Checking Rights: An IR Manager's Guide to Checking Copyright

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Abstract

Institutional repository (IR) managers often find themselves providing copyright guidance to faculty who wish to self-archive their published scholarship or to students depositing theses and dissertations. As IR managers may not be copyright experts themselves, making determinations and checking rights can be difficult and time-consuming. This article is intended as a practical guide to describe common types of material that can be placed in an IR as well as potential copyright issues and other considerations for each type. Material types covered include book chapters, journal articles, conference proceedings, student papers, electronic theses and dissertations, research data sets, historical and archival materials, and oral histories. Underlying issues such as copyright ownership, work made for hire, and the legal definition of *publication* are also discussed. For easier reference, the appendix contains a chart with brief descriptions of issues and resources.

Keywords: Copyright, institutional repositories, archival materials, authorship

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Early institutional repository (IR) platforms were originally intended to provide open access to an institution's previously published peer-reviewed research (Giesecke, 2011). However, the software used by many IRs supports the uploading and hosting of any file type, and over the years IR managers have deposited other materials into IRs. Student theses and dissertations, archival materials, and research data sets can now be found on the same platforms that once hosted only traditionally published faculty research and scholarship.

Scholarly publishing and intellectual property rights are complicated topics. The question of whether academic authors own the rights to work produced under contract is open (Strauss, 2011), and studies have shown that authors of scholarly materials have a limited understanding of intellectual property rights in general (Repanovici & Barsan, 2015). At the same time, there is limited documentation on how best to check rights. Because of these and other complications, IR managers are faced with an array of rights questions and need to take a proactive role in checking the rights of materials they deposit.

This article is intended as a practical guide to describe common types of material that can be placed in an IR as well as potential copyright issues and other considerations for each type. For easier reference, the appendix contains a chart with brief description of issues and resources.

Underlying Issues

Regardless of the type of material being deposited, there are a number of underlying issues an IR manager must address. The two chief issues are the question of who owns scholarly work, which is complicated by the concept of work made for hire (Carroll, 2015; Strauss, 2011), and the deterring effect that misconceptions and fear of copyright can have on authors of scholarship who would like to self-archive their work (Repanovici & Barsan, 2015; Dawson & Yang, 2016).

Ownership

The question of who owns scholarly material seems straightforward. However, there are differing opinions on whether faculty members or other university employees are obligated to cede ownership of their work to their institution (Carroll, 2015).

Under the US Copyright Act of 1976, copyright protection is granted to the creator of "original works of authorship fixed in any tangible medium of expression" (17 U.S.C. § 102). In the case of coauthored or "joint" works, all authors are considered co-owners (17 U.S.C. § 201) unless a written agreement is made that states otherwise. Simone (2019) discussed some of the many complications that can

occur with joint and collective works, including recent and notable examples from case law. Research materials such as data sets (Carroll, 2015), contributions to collective works (17 U.S.C. § 201), and works cowritten by authors who are affected by international agreements with foreign governments (Scheufen, 2015) can add further wrinkles.

Additionally, there is one important exception to copyright protection: work made for hire. In a work made for hire situation, "the employer or other person for whom the work was prepared is considered the author [and] owns all of the rights comprised in the copyright" unless a written agreement stating otherwise exists (17 U.S.C. § 201). Whether work made for hire applies in the case of scholarly material has been a long-running matter of debate, with some arguing that a "teacher exception" exempts scholarly output created by university faculty and academic librarians (Hellyer, 2016) and others arguing that the Copyright Act of 1976, which did not include an explicit exception for teachers, removed any such exemption (Gertz, 2013, p. 1475). This debate largely comes from a historical common law exception to copyright dating from the 1920s that was based on "institutional tradition and regular practice" of professors' ownership of their output (Strauss, 2011).

Although some courts have reached conclusions that seem to uphold the continued validity of a teacher exception (Strauss, 2011, pp. 26–28), these exceptions are generally made not because of any special status granted to teachers but instead due to circumstances surrounding the creation of the work in question. For example, in one case a teacher was found to have ownership of a course he created based on his preparation of it on his own time, without any direction or supervision by his employer (Strauss, 2011, p. 27). Strauss did go on to cite several cases where a court explicitly acknowledged the exception, but even here there is no real consistency. Contrarily, Gertz (2013) cited a 2010 case in which a district court was explicitly asked to examine whether a teacher exception existed; it ruled that "no such exception survived the enactment of the 1976 Copyright Act" (*Molinelli-Freytes v. University of Puerto Rico*, 2010).

The lack of a teacher exception does not necessarily mean an author's scholarly work belongs to the university for which they work. As the court ruling cited earlier points out, many institutions "have proactively created policies that grant professors ownership of copyrights" (*Molinelli-Freytes v. University of Puerto Rico*, 2010). Whether these policies grant ownership to faculty authors may differ depending on the type of work in question (e.g., articles versus course materials). The University of California, for example, has policies in place that typically grant faculty authors copyright of any "scholarly/aesthetic works" they create (University of California, n.d.) while retaining copyright in other cases.

From a practical standpoint, IR managers working in an institution with no

written policy in place may need to reach out to their office of sponsored research, academic affairs, or other relevant unit with questions about ownership of faculty works such as articles and course materials. As students are not in an employer-employee relationship with institutions they attend, copyright of theses, undergraduate papers, and other student works is typically held to reside with students even if they are granted a stipend and work space (Patel, 1996; McFarlane, 2012; Seidemann, 2004).

