

# Copyright and Open Licensing for Affordable and OER Resources: Part One

Lisa A. Macklin  
Director, Scholarly Communications Office  
Emory University

Affordable Learning Georgia Webinar, September 25, 2015



# About me . . .

I lead Emory's Scholarly Communications Office:

- Copyright for faculty, students and libraries
- Open Access Initiatives, including Emory's Open Education Initiative (OERs)

I am both a librarian and a lawyer, but I'm not your lawyer



By the end of this session,  
you should. . .

- Have a basic understanding of copyright ownership and protection
- Understand copyright in the context of creating OERs



# What is OER?

OER are teaching, learning, and research resources that reside in the public domain or have been released under an intellectual property license that permits their free use and re-purposing by others.

Hewlett Foundation at  
<http://www.hewlett.org/programs/education/open-educational-resources>



# Copyright Law - A quick overview



# What are the exclusive rights?

- To reproduce the work
- To prepare derivative works
- To distribute copies of the work
- To publicly perform the work
- To publicly display the work directly or by telecommunication
- To publicly perform a sound recording by digital means



# Rights are Limited

- Creators get exclusive rights that are limited by:
  - Subject matter
    - Not everything gets copyright protection
  - Time
    - Duration of copyright term
  - Defined exceptions
    - Fair use, classroom exception, etc



# Subject Matter: What does Copyright Protect?

Original works of authorship fixed in a tangible medium of expression





# What does Copyright Protect?

- Literary & Dramatic works
- Musical works & Sound recordings
- Pictorial, graphic and sculptural works
- Motion pictures and other audiovisual works
- Pantomimes and other choreographic works
- Architectural works



# What isn't Protected by Copyright?

Works not protected by copyright include:

- Titles, names, short phrases, slogans
- Facts, news and discoveries
- Works created by the U.S. government
- Ideas, procedures, methods, systems, processes (but these may be patentable)
- Works lacking a modicum of originality (e.g. a phone book in alphabetical order)



# Time - Duration of Copyright

- Term of copyright is currently life of the author + 70 years
- When copyright expires, work enters the public domain
  - Works published in the US prior to 1923
- Copyright notice © is no longer required



# Copyright and Creating OERs

## Copyright & Authors



# Copyright Law & Authors

Authors automatically own the copyright to their work, unless

- they assign rights to a publisher or
- it is a work made for hire (author never owned copyright)

Students as authors are typically copyright owners, and using student created content likely requires their permission



