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## A License to Plagiarize

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## A LICENSE TO PLAGIARIZE

Brian L. Frye\*

*It's nice to be liked, but it's better by far to get paid.*<sup>1</sup>

Since time immemorial, authors have wanted to own various kinds of exclusive rights in the works they create. Curiously, the rights authors want to own at any particular point in time tend to reflect the nature of the market for the works they create. The first exclusive right authors wanted was attribution. In classical Greece, philosophers accused each other of copying ideas without attribution.<sup>2</sup> The Roman poet Martial coined the term *plagiarius* to criticize other poets for passing off his poems as their own.<sup>3</sup> Even medieval Irish poets observed plagiarism norms that prohibited copying without attribution.<sup>4</sup> In all of these cases, authors cared about attribution because it was essential to their livelihood.

The concept of copyright didn't exist until the invention of the printing press created the publishing industry.<sup>5</sup> Suddenly, the exclusive right to re-

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\* Spears-Gilbert Professor of Law, University of Kentucky College of Law. Many thanks to Kat Walsh, Jef Pearlman, and Mike Overby for inspiring this project, and for their immensely helpful comments. To the extent possible under law, I waive all copyright and related or neighboring rights to "A License to Plagiarize." In addition, I explicitly permit plagiarism of this work, and specifically object to anyone enforcing plagiarism rules or norms against anyone who plagiarizes this work for any purpose. This means that you may incorporate this work, without attribution or acknowledgment, into work submitted under your own name or any other attribution, for any purpose.

1. Liz Phair, *Money*, on WHITECHOCOLATESPACEEGG (Capitol Records and Matador Records 1998).

2. See, e.g., George Karamanolis, *Numenius*, STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2016), <https://plato.stanford.edu/archives/win2016/entries/numenius/> ("The extent of Numenius' influence on Plotinus was debated in antiquity. Plotinus' students, Amelius and Porphyry, were concerned to discredit the widespread charge of Plotinus' plagiarism of Numenius.") (citing *Life of Plotinus* 18.1–8, 21.1–9); see also PLATO, *Euthydemus* (Rosamond Kent Sprague trans.), in PLATO: COMPLETE WORKS 939, 982 (John M. Cooper ed., Hackett Pub. Co. 1997) (c. 384 B.C.) ("If you will take my advice, be careful not to talk in front of a large group; the listeners are likely to master it right away and give you no credit.").

3. Martial, EPIGRAMS bk. I, at 62–63 (E. Capps et al. eds., Walter C.A. Ker trans., G.P. Putnam's Sons 1919) (c. 84–86). The Latin word *plagiarius* means "kidnapper," and Martial made plagiarism one of the themes of his epigrams. J. Mira Seo, *Plagiarism and Poetic Identity in Martial*, 130 AM. J. OF PHILOLOGY 567, 567 (2009).

4. See Brian L. Frye, *The Stolen Poem of Saint Moling*, in FORGOTTEN INTELLECTUAL PROPERTY LORE 116, 116–18 (Shubha Ghosh ed., Edward Elgar Pub., Inc., 2020).

5. See generally LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 3 (1968).

produce a work of authorship became valuable and desirable.<sup>6</sup> Publishers were quick to create copyright protection, first privately via the Stationers' Company, and then legislatively through the Statute of Anne.<sup>7</sup>

Soon, authorship became a commercial enterprise, tied to the reproduction and distribution of works by publishers.<sup>8</sup> Where authors had once relied on patronage and performance, now they could rely on publication.<sup>9</sup> While attribution was still important, copyright increasingly took pride of place as the legal mechanism that enabled authors to claim part of the economic value associated with the works they produced.<sup>10</sup> Publishers still kept most of the profits, but at least copyright made it possible for authors to claim their share up front.<sup>11</sup>

Yet the relationship between authors and publishers has always been complicated. Samuel Johnson famously observed, "No man but a blockhead ever wrote, except for money."<sup>12</sup> But he was joking. In fact, Johnson and his peers often wrote for free and just as often wrote anonymously.<sup>13</sup> Authors have always been blockheads, and they wouldn't have it any other way. Everyone loves to get paid, but sometimes it isn't the most important thing. After all, no one goes into writing for the money. While getting rich is never easy, writing is an especially unlikely path to the pot of gold. More often than not, authors pour their heart and soul into works that have no economic value at all.