Author Knowledge of Copyright

A second underlying issue that can impact IR managers' workload is that faculty and student authors alike often have a limited knowledge of how copyright works, which can deter them from submitting published work to IRs (Repanovici & Barsan 2015; Dawson & Yang, 2016). IR websites compound this effect by tending to provide information on reuse of already deposited items rather than guidance for authors who wish to self-archive (Dawson & Yang, 2016).

Because users downloading items from a repository for their own use are less likely to have direct access to IR managers, it makes sense to provide written documentation to these users. However, this focus means that researchers looking to publish their work in a repository have less information on how to self-archive and will instead contact IR managers to deposit their files. For example, 79% of respondents (28 individual IR administrators) to a 2013 survey stated that "less than 25%, or none, of their material was self-submitted," with IR managers and librarians actively searching out and depositing the material rather than relying on author submissions (Rinehart & Cunningham, 2017, pp. 44–45). Despite this study's small sample size and age, it shows the impact that lack of knowledge about copyright can have on IR managers.

IR managers who find themselves especially affected by mediated deposits may wish to consider offering more direct instruction, creating online resources, or finding other ways to educate their institution's researchers about copyright ownership and self-archiving. Likewise, creating an IR submission agreement that explains possible issues in a clear, common-sense way instead of complicated legal jargon can help clarify researchers' confusion (Rinehart & Cunningham, 2017).

When depositing the work of students—especially graduate students who might go on to publish their work professionally—rather than faculty, IR managers can work with instruction librarians to mix information about publishing and copyright into information-literacy instruction (Keener, 2015).

Third-party materials. Research and scholarship often quotes, analyzes, or comments on the work of other authors and may contain copyrighted material from these third parties. In the case of longer works, such as electronic theses and dissertations (ETDs), journal publishers sometimes allow the inclusion of entire

articles.

If an item that is being deposited contains someone else's work, the researcher must either make a determination of fair use or ask permission from the third party—ideally long before publication. Because researchers are not likely to be copyright experts, IR managers may need to help them make a fair use determination or figure out how best to ask for permission. For cases where reuse is extensive, IR managers should check with the publisher for any policies on reuse of their materials or ensure that the researcher has done so. As with copyright ownership, IR managers may wish to consider collaborating with instruction librarians at their institution to increase student knowledge and reduce workload in the long term.

A lengthy discussion of fair use is beyond the scope of this article. IR managers who require further guidance may consult the Association of Research Libraries' Code of Best Practices in Fair Use for Academic and Research Libraries.[1] Columbia University Libraries' Copyright Advisory Services website has detailed advice on asking copyright holders of published works for permission, including several sample letters.[2] Finally, the "Thinking through Fair Use" tool maintained by the University of Minnesota Libraries can be helpful in determining fair use and educating researchers about fair use as a topic.[3]

Types of Material in the IR

Faculty Research

University faculty are integral members of the academic community; as such they are expected to engage in research, teaching, and service (Fowler, 2017). The first of those responsibilities—research—carries the additional expectation that faculty researchers will share the results of their experiments and investigations. Journal articles, books, book chapters, conference posters, and conference proceedings are methods for sharing that research. Leary, Lundstrom, and Martin (2012) provided a general workflow for adding faculty publications to an IR, which includes the process of copyright clearance.

Listed below are some of the copyright issues that IR managers may encounter when depositing the various types of faculty research into the IR.

Journal articles. IR platforms were originally designed to capture a university's research (e.g., previously published journal articles). Many IR managers rely on SHERPA/RoMEO, an online database that contains information about

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[1] The code can be found on the association's website: https://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf.
[2] Columbia's advice can be found at https://copyright.columbia.edu/basics/permissions-and-licensing.html.
[3] See https://www.lib.umn.edu/copyright/fairthoughts for more information.

journals' copyright and self-archiving policies, when adding these materials to an IR. Each record includes details about embargo periods, required publisher statements (to be included in the archived version of the article), the record's most recent update, links to publisher documentation, and any other policies specific to a journal or publisher.

SHERPA/RoMEO uses a color scheme (green, blue, yellow, white) to help users identify whether a publisher or journal supports self-archiving, and, if it does, which version of an article authors are allowed to archive (SHERPA/RoMEO, n.d., "Definitions and terms"). Green, the least restrictive of the colors, indicates that a publisher allows authors to archive preprint (before peer review) *and* postprint (after peer review but before formatting and typesetting) or the publisher's version of an article; blue indicates that authors can archive the postprint or publisher's version; yellow indicates authors can archive only the preprint version; and white, the most restrictive color, indicates that the publisher does not support self-archiving.

SHERPA/RoMEO is a powerful tool, but it does not always contain up-to-date information and it does not provide information for all publishers and journals. For example, the website lists publishers that allow self-archiving of the publisher's version of an article in an IR (SHERPA/RoMEO, n.d., "Publisher copyright policies"), but the last update appears to have been in November 2015. Likewise, individual journal or publisher records may be outdated. Users should always check the date of last update and refer to the journal or publisher website if necessary. When no information is available and circumstances require it, individual journals or publishers can be contacted directly.

IR managers also need to be aware of the ambiguity some terms on the SHERPA/RoMEO website carry in the broader conversation about scholarly publishing. As Conrad noted, there is no consensus or standard for versioning digital journal articles (2011, p. 20). Indeed, the SHERPA/RoMEO website itself makes a point of mentioning that words like *preprint* and *postprint* are used ambiguously by publishers and that users of the site should not consider its listings legal advice (Sherpa/RoMEO, n.d., "Definitions and terms").

