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Copyright and Institutional Repositories

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Copyright and Institutional Repositories

Lisa A. Macklin

The application of copyright law to content in institutional repositories (IRs) is often a challenge for faculty and students who author works they want to deposit in institutional repositories, as well as for the librarians who manage them. Since most, if not all, of the works in an institutional repository are protected by copyright, successfully managing copyright issues is essential to populating a repository with content. In a 2008 study entitled *Identifying Factors of Success in CIC Institutional Repository Development*, copyright clearance is identified as a significant factor hampering institutional repository success for both faculty and IR managers.¹ An understanding of copyright law and methods for managing rights can provide a foundation for any librarian navigating rights questions for works in IRs.

Copyright: An Overview

In the United States, copyright protection is established in Article I, Section 8 of the Constitution that provides for Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Under this provision, Congress enacted the Copyright Act of 1976 and subsequent amendments, 17 U.S.C § 101 et seq. 17 U.S.C. § 102(a) provides copyright protection to the following original works of authorship fixed in a tangible medium of expression:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.²

Important concepts included in 17 U.S.C. § 102(a) are the requirements for originality and for fixity. In order to be original, a work must have a minimal degree of creativity and must not have been merely copied. A work is “fixed” under 17 U.S.C. § 101 when it “is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”³ Whenever fingers touch a keyboard, pen is put to paper, or paintbrush to canvas, a work is fixed. Websites and other digital media are also fixed.

Copyright protection attaches automatically from the moment of creation of these original works of authorship fixed in a tangible medium of expression. Although in the past U.S. Copyright Law has required a copyright notice (the copyright symbol © often seen) and also copyright registration with the Copyright Office, neither of these are current requirements. Therefore, one cannot rely on finding a copyright notice on a work to know that it is protected by copyright. The public availability of a work on the Internet doesn’t mean that the work is not protected by copyright. It is best to presume that a work is protected by copyright unless there is reason to believe otherwise.

The automatic copyright protection an author or creator receives includes a bundle of exclusive rights that no one else may exercise without the author’s consent. These rights in 17 U.S.C. § 106 include:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.⁴

These exclusive rights are quite broad, and remain with authors or their heirs until they assign some or all of these rights to another. Currently, the term of copyright is life of the author plus seventy years.⁵ If the work is a “work made

for hire,” made by employees within the scope of their employment or as independent contractors as part of the contract, or the work had an anonymous or pseudonymous author, then the copyright term is 95 years from publication or 120 years from creation, whichever comes first.⁶

When copyright expires, the work enters the public domain, and can be used by anyone for any purpose. In the United States, works published in the U.S. prior to 1923 are in the public domain. Works published in the U.S. from 1923 to 1989 may be in the public domain if the previously required formalities of copyright notice and registration were not properly followed. For unpublished works, the work enters the public domain 70 years after the author’s death. Also, 17 U.S.C. § 105 specifically does not allow copyright protection for any work of the U.S. Government. A work of the U.S. Government is defined as “a work prepared by an officer or employee of the United States Government as part of that person’s official duties.”⁷ There are documents in library government document collections, such as Congressional Hearings and reports by independent contractors, which do not meet the criteria of being a U.S. government work and therefore are not in the public domain under U.S. Copyright Law. In addition, works by state governments, foreign governments, or non-government organizations do not fall under the definition of a work of the U.S. Government and therefore are not automatically in the public domain. Determining if a work is in the public domain can be difficult, often requiring some research if it is not obvious the work was published in the U.S. prior to 1923 or is a work of the U.S. Government. A recommended resource for determining if works may be in the public domain is Peter Hirtle’s chart *Copyright Term and the Public Domain in the United States*.⁸

Works where the copyright owner cannot be determined, or if known, cannot be located, are referred to as orphan works.⁹ These works still have copyright protection and cannot be freely used as though they are in the public domain, even though a copyright owner cannot be contacted for permission. The two attempts at a legislative solution in 2006 and 2008 did not result in an amendment to U.S. Copyright Law, and at the end of 2012 the U.S. Copyright Office issued a Notice of Inquiry asking for comments on the current state of orphan works in the U.S.¹⁰ In the absence of changes to U.S. Copyright Law specifically addressing potential uses for orphan works, many are relying on fair use to make use of orphan works.