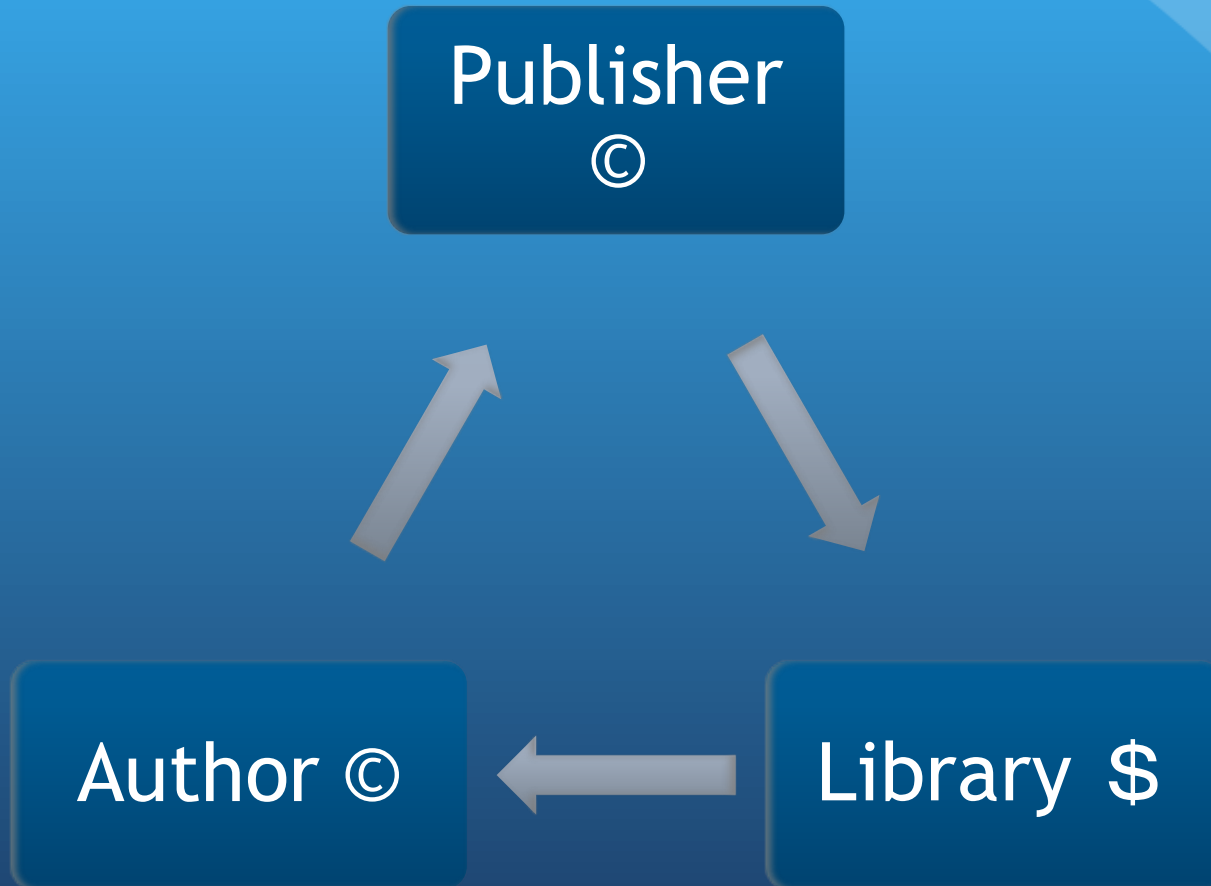
# Copyright Law & Authors

Ownership of faculty created works is governed by:

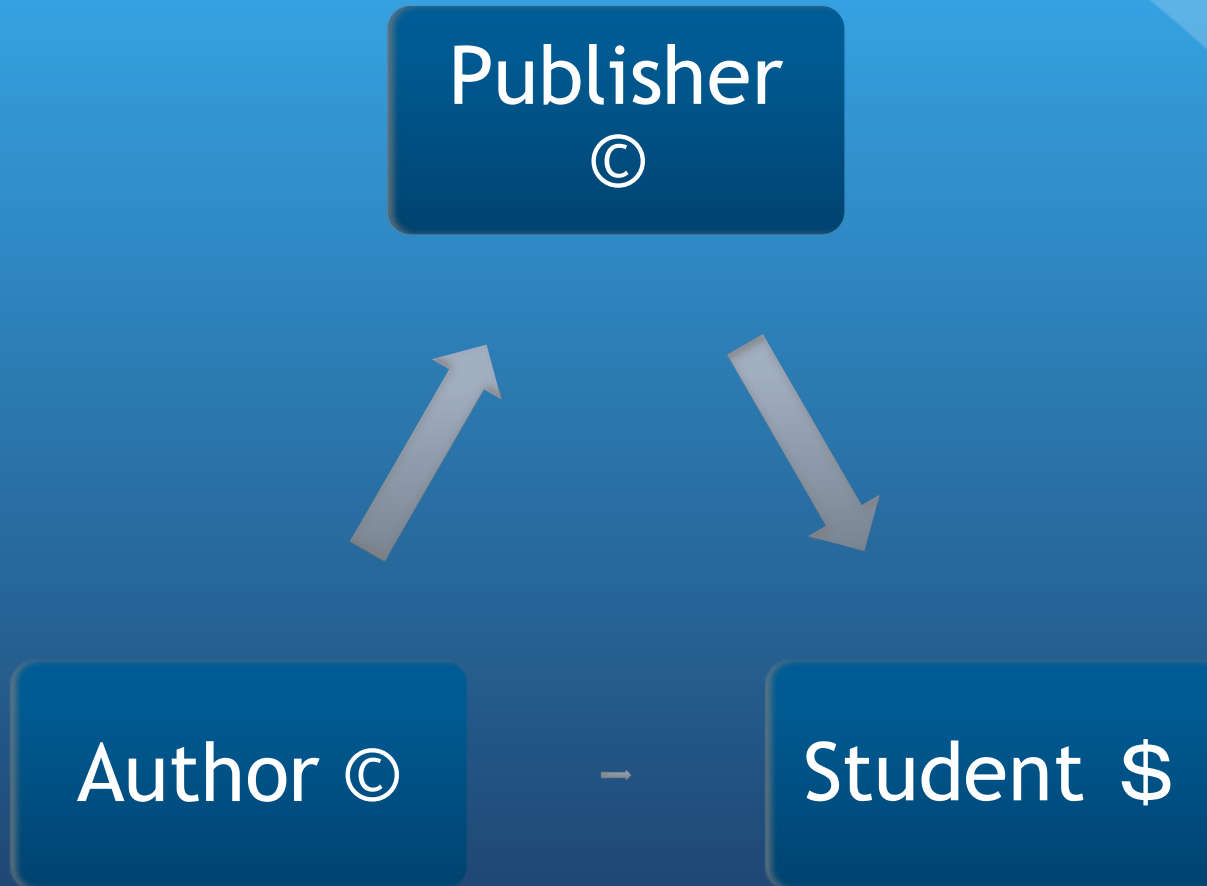
- USG Intellectual Properties Policy
- Granting agencies may also have requirements to make resulting research openly accessible



