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Faculty Require Online Distribution of Student Work: Enter the Librarian

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Chapter Three

Faculty Require Online Distribution of Student Work

Enter the Librarian

Micah Zeller and Emily Symonds Stenberg

There is not anything especially futuristic about the scenario of academic librarians providing support to the university faculty who teach undergraduates by providing reference services, leading instruction sessions, or embedding within a specific course. What is changing is how the work produced in these classes is being submitted, shared, and published—and, by extension, the role academic librarians play in the creation and dissemination of this work. Academic libraries offer such open access platforms as institutional repositories and functional specialists with knowledge of intellectual property, the law, and scholarly communication issues; they are thus well positioned to facilitate such distribution. For the library and university of the future educating the students of the next millennium, this should be a perfect match.

Yet, even as the future arrives with incremental adjustments rather than immediate transformations, library professionals do not necessarily agree on how to respond to these changes. A 2015 discussion on the ACRL Scholarly Communication LISTSERV on the topic of student license agreements indicates how difficult it is to establish a clear answer or policy on handling student work and how easy it is to get lost in the quagmire of faculty, student, and librarian rights, roles, and responsibilities (2015).1 Librarians, lawyers, and lawyer-librarians who regularly deal with such questions have difficulty agreeing on a single way to address the issues. Given the number and variety of higher educational institutions, there is no one-size-fits-all approach. Answers are often variations of “It depends,” which underscores the importance
of librarians being aware of both the relevant issues and the open access or student publishing environment at their specific institutions. "It depends" is a more knowledgeable and helpful answer than "I don't know" and leads to productive discussion of situation-specific facts and possible outcomes.

Guidance on open access and scholarly communications is now a common component of the services offered by libraries, including at authors' own institutions. On staff at Washington University Libraries are the authors—a digital publishing and digital preservation librarian and a copyright and digital access librarian with a JD and a law license—as well as a scholarly communications coordinator who is also a subject librarian. These positions collaborate with colleagues on providing services for content created by faculty, graduate students, and undergraduate students, the latter at an increasingly frequent rate.

In 2013, when the authors started in their respective positions, the university repository had only two collections containing undergraduate work: senior honors papers and research symposium posters. Two years later, there are four additional collections built on undergraduate student works completed for specific classes, as well as complete digital runs of two print publications produced through the university's undergraduate research office. These collections complement course projects on other platforms, such as Omeka, WordPress, and YouTube, and all were created with the direct involvement of a librarian or the university libraries. But here and elsewhere, undergraduates have been required to post to Facebook or Twitter, edit Wikipedia entries, contribute to GitHub, create or comment on a blog, and even engage in open access publishing—none of which necessarily involves libraries or librarians. Whether a librarian knows about individual assignments or facilitates their distribution, he or she often has experience and perspective related to building online collections, establishing access options, and supporting positive pedagogical outcomes.

This chapter is not the final word on how libraries will be involved in this area, nor is it an exhaustive discussion of the relevant issues. It begins by examining literature on scholarly communications, undergraduate students, and the role of libraries and then shares the authors' specific experience with a cross-section of courses: an engineering capstone where students are required to "publish" their final papers to the institutional repository, an archaeology course where students create and upload videos to YouTube, and an American culture studies seminar where students conduct oral history interviews that they must add to a Documenting Ferguson repository and to the University Archives. For each of these assignments, the instructor and a librarian were in communication about requirements and various policies. These courses demonstrate the issues academic libraries are now encountering as a result of the services they provide and illustrate how cultivating expertise in a range of fields promotes the ability to continue providing
meaningful support. Here we address legal mechanisms, privacy rights, online identity, platform choice, and ethical questions related to mandating a digital presence.

If libraries do not become involved in these developments, then it does not mean the developments will not occur at all. Instead, it indicates that faculty are proceeding on their own and that the future exists without us.

LITERATURE REVIEW

Of the many roles held by academic librarians, one of growing importance is that of scholarly communications expert for faculty and students. Tensions over access to the results of taxpayer-funded research combined with an increasing awareness of the implications of digital distribution have made open access, privacy, copyright, and other intellectual property issues more important to both librarians and universities. As Kevin Smith (2015) wrote in his preface to volume 1 of this series, “[a]cademic libraries will have a vital role in supporting these [social and educational] processes and in helping our students adapt to the several different styles of study and communication with which they will need fluency” (x). Librarians are increasingly speaking this language of scholarly communication to graduate and undergraduate students in direct relation to their current schoolwork and academic careers, not just as possible issues for their future careers. Stern (2014) emphasizes the importance of copyright training when classwork is added to an institutional repository, or IR (7), but this training may be necessary for more than just classwork or IRs, and often librarians will be the ones to provide it. Hensley (2013) argues:

Undergraduate research programs offer new opportunities for librarians to weave together their expertise in areas of student learning, information literacy, and scholarly communication. In fact, one could argue that the librarian’s expertise is best positioned to lead support for the last phase of the research process—publication and dissemination of original undergraduate student work. (114)

