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Rights, ethics, accuracy, and open licenses in online collections

What's "ours" isn't really ours

Digitizing existing collections and making them available online facilitates public and scholarly access to the niftiness we have squirreled away in our archives and special collections. But providing only online access to collections is of limited value when visitors don't know how they can make use of these materials. That is why there are many efforts underway in libraries and related cultural institutions to become more active in establishing and communicating this information to our visitors.

One way we communicate usability information to our visitors is by describing the rights status of items from our collections that we have digitized and shared online. Some libraries have stuck with the "hands-off" approach, with statements that suggest, "We have no clear info about this item. Do whatever you want, it's all at your own risk—but you must write us for permission to do anything, too."

However, other organizations have attempted to improve on that and provide more information to users. These attempts have often been limited by liability concerns from institutional counsel (e.g., "We don't want to be liable for misuse if we wrongly label something as public domain."). Rights descriptions have also been less-than-useful for end users because of a lack of standardization.

The problems of limited information and lack of standardization in descriptive rights statements are both being addressed through collaborative efforts to systematize accurate information sharing about items' rights statuses, such as the RightsStatements.org project underway via DPLA and Europeana. It will take both time and human effort to establish the actual rights status of many items. Even for a single item, it can be an intensive research project to determine whether there is a rights owner, and to establish who it might be. It is likely some of the details of these projects will continue to evolve, but RightsStatements.org is well on its way to addressing the thorny problems caused by proliferating idiosyncratic ways of describing rights statuses in online collections.

However, prior to the existence of rights standardization efforts, some organizations started using open licenses to try to communicate rights information—often with the best of intentions, but in ways that sow confusion. For example, it is legally inappropriate for people or organizations other than a rightsholder to try to apply an open license to a work. They are intended to be

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used by rightsholders to let others know that a work is preapproved for use under certain conditions. While we (libraries) may have the right to digitize works in our collections and share them online by statute or permission, we far less frequently have the right to authorize uses by others. Below are a few use cases that illustrate some problematic current practices involving open licenses with online collections.

Open licenses and public domain materials

• **Use case: "Open licensing" public domain materials to encourage sharing.** Some libraries and cultural organizations have attempted to apply Creative Commons licenses to scanned copies of public domain materials with the good intent of stimulating reuse. However, public domain works, by definition, have no rightsholders, so nobody can apply a Creative Commons license to a public domain work. And in the United States, the law is fairly well established that accurate reproduction of a pre-existing work in a new medium does not create any new rights in that work unless additional authorship has occurred.[1] Other countries' legal regimes may differ on this point, but similar positions (no new rights ownership without new authorship) are fairly common internationally. A more appropriate practice would be to apply an accurate descriptive rights statement.

• **Use case: "Open licensing" public domain materials to enforce attribution.** I have seen it suggested that some organizations may attempt to apply Creative Commons licenses to public domain works in order to facilitate correct attribution. Most holding institutions hope to receive credit when copies of works from our collections are used. But purporting to grant a Creative Commons Attribution license in a public domain work inappropriately suggests that we: 1) have the right to withhold permission to use the work, and 2) have the right to require attribution as a condition of use. We do not have either of those rights, so Creative Commons licenses are not appropriate and may sometimes even be fraudulent when used this way. The best way to facilitate attribution without misrepresenting our rights is simply to offer a suggested credit statement.

• **Use case: Open licensing to reduce uncertainty about mixed rights statuses.** Some organizations use Creative Commons licenses with special classes of digital-collections items where there may be some legitimate complexity to rights statuses. For example, photographs of sculptures often contain new authorship—the photographer chooses how to frame and light the shot, etc.—and therefore the photograph can have a new copyright, even when the sculpture in the photograph is in the public domain. Creative Commons licenses are appropriate in these circumstances to let everyone know they have the permission of the rightsholder to use the new work as well as the public domain sculpture.

However, a rights waiver may be a more appropriate tool than a license to convey that we do not believe we have rights in the item, or that we are aware that laws vary across jurisdictions about whether there may be rights in the item, and we don't want to claim them even in the jurisdictions where they exist. Creative Commons uses "a museum or library reproducing a work in the public domain [that wants] to convey clearly to the public that you claim no copyright in your digital copy" as their primary example of appropriate use of a CC0 waiver.[2] A license implies there are rights, and we hold them. A waiver makes it clear that if there are rights, we don't want them.

Open licenses and materials with extant copyrights

Sometimes libraries and related organizations are lucky enough to either own the rights in materials from our collections (through transfer or license from a donor, etc.) or to have permission from a rightsholder to grant the public rights to use the materials. In these cases, we can grant the Creative Commons license (or other open license) without further permission or approval. However, if the

documentation around rights granted to the organization is less than clear, knowing with certainty that we have the rights needed to grant an open license can be tricky.

• **Use case: Authorization with non-standard language.** The specific wording of a legal authorization can make all the difference. An authorization from the 1960s that uses broad language like "publishing rights" could plausibly cover online distribution today, but if it granted "printing rights," that specificity might make the authorization for online distribution somewhat less plausible. In either case, whether such an authorization provides sufficient permission to digitize materials is one judgment call, and whether it provides sufficient basis to authorize use by others (as via a Creative Commons license) is another.