If the purpose of copyright is to enable authors to capture some of the economic value of the works they create, then there's no reason to protect works that lack economic value. And when the copyright in a work stops generating economic value, there's no reason for it to persist. At the very least, authors ought to be able to abandon the copyright in the works they created and place those works in the public domain.

But what about attribution? Typically, we think of attribution as a non-economic, moral right that entitles the author of a work to expect proper attribution of their works. While the attribution right isn't technically a legal right, plagiarism norms ensure its vigorous enforcement. And in a gift economy, attribution is often far more valuable than copyright.<sup>14</sup> After all, aca-

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6. *Id.* at 3–5.

7. *Id.* at 3.

8. *See id.*

9. *See id.*

10. *Id.* at 4–5.

11. Patterson, *supra* note 5 at 4–5.

12. JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 292 (Charles Grosvenor Osgood ed., Charles Scribner's Sons abr. ed. 1917) (1791).

13. *See, e.g.*, Gillian Paku, *Anonymity in the Eighteenth Century*, OXFORD HANDBOOKS ONLINE (Aug. 2015), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935338.001.0001/oxfordhb-9780199935338-e-37>.

14. Brian L. Frye, *Plagiarize This Paper*, 60 IDEA: IP L. REV. 294, 303–04 (2020).

demics are delighted to see people distribute copies of their works, so long as they are attributed.

Many people have argued that authors ought to be able to abandon their copyrights and place their works in the public domain.<sup>15</sup> I agree. Unfortunately, it can be difficult and complicated. Under the Copyright Act, everything copyrightable is automatically copyrighted, and there is no explicit mechanism for abandoning copyright.<sup>16</sup> Accordingly, Creative Commons created the CC0 tool, which is intended to help authors place their work in the public domain, to the extent legally possible.<sup>17</sup> I think authors also ought to be able to abandon their attribution right and permit plagiarism of their works. Property is property, whether or not it has economic value. Accordingly, I provide a couple of CC+ tools intended to help authors abandon their attribution right.<sup>18</sup>

## I. COPYRIGHT ABANDONMENT

In theory, copyright is supposed to promote the interests of authors, by enabling them to control the disposition of their works. Ironically, our focus on ensuring copyright ownership has also reduced authorial choice by making it difficult or impossible for authors to disclaim ownership of a work.<sup>19</sup> Today, copyright ownership is the default rule,<sup>20</sup> and it's a sticky one. As Aaron Perzanowski and Dave Fagundes recently observed, abandoning the copyright in a work of authorship and placing it in the public domain is complicated, costly, and uncertain.<sup>21</sup>

The Copyright Act grants copyright protection to “original works of authorship fixed in any tangible medium of expression.”<sup>22</sup> In other words, if

15. See Dave Fagundes & Aaron Perzanowski, *Abandoning Copyright*, 62 WM. & MARY L. REV. 487, 491 (2020).

16. See 17 U.S.C. § 102(a) (2020).

17. See *CC0 1.0 Universal (CC0 1.0) Public Domain Dedication*, CREATIVE COMMONS, <https://creativecommons.org/publicdomain/zero/1.0/>.

18. According to Creative Commons:

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It is NOT a new or different license or any license at all, but a facilitation of more Permissions beyond ANY standard CC licenses. Worth emphasizing is that CC+ (and use of that mark) requires that the work be licensed under a standard CC license that provides a baseline set of permissions that have not been modified or customized but reproduces the license verbatim. The plus (+) signifies that all of those same permissions are granted, plus more.

*CCPlus*, CREATIVE COMMONS, <https://wiki.creativecommons.org/wiki/CCPlus> (last visited Feb. 3, 2021).

19. See Fagundes & Perzanowski, *supra* note 15, at 505, 524.

20. See 17 U.S.C. § 102(a)

21. Fagundes & Perzanowski, *supra* note 15, at 505, 524.

22. 17 U.S.C. § 102(a).

you create a copyrightable work of authorship, then you automatically own a copyright in that work, whether or not you want it.<sup>23</sup> The Copyright Act doesn't provide any way to disclaim copyright ownership.<sup>24</sup> Congress probably assumed that people would not voluntarily abandon intangible property that doesn't require any maintenance. Or maybe it just didn't care.