Questions related to scholarly communication are incorporated throughout the Association of College and Research Libraries’ “Framework for Information Literacy for Higher Education” (2015). Under the concept “Information Has Value,” research practices include “[articulating] the purpose and distinguishing characteristics of copyright, fair use, open access, and the public domain” and “[making] informed choices regarding their online actions in full awareness of issues related to privacy and the commodification of personal information” (Association of College and Research Libraries 2015). Whether student work is published online in a repository or other platform or
is not published at all, students need to understand these concepts as consumers and creators, and librarians are in a position to educate them throughout the entire process. As Davis-Kahl (2012) writes, "[a]sking students to consider if and how they want their own work to be shared and used by others shifts the nature of discussions from cautionary and reactive to reflective and proactive, and explicitly acknowledges that the students’ work is valued enough to be shared if they choose" (213). One of the key purposes of this chapter is to look at that “if they choose” moment. Sometimes the sharing is not up to the student, but the method or process of sharing may involve the library. University instructors may require that students make the works or assignments they have created available to the public outside the classroom. Doing so may be a condition of course credit and indeed may be closely tied to a clearly articulable pedagogical purpose. In today’s digital environment, this public presentation requirement may be more than an on-campus poster session or print publication with limited distribution across campus; it may also extend to online and other widely accessible platforms.

Beyond facilitating access to collections, the role of many librarians has expanded to include that of educating students on these issues. What are the pedagogical advantages, if any, of publishing undergraduate work? Does requiring or encouraging submission to a repository or other online platform in advance also encourage students to work harder to produce their best possible work? Undergraduates who participate in student research “face new decisions regarding copyright, data management, open access (OA), authors’ rights, and the creation of metadata for preservation purposes” (Hensley 2013, 116).

Various academic libraries have presented and published on the methods they use to incorporate scholarly communication issues into the work of subject and repository librarians, among others. “Getting Superior Work in the IR: A Self-Supporting Loop,” originally a presentation at the 2013 USETDA conference, discusses how librarians in the Claremont University Consortium embedded and integrated themselves into the student research process to meet the dual goals of (1) teaching information literacy concepts to undergraduate students and (2) improving the quality of the senior theses written in the Environmental Analysis capstone course and made publicly available in the repository (Lowe and Stone 2014). Librarians moved beyond one-shot instruction sessions to a more comprehensive model and incorporated a rubric to evaluate how students had learned and employed these concepts in their research papers. Following the implementation of this model, a rubric analysis project indicated an improvement in both the quality of the scholarship and what Lowe and Stone called students’ “alacrity”—that is, the willingness and eagerness of students who submitted papers to the repository (2014).
A recent survey by Utah State University discusses the benefits of publishing undergraduate work in institutional repositories as perceived by undergraduate research directors and IR librarians. Posited benefits included the fact that "exposure showcases student work, provides examples to other students, and highlights the diversity of student research" (Rozum et al. 2015, 809). Additional benefits as perceived by librarians were increasing scholarly communication awareness (810) and "providing concrete examples of open access scholarship to students early in their academic career" (806), both of which indicate a role for librarians in undergraduate publishing.

Davis-Kahl (2012) observes, "Teachable moments around copyright and CC [Creative Commons] result from discussions and decisions about disseminating student work" (215). These discussions can happen in the libraries, in the classroom, and across the university between librarians and faculty and between librarians and students. Buckland (2015) argues for viewing students as future researchers and involving them in the peer-review and publishing process: "Libraries have long helped students become better consumers by teaching them about authority and authenticity in publishing (be that online or in print) and are key to growing informed graduates. Currently, libraries are able to support a different role for students in this continuum—that of creator" (193). Buckland advocates incorporating scholarly publishing issues into education and offering students a "place at the table" (195).

We cannot only discuss what we are doing now and next semester, but we must also determine how we will act and respond in the months and years ahead. We must determine how we define the future with regard to both ideological goals and practical needs. Among the relevant considerations are the future of academic libraries and librarians, the role(s) they serve, and the future—particularly the preservation—of the work that is digitally collected and published by these libraries and librarians. Buckland (2015) advocates for the library as a partner "instead of simply a resource" (194). Smith (2015) argues that librarians will need to "take a leadership role" in developing preservation guidelines for faculty digital scholarship (xii). As he explains, "[m]ore and more of the scholarly works we will be dealing with in academic libraries will be born digital, locally created, and existing in a wide variety of formats" (xi). This trend will apply not only to digital works by faculty and not only to books and scholarly articles but also to student work, including graduate theses, dissertations, and even undergraduate coursework. An instructor may want a record of student work as an example for other students to model or as an example of the type of work produced under the instructor's teaching of a course; the university may want an example or record for accreditation or recruitment purposes. Access does not mean just current or short-term access. Incorporated into the role of digital publishing within libraries is developing and maintaining preservation plans for the original digital scholarship that is collected, curated, and published.
For authors, two possible, if lofty, definitions of future are suggested in articles from the July 2014 special issue of portal: Libraries and the Academy, “Imagining the Future of Academic Libraries.” Menchaca (2014) envisions an academic library where funding is tied to student achievement. “In this version of tomorrow,” he says, “libraries rediscover their core mission, not just as purchasers and stewards of material, but as providers of intellectual property that is differentiated, especially from what is freely available on the Web, in terms of its quality and specific bearing upon students’ learning objectives” (354). Miller (2014), building on Johanna Drucker’s article in the same issue, explores seven strategies for the “academic research library of this university to begin to transform itself into the academic research library of the next university” (331). Incorporating some of Miller’s strategies, he describes the “future-present library” as one that is both innovative and focused on the mission of education (339), inviting the student “to contribute to building new collections and interpreting existing ones” (341) and both showcasing and celebrating learning by “expanding the audience for student research and creativity within library spaces, both physical and digital, by providing new opportunities to display, exhibit, perform, and share that work” (343).