# Traditional publishing model - ©

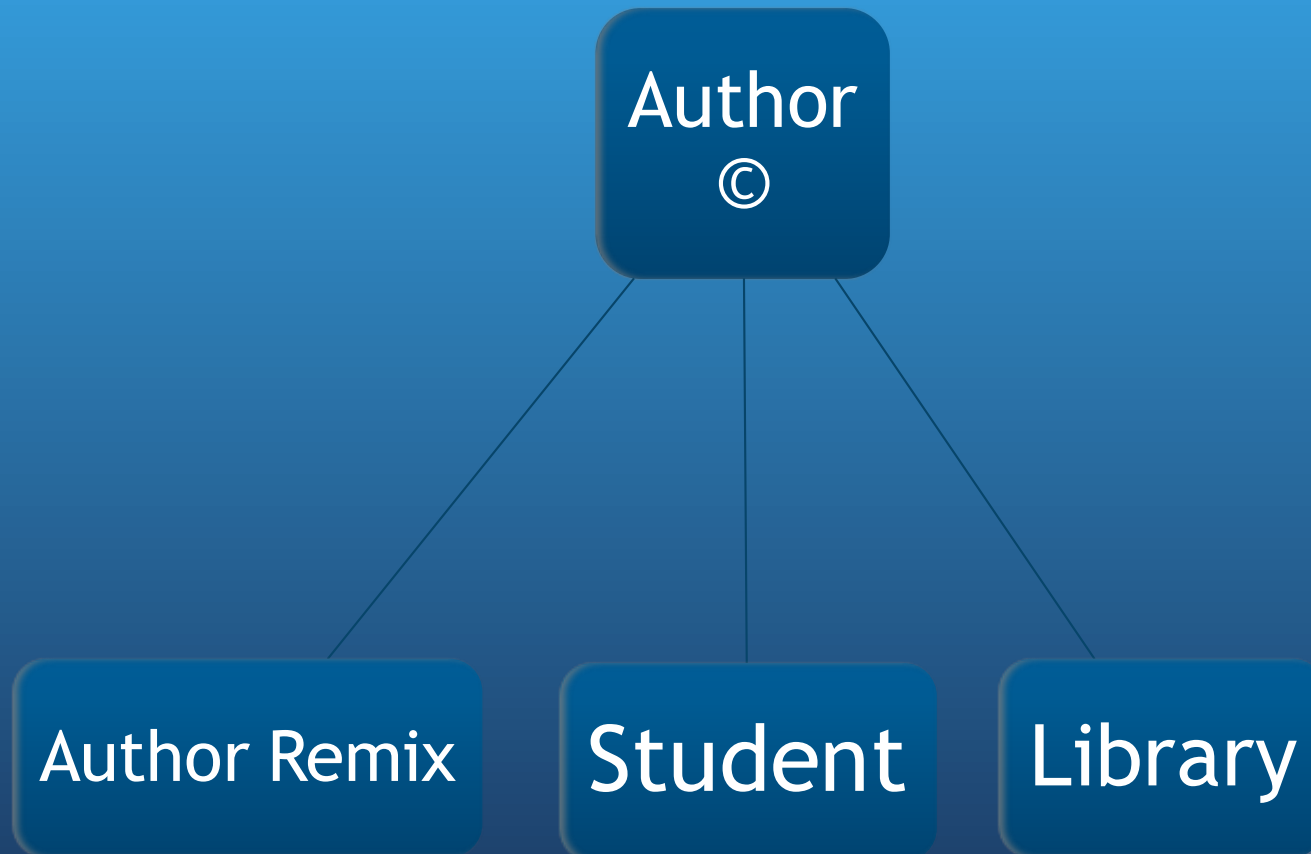


# Traditional textbook model - ©





# OER publishing model - © and open licenses



# Copyright and Creating OERs

## Fair Use



# Exceptions to Exclusive Rights

One broad exception - Fair use (section 107)

- Only exception not tied to one of the exclusive rights
- Originally developed by courts, incorporated into statute in 1976
- Not a checklist, but a balancing act
  - Equitable rule of reason



# Fair Use - Section 107

Balancing test, comprised of four factors:

- Purpose and character of the use
  - commercial vs. nonprofit educational purposes
- Nature of the copyright work
  - creative vs. factual



# Fair Use - Section 107

Balancing test, comprised of four factors:

- Amount and substantiality
  - portion used in relation to the copyrighted work as a whole
- Effect of the use upon the potential market for or the value of the work
  - Use effectively substitutes for purchase



# Fair use in dispute - GSU case

- Dispute on amount of publisher content (Cambridge UP, Oxford UP and Sage) is a fair use for course reserves
- Trial Court found vast majority of readings a fair use, and created 'guidelines' for course readings
- USG incorporated these guidelines into copyright policy
- Publishers appealed, and Court of Appeals remanded back to trial court
- We wait . . .



# Transformative fair use

Transformative fair use is applied by judges in copyright cases (common law) and is still evolving . . .



# Transformative Fair Use

Under first factor of purpose and character of the use, judges ask three questions:

- 1) Does the new work add something new to the original work?
- 2) Does the new work have a further purpose or different character than the original?
- 3) Does the new work alter the original work with new expression, meaning, or message?





# Transformative fair use examples

- 2Live Crew using Roy Orbison's song Pretty Woman as a parody is fair use
  - Campbell v. Acuff-Rose (1994)
- Indexing and providing thumbnails of images a fair use
  - Kelly v. Arriba-Soft (9th Cir. 2003)
- Use of Grateful Dead concert posters in coffee table book a fair use
  - Bill Graham Archives v. Dorling Kindersley (2<sup>nd</sup> Cir. 2006)
- Turnitin's collection of submitted papers into anti-plagiarism db is fair use
  - Vanderhuyse et al. v. iParadigms LLC (4<sup>th</sup> Cir. 2009)



# Navigating Fair Use in OER

Three questions which can be helpful:

Does the copyrighted material help me make my new point?

Will it help my readers or viewers get my point?

Have I used no more than is needed to make my point?



# Applying fair use in OERs

You can attach a creative commons license to works you create

If you include the works of others, properly cite those works

- academic integrity
- clarifies what you used from others



# Next Part Two: Creative Commons

Questions at end