Tools aside, one barrier to self-archiving is that authors often unwittingly transfer all their rights to publishers via copyright transfer agreements (CTAs). The Scholar's Copyright Addendum Engine from Science Commons[4] is one tool authors can use to retain the right to self-archive their work. Authors use the engine to enter their name, the title of the article, and other related information. They also have the option to choose between two different addenda: one created by the Creative Commons and the Scholarly Publishing and Research Coalition (SPARC) and the

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[4] Located at http://scholars.sciencecommons.org/.

other created by authors from Massachusetts Institute of Technology (MIT). The engine then generates an addendum specific to the author's work, which is then attached to the publisher's CTA.

Books and book chapters. Many of the copyright issues around faculty-authored books are similar to those of journal articles, but unfortunately there are no well-developed tools like SHERPA/RoMEO and the Scholar's Copyright Addendum Engine for books. There are, however, at least two different lists that can guide IR managers when considering these materials for deposit in the IR:

1. The List of Compliant Book Publishers—maintained by the Open Access Publishing in European Networks (OAPEN)—includes information about the self-archiving policies of individual publishers.[5]
2. A community-maintained Google spreadsheet that at the time of this writing contained self-archiving information on 150 academic publishers.[6]

Ultimately, just as with journal articles, IR managers or authors should examine the publishing contract and/or copyright transfer agreement received by the authors to determine whether a book chapter or book can be placed in a repository. Some publishers post their OA policies for published books to their websites, but many do not. As with journal articles, it may be necessary to reach out to a book publisher directly to ask about their stance on self-archiving. Although it is unusual for publishers to allow entire books to be archived in an IR, it never hurts to ask.

Conference proceedings. Because conferences handle the publication of presentations in a number of different ways, copyright issues for this type of material will vary. The conference website or proceedings may contain information about the copyright of specific presentations and posters.

Generally speaking, however, one of the following circumstances will be true:

1. The conference publishes proceedings in a journal.
2. The conference publishes proceedings as a stand-alone document.
3. The conference does not publish proceedings.

If a conference publishes its proceedings in a journal, any presentation published will likely follow that journal's policies on self-archiving. IR managers should then follow the same procedures that they do with journal articles.

If a conference publishes stand-alone conference proceedings, checking for copyright can be more complicated. Some conferences, such as those sponsored by the Institute of Electrical and Electronics Engineers (IEEE), require authors to transfer copyright using a copyright transfer agreement (IEEE, 2018, p. 72). Others

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[5] The list can be found at https://oapen.org/content/deposit-publishers-list-compliant-book-publishers.
[6] Find the spreadsheet at
https://docs.google.com/spreadsheets/d/1i44kKzsFS412ugDTt0maanAUqy8LV5Rjj820dVkK9vs/edit#gid=1003624866.

do not. Authors should check their agreements to see what the terms stipulate. If the author did not sign a written copyright transfer agreement for their work, IR staff can assume it is safe to place in the IR.

If a conference does not publish proceedings in any form and if the author did not sign a copyright transfer agreement, then all rights should remain with the author. Most posters presented at a conference will fall into this category because they are not usually published in proceedings. Linde et al. (2011) discussed some of the difficulties involved in self-archiving conference proceedings in more detail, including determination of copyright.

Government funding and works by federal employees. Work produced using funding provided by a federal government grant often carries with it specific requirements about public access (Lawson, Gray, and Mauri, 2016). For example, the National Institutes of Health has a Public Access Policy that requires "all investigators funded by the NIH" to submit "an electronic version of their final peer-reviewed manuscripts" into PubMed Central within 12 months of the date of publication (National Institutes of Health, 2014).

Although, generally speaking, policies like the NIH's increase public access to research, they do not always allow authors to deposit the work in an IR. Lange (2016) noted that journals' author agreements in particular may have policies that comply with government funding requirements but still do not allow self-archiving by authors. As a result, IR managers should still carefully examine publishers' policies as well as the policies and mandates of funding agencies before depositing the results in their local institution's repository.

Work created by federal employees results in a similar situation with different consequences. Some campuses (especially land-grant universities) may house government research institutions where researchers may be federal employees instead of, or as well as, university faculty. In these instances it is worth noting that work created by federal employees within the scope of their employment is in the public domain pursuant to the US Copyright Act (17 U.S.C. § 105). In cases where IR managers are depositing work wholly produced by US federal employees in their official capacity, there is no need to check for copyright ownership.

Conversely, works authored jointly by federal and nonfederal employees require a more thoughtful assessment when considering their eligibility for deposit into the IR. Compilations, where individual works are collected to produce a whole, can often be separated into their distinctive parts, and IR managers should feel free to deposit into the IR any section authored solely by one or more federal employees.

When federal employees coauthor a single work with nonfederal employees, and all parties intentionally create a whole work where individual efforts are not

obvious and/or easily separated out (e.g., journal articles), the work is considered a "joint work" of authorship (17.U.S.C. § 101), with each author sharing equally in the copyright of that work (17.U.S.C. § 201). IR managers, understandably, might question the copyright status of these works. If the federal employee's work cannot receive copyright protection, and if there is no way to distinguish between their work and a non–federal employee's work, does that suggest the work falls directly into the public domain?