AT THE LOCAL LEVEL

The authors are part of Washington University’s Digital Library Services and Scholarly Publishing unit, which was created to “assist faculty, departments and students with developing digital projects” (Digital Gateway Blog n.d.). The university repository Open Scholarship is managed by the libraries and was created in response to a faculty senate open access resolution adopted in 2011. It states in part, “The Faculty of Washington University in St. Louis is committed to making its scholarship and creative works freely and easily available to the world community. Faculty members are encouraged to seek venues for their works that share this ideal.” The resolution also encouraged the provost’s office and the libraries “to establish digital repositories and provide author support services to aid the Faculty in providing greater access to their work” (Washington University 2011). While the resolution refers to faculty work and specifically to scholarly articles, student-created materials have increasingly become a focus; since 2009, most theses and dissertations have been submitted in electronic format only and are housed in and accessed through the repository.

A primary role of the digital publishing librarian is that of consultant. She works with subject librarians, who work more directly with faculty and students across the university. A major portion of her position description is to manage the repository, and so she gathers information from subject librarians
and other people interested in creating or contributing to a collection and discusses options for administration of the collection, access possibilities for the submissions, potential areas of concern, metadata requirements, and time lines. Many of the materials added to the repository since 2014 have come from these relationships. As the coordinator for the repository, this position is able to recognize patterns across collections, not only in how content contributors want collections to display, but also in how broadly they want collections to be accessible. Many of these consultations end up involving the copyright librarian, who can provide a risk-benefit analysis of copyright questions and make collections open versus restricted.

The copyright librarian at Washington University has a JD and a law license. His primary responsibility is helping faculty, students, and staff address intellectual property issues that connect to research, teaching, and library services. This work includes drafting license language for Open Scholarship repository collections and customizing asset agreements for digital projects. Different collections, of course, raise different issues. The driving considerations when structuring agreements are to secure sufficient permission to distribute the work quickly and efficiently, optimize short- and long-term access to it, and make it available in a variety of formats with clear terms governing downstream use.

The projects the authors take on at the library come from multiple directions and are initiated both internally and externally. None of the projects need necessarily be hosted in a library’s repository in order for librarians to be involved. Platforms abound for making student work publicly available, and indeed it is in these contexts that many of the thornier legal, technical, and pedagogical questions arise. In this context, library staff may play a valuable role as what Smith (2015) calls “consulting knowledge managers”—ready to provide service and expertise in fluid situations (xv).

**YOUTUBE**

In one example, a Washington University lecturer met with library instructional support staff to explore options for hosting student-created videos as part of an introduction to archaeology course she was teaching. After discussing logistics and selecting YouTube as the platform of choice, it was suggested she speak with the copyright librarian to “review rights”—in other words, to hash out any potential legal issues with requiring as a condition of course credit that she or the students upload videos they create using the instructor’s account with a shared log-in. From the perspective of the reasonable observer, does the objective conduct of the students and the instructor indicate that there is agreement (a license) for the work to be shared on YouTube? And if such a license exists, can the student revoke her consent?
Does it authorize the instructor to grant the platform a sublicense and agree to its terms of use?

For better or worse, we have scant case law for guidance, at least that which is directly on point (the law on licenses is discussed in a later section). But no matter one’s level of certainty, it is possible that a court may in short order adopt a contrary and unexpected position. It is useful, then, to remember that none of the conduct giving rise to permission occurs in a vacuum. Instead, the relevant focus should be on the totality of the circumstances. Librarians are accustomed to balancing different parties’ interests, and when discussing how or whether to make student work publicly available, it is wise to consider first what the instructor’s and students’ reasonable expectations are.

DOCUMENTING FERGUSON

In another example, in August 2014 Washington University Libraries created a digital repository—Documenting Ferguson—that was meant to preserve and make accessible community-generated content that was created following the police killing of eighteen-year-old Michael Brown in Ferguson, Missouri. Part of the project’s purpose was to use these collections to create opportunities for engagement and learning. One result was a partnership with a professor teaching a sophomore seminar called Slavery and Memory in American Popular Culture, part of which required students to interview residents of Ferguson and contribute their recorded work to both the Documenting Ferguson repository and the University Archives Oral History Collection. This library-initiated collection naturally involved librarians, especially the copyright librarian, in addressing IP rights and ethical concerns; sharing guidelines, principles, and best practices for conducting oral history interviews; providing technical expertise and equipment; and drafting release forms and other paperwork, all with the underlying intent to promote the seminar’s pedagogical objectives.

