingly, in jurisdictions with

legal rights of attribution, it is not uncommon to find a parallel right of *dis*attribution--a legal right for the creator *not* be publicly associated with their work. While this right is not very commonly invoked, it may be useful when works are altered in ways that are permitted by law, but unacceptable to the creator. Although they remain irrevocable, so that permission may not be withdrawn after an objected-to use is begun, the current versions of the Creative Commons licenses all allow rightsholders to stipulate non-attribution for uses of their work. In jurisdictions where the law does not address attribution, Creative Commons licenses may create a contractual obligation not to name the creator, with the odd result of works that can be re-used, but for which attribution information may not be shared. Such odd results do address academic creators' concerns about being associated with uses of their work that they find distasteful; they also could undercut profiteering from republication of openly licensed works. While few academic creators will be excited about removing their attribution information from a work, pointing out this counterintuitive option may help library staff to alleviate fears that open licenses will exacerbate the potential for misuse of their work.

Conclusion

Library staff have long been a trusted source of information for academic creators on a variety of issues. Copyright, licensing, and intellectual property issues are areas in which academic creators increasingly expect their libraries to be able to provide information and support. As we move into the 21st century, more library staff members will be developing knowledge and expertise on the particulars and technicalities of law and policy in these areas. It will be to our benefit, and to the benefit of other academic creators who seek our support, to also develop understanding and insight into how those issues are discussed, both within and outside academia. Technical knowledge and rhetorical insight are both essential to teasing apart the many potentially conflicting issues, goals, and expectations presented when a creator approaches us to ask “How do I protect my work?”

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1 This is not to suggest that no one working in disciplines outside information and library science has such broad or deep systems knowledge, simply that on average a library staff member is somewhat more likely to possess the outlook and experience necessary to develop such a perspective.

2 Some creators who do not own their commercially valuable works are paid more when the work is used more (as in most royalty arrangements), but sometimes they are not (as when a work was created “for hire,” or when it was purchased with a lump sum payment or without any direct compensation to the creator).

3 Academic creators who do seek information from their libraries may have some interests better served by a tech transfer or commercialization office. Partnership with such entities can be very profitable for providing a more comprehensive suite of support services to academic creators.

4 Creators may be less reassured to hear that forms and some instruments may not contain sufficient creative expression to give rise to a copyright. But even where this may be true, there can still be opportunities for commercial development, if the creator is determined.

5 Elementary and secondary educators, as well as creators outside of academia, also often hold beliefs that conflate copyright infringement and plagiarism, or that unrealistically simplify issues of credit and attribution, in my experience. In one particularly fruitful training, a large group of K-12 library and media staff were overjoyed to learn that they could teach about

plagiarism without necessarily also invoking threatening legal concepts that were difficult and sometimes off-putting for their young students.

6 There is a provision in the Digital Millenium Copyright Act that addresses attribution-related information, making it illegal to provide false information or alter or remove existing information, but this provision is directed to "Copyright Management Information," which may or may not include information relevant to the attribution of performers or creators (17 U.S.C. § 1202).

7 Many people have learned about plagiarism in contexts where it is given such moral weight that to suggest there are times when it is appropriate to *omit* attribution for a quoted or referenced work often provokes disdain from academics and non-academics alike. It remains true, however, that in many areas of intellectual and creative production it is accepted practice not to give credit. For example, collage artworks rarely come with source citations, attorneys are overjoyed when their briefs are incorporated uncredited into a court opinion, and many forms of art celebrate subtle allusions that are only "credited" if readers/listeners/watchers are fully in the know.

8 Copyright is "strict liability" law. If copying occurred and was impermissible by law, it may be found to be infringement. The copier's intent is irrelevant.

9 These mechanisms include, but are not limited to: failing classes, being kicked out of programs of study, revocation of degrees, firings from jobs, retraction of publications, and loss of reputation.

10 Historically, copyright law--and its predecessors like Crown patents for printers--were employed for purposes of State censorship. Realistically speaking, copyright is often effective in achieving de facto censorship, because many accused infringers do not have the resources or knowledge to contest a censorious accusation. See, for example, ChillingEffects.org.

11 Open and/or free software licenses have sometimes been applied to more artistic or literary works, and non-Creative Commons licenses aimed at art and literature (such as the GNU Free Documentation License) do exist.

12 In a number of jurisdictions, a variety of rights under copyright law are permanently lodged with the creator (and sometimes her heirs); these rights cannot be waived or transferred away by contracts or licenses.