If a nonfederal employee is working under a contract or grant with the US government in the previously mentioned situation, the stipulations of the agreement should indicate the copyright status of the resulting publication (CENDI, 2017, Section 4.1). When there are no such provisions, or the nonfederal employee is not working under any arrangement with the US government, copyright ownership is uncertain. In 2017, the Copyright and Intellectual Property Working Group arm of the Commerce, Energy, NASA (National Aeronautics and Space Administration), Defense Information Managers Group (CENDI), a group of scientific and technical information managers from 14 federal research–funding agencies, released "Frequently Asked Questions about Copyright: Issues Affecting the U.S. Government." The FAQ is intended to provide copyright education for librarians, agency staff, and authors, but it left the question about the copyrightability of works coauthored by federal and nonfederal employees largely unanswered. Section 3.2.7 states: "When the U.S. Government is joint author with a non-government entity, the law on how much of the work is protected by copyright is unsettled and is thus open to differing interpretations. In such situations, you should consult your Office of General Counsel" (CENDI, 2017).

Student Scholarship

Unlike the faculty research previously described, scholarly and creative work produced by students is generally not published prior to its deposit in the IR. This makes student work simpler from a copyright perspective. Graduate and undergraduate students who produce research usually own the copyright to their work, meaning they can give permission for deposit and an IR manager does not have to check publisher permissions.

However, there are still a number of issues that can affect the IR manager interested in depositing student work. Those issues include the need for institutional review board (IRB) approval if the research involves human subjects and requires the systematic collection of data about them, as well as consideration of privacy laws like the Family Educational Rights and Privacy Act (FERPA). ETDs and student conference presentations can add further complications.

IRB approval. IRBs provide oversight for all research involving human subjects. If research involves human subjects and requires the systemic collection of

data about those subjects, it must be approved by the IRB prior to the student beginning work. Faculty are familiar with these requirements, but students may not be. When depositing student work that involved human subjects, IR managers should check with the IRB to confirm that the student has gone through the approval process. Over the long term, IR managers can make the process of depositing student work smoother by working closely with their IRB's staff to develop mutually beneficial workflows.

Although a more detailed discussion of IRBs is beyond the scope of this article, additional resources are available online from Public Responsibility in Medicine and Research[7] and the Office for Human Research Protections, a department of the US Department of Health and Human Services.[8]

FERPA. FERPA is a federal statute concerned with the privacy of students' "education records" such as grades and health records (Ramírez & McMillan, 2010). Student work counts as a type of education record, so schools must treat papers, exams, and ETDs as they would any other information subject to FERPA.

LeRoy Rooker, director of the Family Policy Compliance Office in 1993, stated in a letter to the American Library Association that "none of the exceptions [to FERPA] would permit making student theses available to the public, such as in the University Library, without first obtaining written consent from the student. Further, the written consent must specify the records that may be disclosed; state the purpose of the disclosure; and identify the party or class of parties to whom the disclosure may be made" ("Department of Education clarifies access," 1993).

As Callicott, Scherer, and Wesolek pointed out (2015), and as Rooker himself acknowledged, it has long been standard practice for universities to acquire written permission for theses and dissertations ahead of time, either during the submission process or as part of the broader graduate program; historically, this may have been just permission to store printed copies in the library, but in more recent times it has included the publishing and distribution of ETDs in IRs and other online venues.

Other student work, however, may not adhere to the same guidelines, and any IR manager who intends to upload student work should first make sure that the institution has written permission from the student. One option is to build this permission into any IR submission forms filled out by students uploading their work. Librarians at California Polytechnic State University, San Luis Obispo, for example, added a statement to their submission agreement in which students "agree to share their work and waive any privacy rights granted by FERPA or any other law, policy or regulation, with respect to this work, for the purpose of publication" (Ramírez & McMillan, 2010).

Electronic theses and dissertations. Researchers in some disciplines have

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[7] Their website can be found at https://www.primr.org.
[8] See https://www.hhs.gov/ohrp.

expressed fears that publishing ETDs online can affect students' ability to publish books and other works derived from them. For example, in 2013 the Council of the American Historical Association (AHA) adopted a policy that "strongly encourages" libraries to embargo history dissertations "for as many as six years" to protect authors' ability to publish works based on them, arguing that university presses would not consider books based on dissertations that had been disseminated for free online (2013). However, not everyone agrees with such a strong stance. Ryvard (2013) presented a variety of differing opinions, while other contemporaneous research suggested that the impact of prior online publication on a dissertation's publication in book form is an area that is still poorly understood (Ramírez, Dalton, McMillan, Read, & Seamans, 2013; Ramírez et al., 2014). Some authors argue that placing ETDs in an IR actually *increases* a student's chance of future publication, citing several success stories from award-winning ETDs in the Networked Digital Library of Theses and Dissertations whose authors went on to publish books based on their dissertations (Callicott, Scherer, & Wesolek, 2015).

More recently, Rupp-Serrano and Waller, (2018) noted that although students and faculty may express concerns about prior publication of their work, the majority of publishers welcomed revised versions of openly available submissions (pp. 3–4). Additionally, they suggested a 6- to 24-month embargo as sufficient for the purposes of any student actively working on preparing a book version of their dissertation (p. 16). It is also worth noting that there is a history of uncertainty when it comes to whether ETDs are or are not published according to copyright law. Clement and Levine (2011) looked at some of the ways the definition of *published* under the law has changed over time.