Structuring the oral histories seminar raised the question of whether the students’ proposed activities—that is, conducting interviews with local residents and making the recordings and associated materials available to the public online through the Documenting Ferguson repository and in perpetuity via University Archives—would be subject to IRB oversight. In this and all other such projects, it is the investigator’s responsibility to ask whether her and her students’ research requires the examination and approval of protocols under the jurisdiction of an IRB. There are certainly resources, both local and more general, available to help instructors sort through the application policies and determine what must be done and when. But timetables can be inefficient and costly when trying to put a course together and have it
approved in time for the next semester. Enter the librarian. Here is the value of having professional staff, a copyright librarian who is comfortable working through the regulatory definitions and contemplating whether certain activities fall within IRB purview, well-versed in the exemption and approval process (having facilitated submissions in the past), conversant with the issues on which IRB officers are most keen, and on the ball about unconsidered potentialities (e.g., Does anything change if a student wants to use an interview in a senior thesis?).

THE UNIVERSITY REPOSITORY

In 2014, Washington University’s engineering librarian, who had worked with faculty on Open Scholarship collections previously, suggested creating a collection in the repository as an option for the final projects produced in a senior-level mechanical engineering capstone course. Students in the course work in teams to develop a working prototype and are required to produce a “publication that will inform other interested parties of its [the prototype’s] existence” (http://openscholarship.wustl.edu/mems411). This publishing component was already required before a repository collection was created, and earlier discussions between the librarian and faculty had focused on the possibility of developing an open-source database for students to publish to. In the meantime, students published to blogs, Facebook, or other personal websites with no concern for the longevity of the work or the stability of the site. Students would often remove their links or posts shortly after the end of the semester, fulfilling the publication requirement of the course but not perhaps the intent behind it—to share research with their peers. Instructors, however, were interested in developing a record of the work produced by the student groups.

The fall 2014 mechanical engineering class was the first one required to publish to Open Scholarship. Students were allowed to either restrict access to on-campus users only or allow wider access with an embargo of up to two years. Although restricted access and embargoes do come with the risk of developing collections that are not completely open access, they have become increasingly common as options in the university repository, particularly for undergraduate collections. Most discussions between the digital publishing and copyright librarians about new repository collections include a conversation about possible access options, sometimes because the collection includes materials from previous years without direct permission from the student/author and sometimes to give students autonomy over how much they share. The engineering librarian explained the access options to the class; however, in the spring, a few students were surprised when their projects or even just the citations were still online and contacted the librarian to
ask, "Why is my paper still up?" Addressing these sorts of questions is also a perfect opportunity for subject liaisons or other librarians to discuss larger issues of open access, online identity, and even search engine optimization when appropriate.

The political science collection is a curated collection of papers from an upper-level undergraduate course for which the professor always requires students to complete a group research project comparing one aspect of governance among the same three local municipalities. The librarian proposed the idea of sharing past papers as a way to highlight exemplary student projects and allow groups to build on research completed in previous years. Working with the digital publishing librarian, she developed a repository collection for the course. The professor identified which papers she would like included, and the political science librarian added the material. While the work from previous years was restricted, going forward the professor will request permission from the students whose papers she would like to share. Students will be able to sign a release that will be developed in conjunction with the copyright librarian, and they will be asked to select restricted or unrestricted access; they will be able to refuse to participate if they choose.

The engineering technical writing collection developed in a similar manner as the political science collection and was created with a similar structure. In the case of technical writing, the department had been making examples of "successful student papers" available in binders in the department office. Not only was this method unwieldy and disorganized, but it was also not secure and raised potential Family Educational Rights and Privacy Act (FERPA) issues (also discussed in the next section). Faculty now encourage selected students to submit their papers to the repository instead of requesting permission and posting the papers on behalf of students or asking the library to post the papers. While this might give students more autonomy, however, it is also a barrier—while multiple students have been approached, only one has contacted the engineering librarian about submitting, and the collection is empty, even as a new semester starts.

FOCUS ON THE ISSUES

These examples raise a host of related issues. Before proceeding, though, it should be said that specific facts drive particular outcomes, and while it is possible to outline the general parameters of the relevant law, every situation involves circumstances with the potential to control results in unexpected ways. Rarely are librarians, even those with law degrees and state bar licenses, empowered to give legal advice in their capacity as librarians. The legal information provided in this chapter concerns copyright, contracts, pri-
licensure, and other regulations relevant to higher education, and the discussion is general.

Licenses

How does an instructor know whether she has legal justification to make student work available online? Copyright grants each student author the exclusive right to do (and authorize others to do) six things with her work: reproduce it; prepare derivative works based on it; distribute copies of it to the public; perform and display it publicly; and, if it is a sound recording, perform it publicly by means of a digital audio transmission (17 U.S.C. § 106). Making her work publicly accessible, for example, by uploading it to a public channel on YouTube, thus involves one or more of the student’s rights under copyright.

Ideally, the instructor has each student’s written authorization to make his or her work publicly available; in other words, a valid, binding contract in the form of a license agreement through which the student grants the instructor permission to use the student’s (preexisting or prospective) original work of authorship for specific purposes in conjunction with the course. At base, a license is a privilege that protects its grantee from a claim of infringement by the copyright owner. The requisite license need not be broad: Creators may readily retain copyright in their work, with the terms drawn as narrowly as possible.

