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Professor Bertrand Halperin
Chair, APS Publication Oversight Committee
Harvard Univ

Dear Professor Halperin,

Thank you for your suggestion -- we would very much welcome the opportunity to comment on any proposals, and are happy to be available during part of the POC meeting via phone conference.

I enclose an attachment of the two proposals we have made. It is similar to a previous email sent to Prof. Sprouse as part of our discussions on potential solutions. The background to these proposals, as well as some discussion is available on [my webpage](#)¹. We would certainly appreciate any feedback on the proposals in advance of the meeting. Proposal (1) is currently under further review by a lawyer and may change slightly. We would welcome more professional legal views from APS counsel.

As Bill Unruh noted -- we have tried very hard to balance the desire of authors to retain their ability to build on their own work, and the journal's desire to protect their investment in that work through refereeing and publication. We also desire giving the APS the freedom to develop other ways of benefiting from that work and benefiting the authors at the same time.

We believe there is broad agreement on the goals of the Transfer of Copyright (ToC) or license, and that it is essentially a matter of crafting appropriate language which meets the concerns of all parties.

In striking this balance, it may be useful to consider concrete situations. Below are some examples of derivative work which are prohibited by the ToC and current proposals which have been floated:

1. post a figure or parts of your paper (even if rephrased) onto an open

¹ <http://www.damtp.cam.ac.uk/user/jono/item/toc.html>

encyclopedia such as Wikipedia or Quantiki which requires that your work be submitted under the GNU Free Document License (GFDL). In particular, I wanted the option to rework parts of a paper into a tutorial for Quantiki

2. give a talk derived from your paper for which you receive an honorarium or at a conference which charges a fee, like the APS March meeting, especially if the talk is recorded.
3. create a condensed or expanded version of your paper for a conference proceeding (since virtually all of them are published in commercial journals)
4. use parts of your work in a book (if distributed by a commercial entity)

As far as we understand from discussions with Martin Blume and Robert Garisto, none of the above four examples are an issue in and of themselves. I.e. the APS agrees that the author should effectively own their derivative work -- at least as far as we know, they have never gone after a physicist for making a derivative work. So I guess the question is: are there any sorts of derivative works that the APS want to keep control over?

Rather the main issues from the journal's perspective seem to be:

- i) that the APS wants to ensure they would have full freedom to innovate¹ with regard to future technologies (i.e. they don't want to have happen what happened in the New York Times v. Tasini case²)
- ii) that the APS wants to be able to go after rogue publishers who make cheap copies of PRL etc. and sells them to libraries.

We believe that both proposals satisfy these concerns. If there any other concerns we are not aware of, we would certainly be happy to go back to our proposals and see how they might be modified to accommodate them.

Finally, due in part to changes in arxiv licensing options, the issue of what to do with authors who release parts of their paper under a Creative Commons license has arisen over the course of discussion. Although this is partly a separate issue to the author's right to make derivative works, we also address the issue in the attached document.

Yours sincerely,



Jonathan Oppenheim

1 Although this concern may be limited by the fact that it would be a rare author who would try to prevent the APS from giving their research further exposure.

2 http://en.wikipedia.org/wiki/New_York_Times_Co._v._Tasini

Two Proposals

Below are two proposals which we believe would satisfy both the concerns of APS journals and their authors. Both proposals would give authors control over their own derivative works. It may first be useful to recall that in the United States, "derivative work" is defined in 17 U.S.C. 101:

A "derivative work" is a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

Note that rephrasing of parts of a paper would probably still be considered a "derivative work". "Condensations or Abridgments" are specifically mentioned in the Code, which would directly impact many of the activities that authors may want to do. We note that where derivative works has been tested in court, (in software), a firewall was required if a work was to be considered new (i.e. not derived from the original). In other words, the new work would need to be created solely from the ideas in the original work, with the re-creators never having read the original. This would of course be completely impossible for the author of the work.

(1) Bill Unruh's proposal

"Derived works by the author(s): In case another work is created, which is derived from the current work, and in which all of the following conditions apply, the copyright in that derived work rests with the authors of that work, and no claim by APS or its successors will be made on that copyright, except that that derived work shall include a reference, in the standard form for the field, to this work as published in an APS Journal. The conditions are that no more than a total of 50% of the contents of this paper, whether text, equations, tables, or figures, is included in that derived work, that no less than 10% of that derived work consists of new material not covered by this copyright, and that at least one of the authors of that derived work also be an author of this work. In cases where the first two conditions do not apply, and the new work is for commercial purposes, explicit permission of the APS is required."

The intent of this is that if the three conditions are met (percentage of old material, percentage of new, and authorship) the new author(s) own the copyright in the derivative work without any additional APS ownership in that work. The exact language to ensure that the legal language reflects the intent is

being redrafted by a lawyer, and will be sent on when it becomes available.

Note the figure of 50% (Bill would rather have had it higher) above which APS retains control of the copyright and below which APS returns all copyright interest to the author. That figure is there solely because it was the figure the APS agreed to in 1998 when they allowed Bill to sign a special copyright transfer¹. One might want to change that to a less definite figure like approximately half, or approximately 3/4 to obviate futile arguments about exactly how to count. I.e., the intent was to ensure that the APS had sufficient control over the papers as they are actually published without impacting the author's ability to build on their substantial work and contribution. We simply do not believe that APS really wants to control such reuse/derivative work of the author.

(2) A license to publish which is fully permissive to the APS

This proposal is that the APS request a license from the author rather than a transfer of copyright. The wording of the license clearly needs to be broad enough to encompass all of the protections which the APS requires. It has the advantage for the author that, since they still own the copyright, they are entitled to make derivative works. An example of such a license would be for the author to grant the APS:

"the non-exclusive right throughout the world to edit, adapt, translate, publish, reproduce, distribute and display the Article as a whole in printed, electronic or any other medium and format whether now known or yet to be developed."