In any case, it turns out that some people do want to disclaim copyright ownership and place a work in the public domain. Accordingly, the Copyright Office permits copyright owners to file a notice of abandonment, "purporting to abandon a claim to copyright or any of the exclusive rights."<sup>25</sup> However, filing a notice of abandonment costs \$105,<sup>26</sup> and the Copyright Office doesn't even promise it will work.<sup>27</sup>

Unsurprisingly, copyright owners rarely file notices of abandonment. Only 190 were filed between 1978 and 2018, and only a few of those were efforts to abandon a valid copyright.<sup>28</sup> But at least some copyright owners wanted to place their works in the public domain badly enough to pay for the privilege, whether or not it actually works. Presumably, many more authors would donate their works to the public domain if it were easy, free, and effective.<sup>29</sup>

Of course, authors can simply state their intention to abandon their copyright in a work and donate it to the public domain. But as the Copyright Office acknowledges, it is unclear whether such a statement actually irrevocably places a work of authorship in the public domain. If an author expressly donates a work to the public domain, the author probably cannot claim any residual copyright interest in the work.<sup>30</sup> But what about termination of transfer?<sup>31</sup> Perhaps the author's heirs can reclaim the copyright in a donated work. At the very least, *Golan v. Holder* says it's constitutional for Congress to remove a work from the public domain.<sup>32</sup>

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23. *See id.*

24. Fagundes & Perzanowski, *supra* note 15, at 490.

25. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 1806 (3d ed. 2017).

26. Fagundes & Perzanowski, *supra* note 15, at 531.

27. *Id.* at 531–32.

28. *Id.* at 532–34.

29. *See id.* at 558–59.

30. *See, e.g.*, David Walker, *Court Dismisses \$1 Billion Copyright Claim Against Getty*, PDNPULSE (Nov. 22, 2016) (discussing *Highsmith v. Getty Images*, No. 1:16-CV-05924 (S.D.N.Y. 2017), suggesting that author's donation of works to the public domain precluded author's Digital Millennium Copyright Act action for commercial use of works).

31. *See* 17 U.S.C. § 203 (2020).

32. *Golan v. Holder*, 565 U.S. 302, 308 (2012).

## II. CREATIVE COMMONS

Creative Commons tried to solve this problem by creating licenses that authors can use to grant permission to use their works in certain ways.<sup>33</sup> There are six licenses, which grant different degrees of permission to use a work:

1. Attribution (CC BY)
2. Attribution-ShareAlike (CC BY-SA)
3. Attribution-NoDerivs (CC BY-ND)
4. Attribution-NonCommercial (CC BY-NC)
5. Attribution-NonCommercial-ShareAlike (CC BY-NC-SA)
6. Attribution-NonCommercial-NoDerivs (CC BY-NC-ND).

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The Attribution license is the most permissive. It permits the use of a work, so long as the user provides credit to the author. The ShareAlike license permits the use of a work, so long as the user adopts the same license as the author. The NonCommercial license permits the use of a work for non-commercial purposes. And the NoDerivs license permits the use of a work but does not permit the creation of derivative works. The different Creative Commons licenses enable authors to stack requirements, in order to achieve the degree of permission they prefer.

Notably, all of the Creative Commons licenses require attribution. That's possible precisely because they're licenses. Authors who adopt a Creative Commons license retain copyright ownership of their work but permit certain uses, with specific conditions, including attribution. As a consequence, if you use a Creative Commons-licensed work without attribution, the use may be copyright infringement and is almost certainly a breach of contract.<sup>34</sup>

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33. Information about Creative Commons' licensing system is available at *About CC Licenses*, CREATIVE COMMONS, <https://creativecommons.org/about/cclicenses/> (last visited Dec. 28, 2020).

34. Because a Creative Commons license is a non-exclusive license, breaching the license may or may not constitute copyright infringement. Many courts have held that non-exclusive licensors cannot sue licensees for copyright infringement, only breach of contract. *See, e.g.*, *Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998) ("A copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement."). However, courts have also recognized that the failure to satisfy a condition of a license may constitute copyright infringement, even though the failure to satisfy a covenant cannot. *See, e.g.*, *Jacobsen v. Katzer*, 535 F.3d 1373, 1381–83 (Fed. Cir.