Despite a lack of clear agreement in the literature, it is up to the IR manager to make sure that students placing ETDs in IRs are aware of the possible risks and rewards. As with many other student-focused tasks, this can be made easier by providing early education to students about their rights and the institution's expectations as well as working with institutional stakeholders to set clear policies. As Callicott, Scherer, and Wesolek wrote, "graduate students should be made fully aware of an institution's policies on ETDs from the outset—not on the eve of graduation" (2015, p. 52).

Beyond students wanting to ensure that their work can be republished in the future, there have been instances where faculty—or institutions—have tried to claim copyright in graduate students' dissertations and theses (McKiernan, 2012). Even though faculty advisors do provide a significant amount of help to their students in the form of idea generation, guidance, and editorial work, generally none of these activities would bestow joint authorship—or copyright ownership—upon the faculty member. Section 101 of the US Copyright Act (1976) defined joint works of authorship as a "work prepared by two or more authors with the intention that

their contributions be merged into inseparable or interdependent parts of a unitary whole" (17 U.S.C. § 101). Notwithstanding the copyrightability question of typical advisor contributions, the US Court of Appeals for the Second Circuit affirmed that joint authorship hangs, at least partially, on the word "intention." For a work to rise to the level of joint authorship, authors must intend to create an "inseparable and interdependent" whole (17 U.S.C. § 101) "at the time the contribution of each [author] was created" (*Childress v. Taylor*, 1991, para. 23). The court also counseled that "care must be taken to ensure that true collaborators in the creative process are accorded the perquisites of co-authorship and to guard against the risk that a sole author is denied exclusive authorship status simply because another person rendered some form of assistance" (*Childress v. Taylor*, 1991, para. 14).

Furthermore, as previously discussed, a student's relationship with an institution where they are studying is different from that of an employee and employer, and student work does not fall under the work made for hire exception to copyright.

However, students may be unaware of their rights or be unwilling to speak against their faculty advisors or institutions out of fear of their dissertation not being approved. IR managers who have concerns about unethical behavior from faculty advisors, or who are approached by students with such concerns, may find themselves in the position of having to advocate for students' intellectual property rights, or at least having to educate all parties involved about what copyright in a work entails.

For further reading, see McMillan's (2016) discussion of some of the copyright and ownership issues that can affect ETDs as well as discussions by Bergin and Roh (2016) and Macklin (2013) on the use of third-party content in ETDs. For a more general resource, Callicott, Scherer, and Wesolek (2015) provided a detailed overview of how placing ETDs in IRs can affect graduate students and other stakeholders and then offered policy suggestions.

Conference papers, presentations, and posters. When students present at a professional conference, their work should be treated similarly to faculty presentations (see the previous discussion). However, some student presentations may come from student-focused conferences, showcases, or other events run by the institution they attend. These events are not likely to publish presenters' work in any form, and in these cases it may be more appropriate to process deposits into the IR as similar to any other type of student work.

Research Data Sets

Research data is defined by the US Office of Management and Budget (1999) as "the recorded factual material commonly accepted in the scientific community as necessary to validate research findings." When expressed as facts, data do not enjoy

copyright protection and are therefore in the public domain (US Copyright Office, 2017).

The expression of data, however, can be protected if enough creativity has been evidenced in selection and organization to qualify for copyright protection (US Copyright Office, 1997, p. 8). In other words, databases, charts, and graphs created from data may be protected by copyright. One difficulty that IR managers face is the broad definition of *data sets* (Borgman, 2012, p. 1061). The term encompasses a number of different ways of collecting and displaying data and can include works generated by faculty, students, and professional employees of universities. Additionally, data sets can contain items that are themselves protected by copyright (e.g., images, videos, models) and which may belong to third parties, in which case the IR manager needs to consider whether the use of the items constitutes fair use or whether the rightsholder(s) need to be contacted for permission.

Copyright issues surrounding data sets are compounded by the question of ownership. As previously discussed, the work made for hire nature of traditional scholarship is hotly debated. For data sets, a much newer type of research output without the long tradition of institutional practices, there are even fewer answers. Borgman (2012), Simons and Richardson (2013), and Carroll (2015) all discussed the public sharing of research data in greater detail, including some of the intellectual property issues that result.

Ultimately it is incumbent on the IR manager to determine if the person depositing the data set has the right to do so or if permission must be sought from the institution or another party.

Archival Materials

Materials from an institution's archives or special collections can present more complex copyright issues than work created by faculty or students. The uncertainty of copyright ownership, the unpublished nature of many archival materials, and the varying usage stipulations of donor agreements require a studied evaluation before depositing these items into an IR. Although this article does not discuss digitization en masse, IR managers interested in that topic can consult Daigle (2012) and Dryden (2012) for copyright concerns in those cases.

Copyright ownership. Archival and special collections can come from a number of sources and can contain a wide variety of materials, which can complicate the copyright-determination process. If the collections come from the home institution's faculty, staff, students, or administrative units, copyright ownership is likely to reside with either the author or the institution itself. However, if a collection has been donated by an outside party, copyright ownership can be more uncertain. Copyright for items created by the donor will presumably reside with the donor, but donated collections can also include third-party materials whose

copyright ownership might not reside with the person making the donation.

Published versus unpublished materials. Many institutions' archives and special collections include both published and unpublished materials, further complicating copyright evaluation.