But it may be lawful—if not necessarily wise—for an instructor to make a student’s work publicly available even absent such an express, written grant through the operation of a nonexclusive license. Such a license may be granted orally or implied from conduct (Nimmer and Nimmer 2014, §10.03(a)(7), hereinafter Nimmer 2014). So the individual circumstances of a given course may indeed give rise to the requisite permission to make the student’s work publicly available.

Though licenses are often conveyed in contractual terms through written instruments that meet all requisite formalities, the existence of a license and its associated privileges or permission does not necessarily depend on the prior existence of an underlying contract. Instead, a court may imply after the fact the existence of enforceable obligations arising from an agreement (read: contract) between the parties. Different federal courts have different tests to determine whether such a license may be implied-in-fact. The primary focus is on the totality of the parties’ conduct—language and behavior demonstrating assent to permit the use of the work in a certain way in exchange for reciprocal obligations by the other party (Nimmer and Dodd 2014, §10.12).

Some courts reduce the inquiry to enumerated criteria; for example, (1) the duration and nature of the parties’ prior and existing relationship, (2) past use of written contracts providing that the materials could only be used with
permission or the creator's involvement, and (3) whether the creator's conduct indicates that use of the material without consent was permissible (Nimmer and Nimmer 2014, §10.03(a)(7), citing first circuit and fourth circuit cases). Even when applied, these factors are nonexhaustive—though in all cases, the party claiming a license as defense bears the burden of proving its existence and scope. Seeking to classify which principle courts will apply given the facts of a specific case is difficult because of the extent to which the underlying concepts and categories overlap. As the authors of one treatise put it, the “multiplicity of labels obscures the commonality of the issue” (Nimmer and Dodd 2014, §10.12).

It is worth noting a slightly different way in which an implied license may be found to exist—not founded in contract principles but instead as an “incident of copyright” implied from the relationship of the parties and based on the legal doctrine of equitable estoppel. This doctrine—colloquially understood as “fairness”—may be invoked where one party misrepresents material facts and intends that the other will act on the concealment to her detriment (Garner 2014). Its principles are likely to apply only in extreme situations—if, for example, a student knew her instructor would upload a work she created as coursework to YouTube and acquiesced thereto but did so with the concealed intention of bringing an infringement suit against the university after the video was posted (all to bargain for a better grade).

As administrators of the platform and drafters of the governing agreements, librarians are well-positioned to explain why elements of the license are included; what informs their scope; and how the arrangement for distribution, preservation, and sharing of rights serves mutual interests in promoting widespread dissemination of scholarship while preserving control and flexible use by creators. And in providing information, answering questions, and supporting collaborative processes giving rise to the structure of collections, library staff fulfill an educational role that is becoming increasingly central to their identity within the academic enterprise.

Privacy

In addition to its implications for intellectual property, making student work publicly available also requires that those involved consider information privacy—which as used here concerns the “collection, use, and disclosure of personal information” and the “power of commercial and government entities over individual autonomy and decision making” (Solove and Schwartz 2009, 1–2). Librarians have experience with privacy norms in other contexts: protecting the confidentiality of library records, identifying and restricting access to sensitive content in archival materials and special collections, and watching for terms in subscription agreements with vendors that permit collection of user data. Faculty, for their part, may be familiar with FERPA,
though fluency varies across departments and disciplines. In most cases, though, it is with FERPA that conversations about privacy and the public web environment often begin (and occasionally end).

FERPA affords students general rights with respect to their education records. Full treatment of the law and its amendments and interpretation is beyond the scope of this chapter (and its authors’ knowledge). For present purposes, our focus is on students’ FERPA-granted rights to control disclosure of information that can identify them. FERPA protects as confidential any information that a student is required to produce in conjunction with attendance at an educational institution. Such “education records” are materials that—broadly defined and with certain exceptions—contain information directly related to an individual student and that are maintained by the institution or a party acting for it.11 This definition encompasses a broad range of academic data, such as students’ names, identification numbers, e-mail addresses, assignments, exams, photographs, and videos containing their likeness.

But there are instances in which schools can release personally identifiable information contained in a student’s record without her prior written consent. One such circumstance involves “directory information,” categories of information defined by FERPA whose release generally would not be considered harmful or an invasion of privacy (20 U.S.C. §1232g(a)(5)(A)–(B)). For the directory information exception to apply, an institution must give public notice of the categories it so designates, inform eligible students of their rights, and provide a reasonable period of time during which opt-out requests may be made.

In light of the law, it seems likely that in most cases an instructor would need to obtain written, signed, and dated consent in order to make a student’s work publicly available. But FERPA is inapplicable where students themselves release information contained in their education records. That said, delineating what actions implicate FERPA and when a waiver is required is not always clear. Given these uncertainties, it is important to ask what the library’s role, if any, should be in this process. FERPA is an explicit practice area of nearly every university general counsel’s office. As the exclusive source of legal advice and services for most institutions, its attorneys are responsible for preparing consent forms, ensuring compliance with applicable regulations, and evaluating when waivers are required. But if a library has staff who are experienced in working with university counsel on related matters (e.g., reviewing licenses, collaborating on deposit agreements, establishing policies for course reserves, and evaluating digitization plans), then it is well-positioned to serve as an intermediary in addressing such issues as FERPA and publicly available student work.