However, Creative Commons also provides an assortment of “tools,” as well as the option to create customized tools under the CC+ protocol.<sup>35</sup> The most commonly used Creative Commons tools are the Public Domain (No Known Copyright) mark and the No Rights Reserved (CC0) tool.<sup>36</sup> The Public Domain mark is simply a convenient way of indicating that a work is in the public domain, with no independent legal effect.<sup>37</sup> But the No Rights Reserved tool is an attempt to enable authors to dedicate their work to the public domain.<sup>38</sup> It provides:

Certain owners wish to permanently relinquish those [Copyright and Related Rights] to a Work for the purpose of contributing to a commons of creative, cultural and scientific works (“Commons”) that the public can reliably and without fear of later claims of infringement build upon, modify, incorporate in other works, reuse and redistribute as freely as possible in any form whatsoever and for any purposes, including without limitation commercial purposes. These owners may contribute to the Commons to promote the ideal of a free culture and the further production of creative, cultural and scientific works, or to gain reputation or greater distribution for their Work in part through the use and efforts of others.

For these and/or other purposes and motivations, and without any expectation of additional consideration or compensation, the person associating CC0 with a Work (the “Affirmer”), to the extent that he or she is an owner of Copyright and Related Rights in the Work, voluntarily elects to apply CC0 to the Work and publicly distribute the Work under its terms, with knowledge of his or her Copyright and Related Rights in the Work and the meaning and intended legal effect of CC0 on those rights.

1. Copyright and Related Rights. A Work made available under CC0 may be protected by copyright and related or neighboring rights (“Copyright and Related Rights”). Copyright and Related Rights include, but are not limited to, the following:

- i. the right to reproduce, adapt, distribute, perform, display, communicate, and translate a Work;<sup>2</sup>

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2008) (holding that the failure to satisfy a condition of an open-source license could constitute copyright infringement).

35. See *CCPlus*, CREATIVE COMMONS, <https://wiki.creativecommons.org/wiki/Ccplus> (last visited Dec. 28, 2020).

36. See CREATIVE COMMONS, <https://creativecommons.org/> (last visited Nov. 6, 2020).

37. *Public Domain Mark*, CREATIVE COMMONS, <https://creativecommons.org/share-your-work/public-domain/pdm> (last visited Nov. 6, 2020). Creative Commons currently only recommends the use of the Public Domain mark for works that are clearly in the public domain in all jurisdictions, typically very old works. *Id.*

38. *CC0: “No Rights Reserved Tool,”* CREATIVE COMMONS, <https://creativecommons.org/share-your-work/public-domain/cc0> (last visited Nov. 6, 2020).

- ii. moral rights retained by the original author(s) and/or performer(s);
- iii. publicity and privacy rights pertaining to a person's image or likeness depicted in a Work;<sup>2</sup>
- iv. rights protecting against unfair competition in regards to a Work, subject to the limitations in paragraph 4(a), below;<sup>2</sup>
- v. rights protecting the extraction, dissemination, use and reuse of data in a Work;<sup>2</sup>
- vi. database rights (such as those arising under Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, and under any national implementation thereof, including any amended or successor version of such directive); and
- vii. other similar, equivalent or corresponding rights throughout the world based on applicable law or treaty, and any national implementations thereof.<sup>2</sup>

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Essentially, the CC0 tool is intended to provide an easy way for authors to disclaim all of their rights in a work of authorship, to the extent permitted by law, and thereby effectively place it in the public domain. The CC0 tool waives all of the exclusive rights provided by the Copyright Act, as well as any related rights, and also waives the right to reclaim any of those rights. But it also grants a unilateral, non-exclusive license to use the work in any way.

Obviously, the CC0 tool is vulnerable to the same legal limitations as copyright abandonment. While it gives authors an easy way to waive their rights in their works, it does not and cannot ensure that the waiver is effective or permanent. After all, if the Copyright Act doesn't permit copyright abandonment, then the CC0 tool's attempt to enable authors to abandon their copyrights will also be ineffective. And if copyright abandonment is reversible, then an author's use of the CC0 tool to abandon copyright is probably also reversible.