• **Use case: Authorization from only some potential rightsholders.** Much more commonly, a grant of rights to the organization will only cover the interest of one rightsholder, when multiple independent rightsholders are represented in the materials. For example, when reviewing recorded interviews in hopes of releasing them publicly with open licenses, the University of Minnesota Libraries often felt confident that we had rights clearly transferred from the interviewers, but ran into several different challenges related to the rights of the interviewees. In some cases, it wasn't clear that the interviewee had granted rights to the interviewer; in others, they had granted only limited rights to use for research. We did not feel comfortable placing open licenses on these materials because we were not confident that we held sufficient rights to do so.

• **Use case: Open licenses and statutory exemptions.** Sometimes a library might consider that a statutory exemption provides sufficient legal basis for digitization. But if digitization relies on one of those exemptions, it likely means that the organization does not hold sufficient rights to grant a license. For example, it may well be fair use sometimes to digitize a research interview transcript, especially with an unidentified interview subject (no market for that work). But although fair use may convey an ability to use the item, it does not convey the necessary rights ownership or authorization to grant a license for that item.

This may strike some readers as an unnecessarily strict approach. Attempting to apply a Creative Commons license when we're not sure of our ability to do so at least lets users know they can probably use the item. We make judgment calls sometimes about whether we can legally copy things. Surely we can make the same kind of judgment calls about whether we can grant a license. However, these questions overlook the fact that while the law permits certain uses without permission, and intentionally defines some of those uses flexibly, the law does not usually take such a flexible approach to rights ownership. Every once in a while, there may be a true judgment call (such as what "publishing rights" mean in the 21st century), but more often, ownership or authorization to license are more cut-and-dried legal issues.

It's also true that while it may be in libraries' interests to preserve the areas where copyright law flexes around some uses, it is not to libraries' advantage to grant questionable open licenses. When we purport to grant licenses in works where we do not own the rights, we undermine the perceived reliability of all rights information shared by cultural organizations, and we undermine the perceived validity of open content licenses as a whole. This is why it is good that the developing standards around rights statements make allowances for situations where rights statuses are unclear in just these ways.

Unfortunately, there is a trend developing among some digitization funders to require application of open licenses to all outputs. This is an exciting embrace of the ideals of open access, but often has none of the flexibility needed to avoid making inappropriate legal claims. A hard-line "we 100% require open licenses" policy means that lacking the rights to grant an open license may also

prevent us from digitizing at all with those funds. Hopefully, greater understanding within the library community of the challenges of open licenses as outlined above, and the developing disciplinary standards for more accurate descriptive rights statements will also help funders adjust their standards accordingly.

Notes

1. *Burrow-Giles Lithographic Co. v. Sarony,* 111 U.S. 53 (1884); *Bridgeman Art Library v. Corel Corp.,* 36 F. Supp. 2d 191 (S.D.N.Y. 1999); *Meshwerks v. Toyota,* 528 F.3d 1258 (10th Cir. 2008).

2. See Creative Commons, "CC0," https://creativecommons.org/choose/zero/.

("Successfully collaborating to revamp first-year instruction," continues from page 72)

At the end of summer, FYIWG held a workshop for librarians on the new curriculum. We ran through a sample lesson plan, explored various options for teaching concepts, and provided librarians with worksheets for the students. For faculty, we introduced the new curriculum at the annual First-Year Writing faculty meeting, included a written summary for their faculty handbook, and created a page on our website with information about the program. All WRD 104 faculty also received an email with information about the new program, and we offered to have a librarian follow up with them individually.

At the end of autumn quarter, we asked all of the librarians who taught sessions to provide feedback. We discussed experiences and observations during a December workshop. Based on this discussion, FYIWG created a second version of our evaluating articles worksheet, so that librarians had options for use in the classroom.

Faculty were also invited to provide comments via a brief survey. One faculty member suggested we create a web page for students that included all of the preclass assignments. Faculty could then just point their students to the web page—a simple enough solution, but one that we had not considered initially. So for winter quarter, we created that web page.[4]

One year later

We have now completed a full academic year with the new curriculum. Faculty are familiar with the curriculum and know what to expect. Librarians feel more comfortable teaching the higher-level thinking skills now that they have had experience. Our plans for the future include assessing the effectiveness of the curriculum so that we can continue to make informed decisions and periodically review the program. We also hope to develop a culture of sharing and observing among librarians when it comes to instruction. Now that we have established regular communication check-in points with the First-Year Writing program, we plan to continue to nurture that conversation so that our instruction program continues to be responsive.

Notes

1. Char Booth, *Reflective Teaching, Effective Learning: Instructional Literacy for Library Educators* (Chicago: ALA, 2011). USER is a simplified version of the ADDIE method (Analysis, Design, Development, Implementation, and Evaluation) of instructional design. USER stands for Understand, Structure, Engage, and Reflect.

2. Visit http://libguides.depaul.edu/research101.

3. Visit http://tutorials.library.depaul.edu/e-learning/developing-a-research-question/.

4. See http://library.depaul.edu/services/library-instruction/Pages/WRD-104-and-HON-100-for-Students.aspx.