With regard to this proposal, we had some discussion with Sanford Thatcher (the president of the American Association of University Presses), who was concerned that (2) would require the publisher to get permission from the author each time they wanted to sue a rogue publisher. He therefore suggested either to make the license exclusive (with respect to the article as a whole), or to give the publisher the right to act on behalf of the copyright holder. We have since noticed that the Royal Soc. license has:

"You [the author] authorise Us [the Royal Society] to act on Your behalf to defend Your copyright in the Article should anyone infringe it, and to retain half of any damages awarded after deducting Our costs."

As authors, we would prefer a non-exclusive license over an exclusive one. Since another journal would not accept submissions which are essentially just an already accepted paper, nor would any reputable physicist do such a thing, this should not impact the journal's viability. If an exclusive license is used, then one would want to make clear that that exclusive license extended just to the work as

1 See <http://www.theory.physics.ubc.ca/copyright/aps-copyrightagree-98.txt>

a whole, and not derivative works.

The Royal Society license is [here¹](http://publishing.royalsociety.org/index.cfm?page=1364) and while the Open Access parts are problematic (for example, their fee for allowing a Creative Commons license is so high as to be virtually pointless, and the 12 months embargo on the PostPrint is too onerous), it is progressive when it comes to the author's rights with respect to copyright and the ability of the author to make derivative works. Clause 6c, allowing reuse by the author of the postprint version, is also fairly permissive, making no restriction on whether use is commercial or non-commercial.

Summary regarding both proposals

We feel that either proposals could be made policy without impacting the financial viability of APS journals. On the contrary, the increased exposure of APS work is more likely to be financially rewarding.

Furthermore, the proposals are not a departure from current practices. The APS has not sued authors for making derivative works, and does not generate significant revenue from controlling derivative works. Nor are the proposals a significant departure from past or current policy. The APS and other journals cannot require a transfer of copyright from government employees², so a license would merely treat other authors in the same way. The Royal Society does not require copyright transfer, and these days, licenses (rather than copyright transfer) are commonplace in the publishing industry. With regard to proposal (1), this was acceptable to the APS in 1998, at least on a case-by-case basis.

Part of the concern by the journals regarding copyright transfer seems to stem in part, as a reaction to the concerns generated by the New York Times vs Tasini case³. We hope that the current proposals satisfy those concerns, and would like to thank the POC for their time and efforts in this matter.

Addenda: Creative Commons licenses: "Let sleeping dogs lie"

Since the issue of the license requirements of web based repositories like the arxiv, has come up with regard to these discussions, we would like to address the practice of authors releasing their work under a Creative Commons license⁴. Since February, the arxiv lets authors submit under one of four licenses. A significant number of authors have submitted to the arxiv under one of the Creative Commons licenses, and then had their paper published in an APS journal. As far as we know, the APS has not refused publication on any occasion

1 <http://publishing.royalsociety.org/index.cfm?page=1364>

2 <http://www.cendi.gov/publications/04-8copyright.html#325>

3 http://en.wikipedia.org/wiki/New_York_Times_Co._v._Tasini

4 Usually the license allows anyone to modify the work under the conditions that the author must be attributed, and the new work must be released for free under the same license. Wikipedia and Quantiki use a Creative Commons type license called the GFDL.

(i.e. they have not considered submission to the arxiv ,under any of the licenses as prior publication). Nor can we imagine that the APS would suffer any financial harm in not refusing publication.

The current effective policy of the APS -- to let sleeping dogs lie, seems to be a good one. If the APS now decided to refuse publication to some of the authors who have submitted to the arxiv under a license of their choice, it would open a huge can of worms. It would make sense for the APS to adopt a wait and see approach when it comes to the arxiv licenses.

Note there may be nothing in the ToC which prohibits submission to the arxiv under a Creative Commons license. This is because before signing the ToC, the author still owns the copyright; they have the authority to license members of the public to use their paper under specific circumstances (and licensing their work does not mean they lose copyright ownership and hence the ability to sign the ToC). The legal situation is however not clear, and furthermore, the author must submit the article to the arxiv before signing the ToC.

To be fair to authors who post to the archive after having signed the ToC, they should either be allowed formally to post to the arxiv under the Creative Commons licenses as well, or at least, the same blind eye cast upon them. We would note that while the present agreement does not explicitly give the reader the right to sign any license (e.g., any one of the four that the arxiv allows for example) the term "post" in the current agreement, allowing authors to post their articles on non-fee public repositories, could be interpreted to give that permission for any of the licenses.

We believe that authors who submit their paper to the ArXiv under a Creative Commons license ought not to be punished for this. The public funds most of our research and it is important to make our research as accessible as possible to them. What is more, projects like Quantiki¹ and SklogWiki² which rely on such licenses can be of tremendous benefit to scientists. The proposal to charge a fee to authors who submit to the ArXiv under a Creative Commons license would in effect act as a punitive deterrent to a practice which benefits both the public and science. We hope that the APS will, at the very least, adopt a wait and see approach before imposing any penalty, financial or otherwise, on such authors. Ideally, the license or ToC ought to give specific permission for authors to submit to the arxiv under any of the licenses.

Finally, once again we would like to thank the POC and editors for their patience and thought on this issue.

Sincerely,
Jonathan Oppenheim and Bill Unruh

1 <http://www.quantiki.org>

2 http://www.sklogwiki.org/SklogWiki/index.php/Main_Page