However, the CC0 tool's unilateral grant of a universal non-exclusive license to use a work may effectively achieve the same goal. Even if the Copyright Act doesn't permit authors to permanently abandon the copyright in their works, it may still permit them to grant irrevocable, non-exclusive licenses.<sup>40</sup> After all, why shouldn't it? The Copyright Act gives copyright owners *carte blanche* to license their work in essentially any way they like.<sup>41</sup>

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39. *Creative Commons CC0 1.0 Universal*, CREATIVE COMMONS, <https://creativecommons.org/publicdomain/zero/1.0/legalcode> (last visited Dec. 28, 2020).

40. See Kat Walsh, *Why Creative Commons Uses CC0*, CREATIVE COMMONS (Feb. 25, 2015), <https://creativecommons.org/2015/02/25/why-creative-commons-uses-cc0/> (explaining that the CC0 fallback license was intended to achieve the practical equivalent of donating a work to the public domain, especially in foreign jurisdictions).

41. See 17 U.S.C. § 201(d)(1) (2020).

Yet, on reflection, the CC0 tool is a bit peculiar. What is it actually intended to accomplish? In theory, it enables authors to dedicate a work to the public domain. But it does so by waiving all of the author's rights in the work and granting a perpetual, non-exclusive right to use the work in any way. As a practical matter, how is that different from a CC BY license?<sup>42</sup> A CC BY license unilaterally grants a perpetual, non-exclusive license to use a work, on the condition that users attribute the work to the author. Does that mean that the CC0 tool eliminates the attribution requirement? It certainly doesn't say so. Perhaps it eliminates the attribution requirement *sub rosa* by omission, much as the CC BY license eliminates the restrictions it does not include. But eliminating the attribution requirement doesn't seem like the real purpose of the CC0 tool.

On the contrary, the purpose of the CC0 tool seems rather formalistic. The CC BY license permits any use of a work so long as the work is attributed to its author, but the author retains copyright in the work.<sup>43</sup> The CC0 tool permits any use of a work but also tries to abandon the copyright in the work. And yet, it does not say anything about attribution of the work.<sup>44</sup> This seems like a potential oversight. When an author uses the CC0 tool, has the author disclaimed any attribution right or not? It's at least arguably unclear, given that attribution isn't protected by copyright in the first place.

### III. PLAGIARISM & THE PUBLIC DOMAIN

At least in theory, there's no obligation to attribute a public domain work to its author. Indeed, with very limited exceptions, the Copyright Act doesn't give authors an attribution right.<sup>45</sup> Of course, as a practical matter, copyright owners can require attribution of a work as a condition of granting a license to use the work, creating a de facto attribution right. And many judges see attribution as an essential, albeit entirely unenumerated, element of the fair use defense.<sup>46</sup>

But public domain works aren't protected by copyright, so anyone can use them in any way they like, including unattributed and misattributed us-

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42. The six Creative Commons licenses also include certain ancillary obligations, including a requirement to identify the license in uses of the work and a prohibition on enforcing anti-circumvention provisions, among other things, which are absent from the CC0 tool.

43. See *Attribution 2.0 Generic (CC BY 2.0)*, CREATIVE COMMONS <https://creativecommons.org/licenses/by/2.0/> (last visited Nov. 6, 2020).

44. See *Creative Commons CC0 1.0 Universal*, CREATIVE COMMONS, <https://creativecommons.org/publicdomain/zero/1.0/legalcode> (last visited Dec. 28, 2020).

45. But see 17 U.S.C. § 106A (2020) (creating limited attribution rights for certain authors of "work[s] of visual art").

46. See, e.g., RICHARD POSNER, *THE LITTLE BOOK OF PLAGIARISM* 16 (2007) (assuming that fair use requires attribution).

es.<sup>47</sup> For example, Edward Bellamy's novel *Looking Backward: 2000-1887* (1888) is in the public domain. Accordingly, I could make a movie based on Bellamy's novel, without attributing the story to him, or publish the novel as Brian L. Frye, *Looking Backward: 2000-1887* (2020). Of course, I wouldn't own a copyright in the copied elements, but I also wouldn't be an infringer because public domain works can't be infringed.<sup>48</sup>

But it would be career suicide. While the Copyright Act doesn't require attribution of public domain works, plagiarism norms most certainly do. If I were actually to claim Bellamy's novel as my own, I would experience a world of academic hurt, no matter how I recast it, because I would be a plagiarist—the most repulsive and reviled kind of literary criminal. After all, pirates are bad because they steal your profits, but plagiarists are far worse because they steal your honor.

