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# Copyright & Open Access

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# Copyright & Open Access

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# Presentation Outline

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- I. Copyright Basics
  - a) What is copyright
  - b) What is protected
  - c) Copyright duration
- II. Open Access Basics
  - a) Open Access Basics
- III. Can Open Access and Copyright Coexist?
  - a) Reconciling Open Access with Copyright
  - b) Open Access in the Current Copyright Regime
  - c) Proposed Copyright Reform



# What is Copyright?

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Copyright is a bundle of rights granted to the creators of a protected work

What works are protected?

- (1) Original (2) works of authorship that are (3) fixed in a tangible medium - 17 U.S.C. §102(a)

This includes:

- Literary works;
- Musical works;
- Dramatic works;
- Pantomimes and choreographic works;
- Pictorial, graphic, and sculptural works;
- Motion pictures and other audio-visual works;
- Sound recordings; and
- Architectural works



# What is Copyright?

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## Who owns copyright in a work?

- Copyright is initially owned by the author/creator of the work
- Can be sold/granted to another entity via contract
  - For example, academic authors typically grant copyright ownership to a journal in their publication agreement

## What rights are granted to the copyright owner?

- Reproduction
- Creation of derivative works (translations, arrangements, abridgements, etc.)
- Distribution
- Public performance
- Public display
- Transmission (sound recordings only)

# Copyright Duration

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When is copyright established?

- Copyright manifests automatically at the time the work is created

How long does copyright last?

- Works created on or after January 1, 1978 – Life of the author + 70 years
- Works created between 1923 and December 31, 1977 – Copyright protection varies based on when/if they were registered or if they filed renewals
- Works published and registered before 1923 – In the public domain, no copyright protection
- Once copyright in a work expires, it enters the public domain and can be used without permission

If you have a concern about whether something is covered under copyright, ask!



# Exceptions to Copyright

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## Fair Use Doctrine (17 U.S.C. §107)

- Fair use allows a copyrighted work to be used without permission for instances of: “criticism, comment, news reporting, teaching, scholarship, or research.”
- In a fair use claim, courts look at:
  - The purpose of the use – is it commercial use or not
  - The nature of the work – is the original creative or factual
  - The amount used – how much
  - The effect of the use – does it affect the market of the original

## Classroom Use Exemption (17 U.S.C. §110(1))

- Allows for copyrighted works to be used in face-to-face teaching without permission
- *E.g.* showing a film in a classroom or using copyrighted images in a lecture



# Why Do We Have Copyright?

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Two explanations for copyright protection:

- Moral Rationale – the creator of a work is entitled to the fruits of their labor and deserve protection against potential infringement
  - Henry Clay, report submitted with S. 223, 24<sup>th</sup> Cong., 2d Sess. (1837)
- Economic Rationale – Creators are more likely to publish when they know they are free to exploit their work economically with no competition
  - Barry W. Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 U.C.L.A. L. REV. 1100 (1971)





# Open Access Movement

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## What is Open Access?

- A method of providing free, unrestricted access to knowledge
  - Budapest Open Access Initiative (BOAI)
- Allows users to read, download, copy, distribute, and print full text scholarly articles with no financial, legal, or technical barriers
- Leads to a democratization of information and helps to close the knowledge gap

## Types of Open Access

- Green Road – Self-archiving of scholarly material
  - Either in institutional or other repositories
- Gold Road – Publication of scholarship in open access journals

DigitalCommons@ONU is an example of Green Road Open Access!

# Can You Reconcile Open Access & U.S. Copyright Law?

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How does it match up to our two rationales?

- Moral – Creators should enjoy “fruits of their labor”
- Economic – Creators will strive to create more knowing they have the sole right to benefit economically

While open access does not advance the economic rationale, it does not contradict the moral rationale

The Open Access Movement seeks to remove economic barriers to knowledge, typically created by publishers, but does not seek to remove copyright protections from authors.

- Under open access, authors or journals retain all rights granted under copyright, but they do not monetize online access
- Still protected from unlicensed reproductions, distributions, etc.

# Organizations Promoting Open Access Publishing

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Creative Commons – <https://www.creativecommons.org>

- Nonprofit organization devoted to sharing knowledge through open copyright licenses
- Encourages copyright holders to allow their works to be distributed, reused, and modified
- Under CC licenses, authors maintain their copyright protections and can reserve whatever rights they please



Public Library of Science (PLOS) – <https://www.plos.org>

- Nonprofit open access publisher specializing in science and medical research
- Publishes 7 open academic journals



Directory of Open Access Journals – <https://doaj.org>

- Comprehensive list of all open scientific and scholarly journals for researchers and authors to utilize

All of these organizations operate within our current copyright laws!

# Proposed Copyright Reform

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Many OA advocacy groups also campaign for reforms to U.S. copyright law.

U.S. copyright is considered by many advocates to be:

- Overly restrictive
- Confusing
- Out of step with modern methods of publication

Recent Legislative Reforms/Court Decisions:

- California A.B. 2192 – Requiring all state-funded research to be uploaded to an open access repository within 1 year of publication
  - Signed and passed as of 10/18/2018
- Fair Access to Science and Technology Act (FASTR) (S. 1701, H.R. 3427) – Requiring federal agencies that spend more than \$100 million on grants for research to make that research available through open access within 1 year of publication
  - Has been debated for the past 5 years despite broad, bipartisan support
- *State of Georgia v. Public.Resource.Org, Inc.* (11<sup>th</sup> Cir. Oct. 19, 2018)
  - Holding that the *Official Code of Georgia Annotated*, the official print publication of Georgia's state laws, is ultimately authored by the People, and therefore falls into public domain.

# Questions?

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If you have any more questions, please contact me at:

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