The first complication goes to the very definition of publication and what it means for a work to be published. Prior to the Copyright Act of 1976, there was no statutory definition of publication, even though it—and the date and place of publication—plays a considerable role in determining copyright status and term limit (Cotter, 2008; Gerhardt, 2011; Benson, 2019). Nimmer provided a definition for publication based on relevant case law in 1956. His interpretation required a two-step determination process. First, the public had to have the ability to view the work (without restriction) and second, the public also had to have the right to physically own "tangible copies of the work" (1956).

Twenty years later, US copyright law underwent a number of sweeping changes and the resulting Copyright Act of 1976 included a formal definition for publication. Publication was defined as "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display constitutes publication. A public performance or display of a work does not of itself constitute publication" (17.U.S.C. § 101).

A number of legal scholars have since weighed in on the statutory definition, and case law provides insight into courts' opinions about what constitutes publication. Unfortunately, as Cotter stated, "the meaning of publication remains, in many circumstances, fuzzy, despite—or perhaps because of—more than one hundred years of case law" (2008, p. 1770). Defining *publication* is made exponentially more difficult with the addition of the Internet and its ability to instantly disseminate intellectual and creative works. Cotter (2008) bravely attempted to provide a standard definition of publication in "Toward a Functional Definition of Publication in Copyright Law," but he conceded that "a broader or narrower definition of publication may be appropriate, depending on the purpose being served" (2008, p. 1789).

The second complicating aspect of published and unpublished works relates closely to the first. The copyright status of items collected by university archives and special collections is determined by the date and location of a work's publication. Acquiring that information can be just as thorny as determining publication status. Ideally, an academic institution would obtain this information during the acquisition process (Hirtle, Hudson, & Kenyon, 2009), but this may happen less frequently than is optimal for a variety of reasons. In addition, many works lack any rightsholder information that might prove useful in determining their copyright status. These

"orphan" works cause additional copyright challenges.

Peter Hirtle's "Copyright Term and the Public Domain in the United States"[9] is invaluable in determining the typical length of copyright. His coauthored book *Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums* is a must-read for anyone tasked with IR and archives collaborations. IR managers may also consult the "Statement of Best Practices in Fair Use of Collections Containing Orphan Works for Libraries, Archives, and Other Memory Institutions" and the Code of Best Practices in Fair Use for Academic and Research Libraries.

Based on our experience, IR managers may wish to do the following:
1. Start by depositing the "low-hanging fruit" from the archives collection (e.g., university-owned materials, items one has already received permission to deposit), that one knows will not be called into question.
2. Consult with IR managers at other academic institutions, always taking into consideration both institutions' tolerance for risk.
3. Document copyright policies and fair use decisions, making sure to capture the reasoning behind those practices.

Donor agreements. Regardless of the age of archival materials or whether it has been published, IR managers need to be aware of donor agreements and what stipulations the donor may have laid out for the use of materials. Agreements may contain permissions to make works widely available, but they can also contain conditions that are more restrictive than copyright laws (Daigle, 2012, p. 255). For example, a donor agreement might stipulate that all materials (even those clearly in the public domain) be restricted to specific groups or organizations, even if copyright law allows for public domain materials to be released to the public at large. Older agreements may be particularly problematic because they are likely to have been drawn up without considering online distribution.

Oral histories

Oral histories, a subset of archival materials, have an equally complicated copyright history due to questions about their copyrightability and ownership. In addition, IR managers need to be aware of possible concerns around issues of privacy and defamation.

Copyrightability. The question surrounding the copyrightability of oral histories as a single work has been hampered by its relatively recent status as a historical research method and by a lack of statutory guidance and case law (Neuenschwander, 1983; Stephenson, 1987). Past research has attempted to tie oral history copyrightability to litigation around other types of spoken word (e.g.,

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[9] Which can be found at https://copyright.cornell.edu/publicdomain.

conversations, addresses, and speeches). Several researchers claimed oral histories do not enjoy copyright protection based on court rulings (Neuenschwander, 1983; Stephenson, 1987; Rubel, 2007), but even while these authors agree on that one point, they disagree sharply on another.

Neuenschwander (1983) and Stephenson (1987) maintained that the court decision in *Hemingway v. Random House Inc.*, could provide a way forward for future litigation to establish copyright protection for oral histories. Rubel (2007), however, came to the opposite conclusion. Citing both *Hemingway v. Random House Inc.* and *King v. Mister Maestro and the 20th Century Fox Record Corporation*, the author determined that oral histories can be "relatively free of copyright" based on the court's emphasis on intent (Rubel, 2007, p. 174). She suggested that interviewees must declare an intent to "publish their words at some future date" to receive copyright protection (Rubel, 2007, p. 174).

Two years later, in *Copyright and Cultural Institutions*, Hirtle, Hudson, and Kenyon (2009) asserted that an oral history deserves copyright protection because it meets the authorship, originality, and tangible format requirements. Indeed, even Neuenschwander, who earlier argued against oral history copyrightability, suggested in his 2014 book *A Guide to Oral History and the Law* that oral histories *are* copyrightable, equating them with nonfiction.

Copyright ownership. The Oral History Association states that an oral history interview "generally consists of a well-prepared interviewer questioning an interviewee and recording their exchange in audio or video format" (n.d.). Oral histories, then, may consist of up to three separate works, each of which may have one or more copyright owners: the interview itself, the recording of the interview, and the transcript of the recording (Hirtle et al., 2009).