Yet the definition of plagiarism depends on who you ask. Different discursive communities define plagiarism in materially different ways. While scholars, novelists, journalists, and lawyers all observe plagiarism norms, none of them observe the same norms.<sup>49</sup>

Nevertheless, the *sine qua non* of plagiarism is unattributed copying.<sup>50</sup> While different plagiarism norms prohibit different kinds and degrees of unattributed copying, attribution is kryptonite to a plagiarism claim. Of course, some plagiarism norms consider inadequate attribution a form of plagiarism, but it's still the failure to fully attribute that constitutes the plagiarism.<sup>51</sup>

The CC0 tool is intended to enable authors to dedicate their works to the public domain. But what about the attribution right? The CC0 tool waives copyright “moral rights” and “related rights.” Is attribution a “moral right” or “related right”? Maybe. Under the Berne Convention, attribution is certainly a moral right.<sup>52</sup> But at the very least, it is unclear whether the CC0 tool is intended to waive the attribution right. It appears to be agnostic. It

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47. See, e.g., *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33–34 (2003).

48. However, if I placed a copyright notice on my plagiarized edition of Bellamy's novel, knowing that I had not added any original elements and had no basis for making a copyright claim, I might be criminally liable for making a fraudulent copyright notice under 17 U.S.C. § 506(c) (2020).

49. See, e.g., Andrew Carter, *The Case for Plagiarism*, 9 U.C. IRVINE L. REV. 531, 534–35 (2019) (observing that practicing attorneys and legal scholars observe different plagiarism norms).

50. See generally Brian L. Frye, *Plagiarism is Not a Crime*, 54 DUQ. L. REV. 133, 137 (2016).

51. Frye, *supra* note 14, at 306.

52. Berne Convention for the Protection of Literary and Artistic Works art. 6bis, Sept. 9, 1886, S. Treaty Doc. No. 99-27 (1986).

doesn't mention attribution and doesn't define—or even describe—“moral rights” and “related rights.”

I think that's at least potentially a problem. When authors use the CC0 tool, they should know what it does. And when users see the CC0 tool, they should know what it means. If CC0 permits plagiarism, authors and users should know. After all, the purpose of Creative Commons licenses and tools is to communicate information about how works can be used. The CC0 tool at least tries to enable authors to disclaim all legal rights they might conceivably assert against users of a work. But it doesn't speak to extra-legal rights that authors might assert, including extra-legal rights of attribution.

#### IV. A LICENSE TO PLAGIARIZE

As I have previously observed, copyright and plagiarism norms are not congruent.<sup>53</sup> Copyright infringement is not always plagiarism, and plagiarism is not always copyright infringement. All of the Creative Commons licenses focus on copyright ownership and copyright licensing. Their purpose is to create copyright licenses that facilitate the use of works of authorship by enabling authors to disclaim the rights they don't want.

But there's a lacuna. What if authors want to disclaim all of their rights in a work of authorship? Specifically, what if authors want to abandon not only their copyright in a work, but also any moral rights they have in the work? The CC0 tool purports to waive all of the author's rights in a work of authorship, including both “copyright” and any “related rights.”<sup>54</sup> But the CC0 tool doesn't specify which “related rights” it's intended to waive. And it doesn't explain what waiving those rights actually means.

As a practical matter, I suspect that the CC BY license and the CC0 tool are effectively the same. While the CC BY license retains copyright ownership of the work in question, it permits any use, so long as it includes attribution, which isn't a right protected by copyright. By contrast, the CC0 tool tries to abandon all copyright in a work but doesn't explicitly disclaim all attribution rights.

In other words, the CC BY license is a de facto public domain license, and the CC0 tool is an effort to actually place a work in the public domain. But both the CC BY license and the CC0 tool seem to assume that attribution is still at least potentially required by plagiarism norms, whether or not the work is in the public domain. Or rather, the CC BY license explicitly requires attribution, and the CC0 tool permits authors to expect attribution, pursuant to any relevant plagiarism norms. While the CC0 tool is agnostic

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53. See generally Frye, *supra* note 48; Frye, *supra* note 14.