It is also useful to consider what it is we are seeking to protect and why. FERPA is not a new law, nor is it intended to be comprehensive with regard
to student privacy. Libraries have long been involved in publishing student theses and dissertations without explicit waiver of FERPA rights. Experienced practitioners like Steve McDonald (2014) have spoken of an "implied pedagogical exception" to FERPA's regulatory reach. At the same time, there are circumstances in which a student's privacy interests carry serious personal consequences and in which legal remedies are not well-suited for undoing damage after it has been done.

Without question, there is mounting attention—evident in popular culture and from the increased focus of legislatures—on the responsibilities of educators and institutions with respect to the privacy interests of students. Many universities now employ chief privacy officers. There may be an opportunity for libraries to play an educational role in this space, drawing on their experience with privacy and in related areas. What reasons, for example, are there to be wary of feeding university-generated data to private technology companies? Are there lessons to be learned from higher education's sometimes problematic relationship with the for-profit publishing industry? To what extent should (or can) an instructor control a student's autonomy and decision-making?

Online Identity

Students may be apprehensive about having their work made publicly available "in perpetuity." Sometimes assignments do not turn out well. When academics and librarians talk about building our online presence, do we talk about a presence that includes examples of a potentially flawed undergraduate group research report or engineering design? We warn about controversial tweets or embarrassing photos that can never be completely deleted from the Internet. Do we also need to warn that formal, structured course assignments might exist forever as a form of the new permanent record? Do we discourage experimentation while trying to encourage awareness of scholarly communication issues? Will these students be embarrassed in ten or twenty years by a senior paper, abstract, or group assignment, especially those who seek to become public figures?

In 1999, one of the authors of this chapter produced a project for an upper-level English class as an undergraduate under a different surname; reference to it shows up as a result on Google but only as a top result if one also knows the name of the university—otherwise, it is buried in the results. Is it embarrassing to know that reference to her contribution to English 414's "American Short Stories—A Re/Presentation" can be found online? Sixteen years later, memories of the details of the project and assignment are lost, but the title indicates, obviously, a familiarity with American literature and perhaps an early exploration of digital humanities in the late 1990s. For someone who was a writer and editor before becoming a librarian, this would not
be professionally or personally embarrassing; neither would the fact that the project involved the entire class. As a digital publishing and preservation librarian, it is actually more embarrassing to know that it is a dead link: "404 Not Found." The project was on the professor's university website, and the professor is no longer affiliated with the university. The parameters of the assignment and the student work are lost. For today's students and students of the future, a university repository or other university-affiliated website with course-specific collections can prevent that record from being erased following a change in institutional affiliation.

Within an appropriate context, such as that of a university repository, these records can serve as artifacts of a specific time rather than samples of students' potential future contributions as writers, researchers, engineers, and even librarians or lawyers. The institutional brand of the repository also serves as a time stamp for the course—what it was about, what it required, and what was produced in this specific course at this specific time. In these situations, the works assigned are frequently factual—Wikipedia entries, summaries of a course unit, research papers—and their validation requires public consumption. More personal creations—those reflecting beliefs, new ideas, or still-nascent thoughts—depend on a degree of protection from broader scrutiny. Rarely do instructors need to be reminded to keep such works more closely guarded. Students have not been asked to share highly personal work and have not been required to post papers or projects from early in their college careers. Nor have students posted creative work, which might have stricter definitions as to what counts as a previous publication. The examples discussed in this chapter are from upper-level courses for juniors and seniors who will soon apply for jobs or graduate school. Must we be defined by our thoughts and outcomes for a specific undergraduate course far into the future? Will students be more aware of the public eye and access and therefore less willing to experiment or take chances with an assignment, particularly students who aspire to highly visible careers?

Platform Choice

An additional concern beyond issues of copyright and FERPA is that students may be required to create an account on a third-party platform in order to submit an assignment online. This account may be on YouTube (although, in at least one instance at Washington University, students used the instructor's shared log-in credentials), but it could also be in the university's repository, Open Scholarship. Students and anyone else who contributes content to the repository must provide a full name, e-mail address, and optional institutional affiliation and create a password separate from their university credentials. Bepress's (2015) online privacy policy states that it "neither sells nor rents contact information to third parties" and goes into further detail about
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what information the company will collect or share and under what circumstances. One stated reason for sharing that information—"We transfer information about you if The Berkeley Electronic Press is acquired by or merged with another company"—illustrates the fact that, once individuals share their personal information, even for a specific purpose, they lose control over what happens to those details and where they might end up. Even when we ignore the very relevant and timely discussions of online security and vulnerability to hacking, there is still the question of requiring students to register with a third-party vendor, provide personal information, and create a username and password beyond the credentials used to access library services, all in order to complete a course assignment. Students may opt out of receiving notifications from bepress, including download counts of their work, but unless there is a designated administrator adding materials, students must create personal accounts to add their assignments. Creating an account in most circumstances is not difficult, but deleting one can be onerous.