Who owns copyright in the interview seems fairly straightforward. Because the interviewer creates the questions and the interviewee provides the responses, it seems reasonable to assume that each owns copyright for their individual portion. However, various experts have argued over the years that the interview could be seen as a joint work (Eustis, 1976; Stephenson, 1987; Hirtle et al., 2009; Neuenschwander, 2014). "The Compendium of U.S. Copyright Office Practices," an internal guide for employees, provides a more nuanced and definitive view:

> The U.S. Copyright Office will assume that the interviewer and the interviewee own the copyright in their respective questions and responses unless (i) the work is claimed as a joint work, (ii) the applicant provides a transfer statement indicating that the interviewer or the interviewee transferred his or her rights to the copyright claimant, or (iii) the applicant indicates that the interview was created or commissioned as a work made for hire. If the applicant fails to provide a transfer statement or fails to answer the work made for hire question, the registration specialist may communicate

with the applicant if it appears that the interviewee or the interviewer is attempting to register the entire interview instead of registering a claim in his or her contribution to the work (Chapter 700, p. 26).

Section iii of the statement above reminds us that copyright belongs to individuals unless a work is made for hire. This will generally only affect the interviewer's claim to copyright because many oral histories are conducted by employees of cultural heritage institutions, a status unlikely to be shared by interviewees.

According to Hirtle et al. (2009), neither the mechanical recording nor the typical word-for-word transcription of an interview provides the originality or creativity required for copyright protection. However, if significant pre- or postproduction manipulation of the recording equipment and/or the recording itself has been made, or if significant original work was done on a transcript, these elements of the oral history may be eligible for copyright in their own right (Hirtle et al., 2009).

Regardless of the legal status of ownership in an oral history interview and its copyrightability, most experts agree that the easiest way to prevent misunderstandings is to draw up a legal agreement that specifically details authorship and copyright ownership prior to conducting an oral history (Stephenson, 1987; Shopes, 2006; Rubel, 2007; Neuenschwander, 2014). Although drafting such an agreement is likely beyond the scope of an IR manager's employment, they can work with the staff of archives or cultural heritage institutions to ensure that agreements exist and check for them when depositing oral histories—in written, audio, or other formats—into the IR.

Conclusion

As this article shows, copyright and intellectual property ownership are complex issues that are made more challenging in the context of IRs by the diversity of materials that accompany contemporary research. Authors and researchers, despite being the creators of their work, may not always own them and may not be aware of restrictions on their use or their rights to self-archive material. For archival materials bound by donor agreements and likely to contain some third-party material, determining copyright ownership can be even more complicated.

The complexity of copyright as it pertains to research materials means that IR managers often find themselves in the position of making decisions about whether materials can be deposited, even if they lack the formal training to do so. This can be a struggle especially at smaller institutions, where there may not be any other mechanism for guidance or advice on copyright available to faculty authors and researchers. In many cases IR managers may find themselves having to play the role of copyright experts and educators as part of their duties to authors and end-users

alike.

Hopefully the resources provided in this article can ease that burden by a small amount. Additional practical resources that delve into details of copyright for specific types of material would help IR managers make quicker, more informed decisions.

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Appendix: Common Copyright Issues in Institutional Repositories

CONTENT TYPE	COPYRIGHT ISSUES	THINGS TO CONSIDER	MORE INFORMATION
Journal Articles	Authors transfer rights to publishers.	Author can retain rights through an addendum (e.g., Science Commons).	Science Commons Addendum: http://scholars.sciencecommons.org/
	Not all publishers allow self-archiving in IR.	Check self-archiving policies.	SHERPA/RoMEO: http://www.sherpa.ac.uk/romeo/index.php
	Funding agencies require deposit of research products.	Check funding agency article sharing requirements.	Funding agency article sharing: http://researchsharing.sparcopen.org/articles
			Check individual funding agency websites.
	Work by federal employees cannot be copyrighted.	Was author acting within scope of federal employment?	ARL brief on copyright status of federal employees' work: https://www.arl.org/wp-content/uploads/2015/06/copyright-status-of-government-works.pdf
Books and Book Chapters	Authors transfer rights to publishers.	Author can retain rights through an addendum (e.g., Science Commons).	Science Commons Addendum: http://scholars.sciencecommons.org/
	Not all publishers allow self-archiving of book chapters in IR.	Check self-archiving policies.	SHERPA/RoMEO: http://www.sherpa.ac.uk/romeo/index.php
			Self-archiving policies for book chapters: http://osc.cam.ac.uk/monographs/open-access-and-

			monographs/making-book-chapters-available-repositories
	Publishers rarely allow self-archiving of entire books.		Contact publishers directly.
Conference Presentations, Papers, and Posters (Faculty)	Conference presentations and papers may be collected into published journals or proceedings.	Conference proceedings' self-archiving policies often mirror publisher self-archiving policies for journals.	SHERPA/RoMEO: http://www.sherpa.ac.uk/romeo/index.php
			Check individual conference websites.
	Posters generally not published like papers and presentations.	Check with author regarding signing CTA for poster.	
Graduate Electronic Theses and Dissertations (ETDs) **Note: Faculty cannot claim authorship in student work even if they provided ideas, guidance, or minor editorial work.**	ETDs often contain third-party copyrighted works (e.g., quotes, images, charts, proprietary testing instruments).	Generally, integrity of ETD should be maintained.	Code of Best Practices in Fair Use for Academic and Research Libraries.
		Student should conduct fair use analysis.	Fair use checklist: https://research.wou.edu/c.php?g=551289&p=3785417
			Fair use evaluator: http://librarycopyright.net/resources/fairuse/
		Do not attach entire proprietary testing instruments (e.g., Stanford-Binet, MMPI, WISC-V).	
	Use of students' previously published journal articles in ETDs.	Many publishers allow use of students' previously published articles (in their entirety) in the IR.	Consult publishers' author rights information pages (e.g., Elsevier: https://www.elsevier.com/__data/assets/pdf_file/0007/55654/AuthorUserRights.pdf)
	Creative Commons licenses can be attached to ETDs in the IR.	Students often need help making informed decisions about Creative Commons licenses.	Creative Commons licenses: https://creativecommons.org/share-your-work/licensing-types-examples/