54. CC0: “No Rights Reserved,” CREATIVE COMMONS, <https://creativecommons.org/share-your-work/public-domain/cc0/> (last visited Nov. 6, 2020).

about the obligation to attribute a work to its author, it's also agnostic about an author's right to compel attribution of a public domain work, based on extra-legal plagiarism norms.

But what about authors who actually want to abandon all of their rights in a work, including attribution? It's unclear whether they can.<sup>55</sup> And yet, they ought to be able to try.

## V. A PLAGIARISM TOOL

The CC0 tool is unclear about whether it permits plagiarism. As a legal matter, maybe it does, and maybe it doesn't. But as a practical matter, uncertainty is decisive. If a license doesn't explicitly permit something, it effectively prohibits it: silence = prohibition.<sup>56</sup>

Accordingly, I think authors need a plagiarism tool. And I think it will benefit authors whether or not they want to permit copying of their work without attribution. After all, as it stands, it's unclear whether the CC0 tool permits copying without attribution. It may or may not be effective at actually placing a work in the public domain. And even if it is effective, it's not clear whether the CC0 tool purports to permit plagiarism or not. Indeed, one might argue that a work isn't truly in the public domain so long as plagiarism norms prevent certain uses of the work.

The availability of a plagiarism tool could help solve that problem. If an author uses the plagiarism tool, it shows that the author wants to permit copying without attribution. And if an author doesn't use the plagiarism tool, it at least suggests that they expect attribution.

Below is the text of a plagiarism tool created for me by Kat Walsh<sup>57</sup> that authors can incorporate into their works:

I explicitly permit plagiarism of this work, and specifically object to anyone enforcing plagiarism rules or norms against anyone who plagiarizes this work for any purpose. This means that you may incorporate this work, without attribution or acknowledgement, into work submitted under your own name or any other attribution, for any purpose.

You will note that I have adopted both the CC0 tool and this plagiarism tool in the star footnote of this essay. I hope that those tools effectively dedicate this essay to the public domain and permit plagiarism.

In the alternative, Mike Overby has created a Creative Commons license intended to accomplish the same goal, and then some, which he has

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55. See generally Frye, *supra* note 14.

56. See LAWRENCE LESSIG, *FREE CULTURE* 187 (2004) (stating that "fair use in America simply means the right to hire a lawyer").

57. Kat Walsh is a former member of the Wikimedia Foundation Board of Trustees, who participated in the creation of the Creative Commons licenses.

titled the “Creative Commons Zero-ShareAlike 2.0 Univiral License (CC0-SA).”<sup>58</sup> I quite like Overby’s license, which contemplates and accounts for a wide range of potential uses of a work that hadn’t previously occurred to me.

Of course, it’s unclear whether Walsh’s plagiarism tool or Overby’s plagiarism license are actually enforceable.<sup>59</sup> Or rather, it’s unlikely they are enforceable, and uncertain what it would even mean to enforce them. Creative Commons licenses and tools are effective and enforceable in substantial part because authors own the copyright in their works, no one can enforce the copyright without their consent, and authors can at least offer unilateral licenses to use the works they create, even if they cannot abandon copyright entirely.

By contrast, authors probably can’t stop people from criticizing plagiarism of their works. I would be delighted if someone plagiarized my articles. But I probably can’t stop anyone else from objecting to it. After all, everyone has a right to express their own moral sentiments about attribution and literary ownership. But should they? Is it any of their business? If I invite plagiarism of the works I create, why should anyone feel justified in asserting my right of attribution on my behalf, without my permission and against my objection?

In any case, even if plagiarism tools and licenses are unenforceable, perhaps they will encourage reflection on the nature of literary ownership, the justification of plagiarism norms, and who should have the right to decide what kind of copying is acceptable. After all, if ghost-writers can sell their attribution right to the highest bidder, why can’t I give mine away?

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58. MIKE OVERBY, CREATIVE COMMONS ZERO-SHAREALIKE 2.0 UNIVIRAL LICENSE (CC0-SA) (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3649212](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3649212).

59. See Frye, *supra* note 14.