IMPLICATIONS AND IMPACT

A great many educational activities are now mediated by technologies. Nearly all courses have an online presence. E-book platforms can capture rich reading trails, from the basics of who read what when to increasingly refined levels of granularity. An individual's progress and performance can be charted against a full dossier of directory information and education records—data drawn from applications before the student even sets foot on campus and compiled in alumni records long past his or her graduation. This information can be extraordinarily useful, both practically and pedagogically. But most undergraduates understand and are influenced by very little of it. Should students be given the opportunity to opt out? How likely is the library to win favor by asking the administration whether it has (and follows) clear guidelines on what it will and will not do internally with student data? For even the most perspicacious, it is difficult to grasp how issues converge and relate unless you have dealt with them before. The boundaries of privacy and control over created works and accumulated personal information remain unsettled. Putting expertise in an academic and research library—which, through its tentacles of services, platforms, resources, and physical proximity, confronts a variety of topics, problems, and circumstances—positions staff to recognize and address many of the corollary issues now arising in the higher education ecosystem. In other words, there is realizable value in getting out in front of issues that are coming sideways into the academic enterprise.

While the digital publishing and copyright librarians at Washington University have each met with faculty, offered internal training sessions within
the libraries, and coordinated information sessions for students, neither position has worked directly with an undergraduate class to incorporate scholarly communication concepts. That is already beginning to change. The libraries hope to develop rotating pairs of librarians across units, including Scholarly Publishing, to educate specific undergraduate classes about issues related to copyright, intellectual property, and publishing. This effort is in direct response to concerns about the dissemination of unpublished research data contained in senior honors papers and research symposium posters; it also connects directly to the ACRL "Framework" and indicates that instruction is becoming more incorporated into all librarian roles in many academic libraries. The authors are developing lesson plans to address these topics before they become an issue. In order to approach digital publishing projects more methodically, the authors have also developed two checklists to document the process going forward (see the appendix at the end of this chapter). The first is a series of questions for an instructor developing an online assignment in conjunction with the libraries; it may be answered directly by the instructor or used by a librarian as a reference when gathering more information. The second is a checklist for a librarian to follow during the development of an online component of a course. At a minimum, each document helps bring order to a process that often involves multiple issues and parties with sometimes conflicting goals. While these checklists may be applicable to other librarians and other institutions, there are no best practices or universal processes. Libraries can and should be aware of the potential issues and benefits discussed earlier and recognize and build on their roles as educators on such issues as copyright, scholarly communications, and information and digital literacy; facilitators of access platforms; and curators of research.

The collections for undergraduate engineering courses at Washington University grew out of a working relationship between the engineering librarian and the digital publishing librarian on a large collection of faculty-authored computer science technical reports that had been added to the repository. This process gave the engineering librarian more information on the repository and more familiarity with developing collections in it. This familiarity allowed her to offer the repository as a solution for the question "Where do we publish the final mechanical engineering projects?" which then led to the technical writing collection. The copyright librarian was heavily involved in the development of the Documenting Ferguson repository and was well-positioned to facilitate publicly accessible student work built from that content. These are just two examples of collaborations between librarians and between librarians and faculty. The digital publishing and copyright librarians work within a larger digital library services unit involved in faculty-driven digital projects, and the experiences of those library staff have influenced later procedures. None of this work can be done by a single person. Some universities are more centralized than others, but in any scenar-
io, it is important to develop collaborative relationships within the libraries and across the university. And an individual unit within the organization as a whole should have its own house in order before advocating notions of privacy and courses of conduct.

At many libraries, user trust has been hard won. How important is it to act with a purpose to preserve it? There is a compelling opportunity for libraries and universities to set standards in this area and make a transparent attempt to balance the interests of students, faculty, administrators, third-party vendors, and commercial content and service providers. There has probably never been a time when this was not true, but as libraries expand beyond a specific building on campus, it becomes even more important. It may be less “Enter the librarian”—one staff member called on to help with specific elements of a project—and more “Enter the libraries,” a university department with specialized staff serving as a resource for undergraduate courses with an online component in addition to undergraduate publishing and scholarly communication discussions.

Students’ work online is not an area in which libraries can choose to opt out. Instructors are assigning projects with an online component and will continue to do so whether librarians are involved or not. In some ways, the future brings more work to librarians, but it also brings more integrated work—digital incorporated with instruction, collections, preservation, copyright, and so on. Advances in technology and online publishing will not necessarily make the librarian’s job easier, and they certainly will not spell the end of libraries. Instead, they will bring about more reasons for us to be aware of potential issues; know how to work with faculty in addressing these issues in the classroom; become experts in scholarly communications, copyright, and other rights; or at least know where and when to find more information. The work is more local—produced on our campuses by our faculty and students—but its reach is potentially worldwide.

APPENDIX: QUESTIONS FOR LIBRARIANS TO CONSIDER WHEN WORKING WITH UNDERGRADUATE ASSIGNMENTS WITH AN ONLINE PUBLISHING COMPONENT

Checklist 1: Questions to Ask about the Assignment

1. What is the assignment, and what is the online component?
2. Is this a required part of the course, and are the requirements specified in the syllabus? Does the instructor provide the opportunity for students to opt out?
3. Are these individual or group projects?
4. Who will add or upload the content to the distribution platform?
5. What options do the students have for selecting the user-access level, such as restricted to on campus or selecting an embargo?
6. What platform do you want to use? What is the trustworthiness and stability of that platform?
7. Do you have examples of other assignments or undergraduate collections, here or elsewhere, you’d like to model?
8. What do you want to happen with the assignments after the course? Do you want them to be available for future students or other users to access?
9. Can we (the library) talk to the class about copyright, intellectual property, and how this assignment might connect to other research questions?