Undergraduate Research Note: Undergraduates and their advisors may be unaware of, or less concerned by, copyright issues due to unfamiliarity with IR dissemination practices.	Undergraduate research often contains third-party copyrighted works (e.g., quotes, images, charts).	Undergraduates and their advisors need help making fair use decisions.	Fair use checklist: https://research.wou.edu/c.php?g=551289&p=3785417
			Fair use evaluator: http://librarycopyright.net/resources/fairuse/
	Human subject research needs IRB approval to deposit in the IR.	Contact faculty advisors regarding IRB status of works using human subjects	IRB fundamentals: https://www.hhs.gov/ohrp/education-and-outreach/human-research-protection-program-fundamentals/index.html
	Creative Commons licenses can be attached to undergraduate research in the IR.	Students often need help making informed decisions about Creative Commons licenses.	Creative Commons licenses: https://creativecommons.org/share-your-work/licensing-types-examples/
Conference Papers, Presentations, and Posters (Students) Note: This information relates to conference papers, presentations, and posters held on campus by the parent institution. For works presented at professional conferences, see Conference Presentations, Papers, and Posters (Faculty)	Research often contains third-party copyrighted works (e.g., quotes, images, charts, proprietary testing instruments).	Students and their advisors need help making fair use decisions.	Fair use checklist: https://wou.libapps.com/libguides/admin_c.php?g=551289&p=3785417
			Fair use evaluator: http://librarycopyright.net/resources/fairuse/
	Human subject research needs IRB approval to deposit in the IR; undergraduate research might not have IRB approval.	Contact faculty advisors regarding IRB status of works using human subjects; include IRB approval in IR (consider "hiding" the file).	IRB fundamentals: https://www.hhs.gov/ohrp/education-and-outreach/human-research-protection-program-fundamentals/index.html
	Creative Commons licenses can be attached to student work in the IR.	Students often need help making informed decisions about Creative Commons licenses.	Creative Commons licenses: https://creativecommons.org/share-your-work/licensing-types-examples/

Data Sets	Data ownership—who owns the data?	Universities formalizing data ownership/copyright policies.	Check institutional policies—Technology Transfer Office
	Data is not copyrightable, but its expression might be.	Underlying data (facts) cannot be copyrighted; databases can have thin copyright protection.	Creative Commons data page: https://wiki.creativecommons.org/wiki/Data#Which_components_of_databases_are_protected_by_copyright.3F
	Data reuse.	Licensing.	Creative Commons CC0 license: https://creativecommons.org/share-your-work/public-domain/cc0/
			Open data licenses: https://opendatacommons.org/licenses/
	Privacy issues.	Data may be in public domain, but privacy concerns may require data to remain hidden.	Health information privacy for research: https://www.hhs.gov/hipaa/for-professionals/special-topics/research/index.html
Archival Materials	Copyright ownership.	Physical ownership doesn't necessarily confer copyright ownership.	
	Published versus unpublished.	Publication status affects copyright duration.	Copyright term and the public domain in the United States: https://copyright.cornell.edu/publicdomain
	Donor agreements.	May be more restrictive than copyright law and/or institutional copyright policy.	

	Mass digitization projects.	Conduct a risk analysis; document copyright determination.	Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums: https://ecommons.cornell.edu/handle/1813/14142
	Standardized rights statements.	Provide information for users detailing what can and cannot be done with an item.	Rights in digital collections: Applying standardized and free-text rights statements: https://www.orbiscascade.org/rights-in-digital-collections/
Oral Histories	Copyright ownership 1. Interviewer 2. Interviewee 3. Script writer 4. Sound recording	Obtain permission from all participants. Transcripts generally aren't copyrightable—word-for-word copy of interview is not original content.	Case study 1: Interviews and oral histories, pp. 215–225, in Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums: https://ecommons.cornell.edu/bitstream/handle/1813/14142/Hirtle-Copyright_final_RGB_lowres-cover1.pdf?sequence=2&isAllowed=y
	Privacy issues.	Consider privacy of interviewee and/or anyone discussed in the interview. Could anything be considered defamatory?	Right of privacy & defamation, pp. 180–185, in Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums: https://ecommons.cornell.edu/bitstream/handle/1813/14142/Hi

		rtle-Copyright_final_RGB_lowres-cover1.pdf?sequence=2&isAllowed=y
	Release forms.	Oral history release forms often ask interviewees to sign away some or all of their rights.	Who owns oral history? A Creative Commons solution: http://ohda.matrix.msu.edu/2012/06/a-creative-commons-solution/
			Oral history release forms: https://www.lib.umich.edu/copyright/oral-history-release-forms
		Make sure interviewee understands openness of IR.	