Checklist 2: For Internal Planning in the Libraries

1. Gather more information about the assignment—from subject liaison, faculty member, and so on. Are there specific considerations based on the discipline or assignment?
2. Look for similar projects to see which policies they have used.
3. Are there policies specific to your university about student rights or publishing student work electronically?
5. Create or find a student license agreement: previously drafted document or model license you may tailor or adapt from the submission form from the institutional repository.
6. Check licensing terms of the platform, especially if it is not one hosted by the library or university.
7. Develop metadata requirements.
8. For a library platform, such as a repository, assign access options (restricted to university or embargo options).
9. Work with the subject librarian to develop the collection, talk with the instructor, try to arrange to talk to the class (or for the subject librarian to talk to class).
10. What are the preservation plans and goals?

These checklists are by no means comprehensive. A number of resources are available online, including the following:

NOTES

1. The initial post was June 16, 2015, and responses continued until June 23 on this and related discussions.

2. Institutional Review Boards (IRBs) review and approve protocols for projects that involve use of human participants. For more information on their purpose, history, and areas of oversight, see http://www.hhs.gov/ohrp/assurances/irb.

3. Again, the librarian’s entrée here comes with the caveat that he is not positioned or qualified to tell an investigator whether her research is subject to review or falls within an exception.

4. Though U.S. law does not contain explicit reference to “making available” or “communication to the public,” such uses are within the exclusive rights provided in Title 17.

5. Student ownership of copyright in scholarly works created for course credit is generally unencumbered by institutional IP policies. But ownership can be more difficult to resolve for works created by an undergraduate in conjunction with sponsored research projects or developed using significant university resources.

6. Other circuits hold that an implied nonexclusive license applies when (1) a person requests the creation of a work, (2) the creator delivers the work to that person, and (3) the creator intends that the person who requested it will copy and distribute it (Atkins v. Fischer, 331 F.3d 988, 992 (D.C. Cir. 2003); I.A.E., Inc. v. Shaver, 74 F.3d 768, 776 (7th Cir. 1996); HGI Associates, Inc. v. Wetmore Printing Co., 427 F.3d 867, 785 (11th Cir. 2005)). These copyright estoppel factors are most frequently applied in cases involving commissioned works. Some commentators argue that a license is less like a contractual obligation but instead better understood as a property interest. See generally Newman (2013). State law is relevant insofar as it provides applicable canons of contractual construction to resolve questions of formation and interpretation within a given purported contract. The more intrepid reader may further consider issues of state and federal comity, preemption, choice of law, the relevance of conditions precedent, illusory promises or other inadequacies of consideration, distinctions between covenants and conditions, and the type and availability of remedies.

7. See also Lipinski (2013), p. 378 (“The law of implied license in the courts is less than consistent”).


9. Black’s Law Dictionary defines equitable estoppel as “preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way”; “The gravamen of estoppel . . . is misleading and consequent loss” (Garner 2014; Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962, 1977 (2014)). For discussion of its application in the context of implied licenses, see Newman (2013), pp. 522–23.

10. “We protect each library user’s right to privacy and confidentiality with respect to information sought or received and resources consulted, borrowed, acquired or transmitted” (American Library Association 2008, no. III). See also International Federation of Library Associations (2015), which provides eight recommendations on practice and education. Libraries arguably have a poorer track record in protecting patron privacy when it comes to e-books.


13. See Ramirez and McMillan (2010), quoting the then-director of the Department of Education’s Family Policy Compliance Office from a 1993 statement that an “institution need not obtain a student’s signed and dated specific written consent to disclose or publish a thesis in the library or elsewhere at the institution” because of the nature of such works as “research sources for the academic community.”

14. Strictly speaking, FERPA provides for the withholding of federal funds to educational institutions that have policies or practices of permitting the release of educational records. Though it imposes burdens and prohibits certain behavior, the law does not create an express cause of action for a private remedy. For example, DeFeo v. McAboy, 260 F. Supp. 2d 790, 793 (E.D. Mo. 2003). A student can, however, file a complaint with the Department of Education concerning alleged failure by the institution to comply with the law’s regulations. See Family Policy Compliance Office (n.d.).

15. The Student Digital Privacy and Parental Act of 2015 was introduced in the House of Representatives in April 2015. The law, if enacted, would significantly amend FERPA. Forty-six states introduced 182 bills addressing student data privacy in 2015, according to a legislation summary prepared by Data Quality Campaign (2015).


17. If your university has reliable data on which majors and courses more often lead students to graduate satisfied and on time, should this information influence the curricular paths on which academic counselors advise? Who balances the interests of the various offices at your institution and would be keen to know and act on information furnished through increasingly sophisticated analytics?

18. Most universities have well-established policies on information technology security and its related topics. But it is difficult to find rules or restrictions on internal, institutional use of sophisticatedly mined student data by school officials with legitimate educational interests.

REFERENCES