Although many of the works scholars use routinely in research and publication are protected by copyright, not everything has copyright protection. Works that lack the requirement of originality, or a minimal degree of creativity, are not protected by copyright under U.S. Copyright Law. This can include

facts and data. Also, copyright protects expression of ideas, but not the ideas themselves. Therefore the archetypical story idea of good versus evil is not protected by copyright, but the written expressions telling this story in its many versions are protected by copyright.

Finally, U.S. Copyright Law grants exclusive rights to creators in 17 U.S.C. § 106, and provides exceptions to those exclusive rights in 17 U.S.C. § 107–121. The fair use exception codified in 17 U.S.C. § 107 is the most important and regularly used copyright exception in education. If a library is the heart of a university, then fair use is the lifeblood. Under the fair use doctrine in § 107, use “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”¹¹ It is the exercise of fair use that promotes the creation of new knowledge and scholarship.

While fair use is undoubtedly one of the most important exceptions in copyright law for education, it can also be difficult to apply. Fair use is a four factor balancing test, meaning that no one factor is determinative in a fair use assessment, and there are no bright line rules. The four factors in § 107 are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.¹²

As a balancing test, not every nonprofit educational use is necessarily a fair use. While nonprofit educational uses are favored, the other three factors must also be considered, and each determination of fair use is a separate fact-based analysis. In recent years, the fourth factor of impact on the market has been given greater emphasis by the courts, but this factor is also not determinative of the outcome of a fair use analysis. In addition, the application of the four factor balancing test is appropriate for published and unpublished works; “[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”¹³ The application of fair use to works in institutional repositories is considered later in this chapter.

Copyright and Authors

Since copyright protection begins at the moment of creation, authors are the copyright owners of their work until and unless they transfer their rights under copyright to another. Copyrights can be sold or given away, in whole or in part. Under U.S. Copyright Law, in order for authors to transfer their copyright or grant another an exclusive license to use their work, there must be a document signed by the copyright owner.¹⁴

Academic publishers have traditionally required a transfer of all copyrights from the author in order to publish an article or book. These transfers are sometimes called copyright transfer agreements, author agreements, or a book contract. Many academic authors sign journal agreements without reading and fully understanding the implications of the terms. A 2004 survey by Ian Rowlands, Dave Nicholas, and Paul Huntingdon of nearly four thousand researchers in 97 countries found that “[o]nly 13 percent said that they took a ‘detailed interest’ in the small print of the copyright agreement when they published their last article and, significantly, nearly half of all authors, 46 percent, admitted that they took no interest at all.”¹⁵ Alma Swan and Sheridan Brown surveyed 1,296 respondents in 2005 on self-archiving their scholarship. Since copyright is perceived as a barrier to self-archiving, they asked authors several questions about copyright, including who retains the copyright to the last article they self-archived. More than a third (35 percent) said they retained the copyright, 37 percent said it remained with the publisher, and 6 percent said that it remained with another party (their employer, for example).¹⁶

Many academic authors do not understand that as the author they are the copyright owner of their work, or that a publisher can publish their work without a transfer of all of their rights under copyright. This lack of full understanding on the part of academic authors can be an opportunity for librarians to provide copyright information to authors at their university in order for these authors to become better stewards of their own copyrights, including the ability to self-archive their work in an institutional repository.

However, the traditional approach of academic journal publishers to require full transfer of copyright with no retention of rights by the author is changing in the U.S. In this author’s opinion, two factors have helped precipitate this change. First, the National Institutes of Health (NIH) Public Access Policy, which went into effect on April 7, 2008, “requires scientists to submit final peer-reviewed journal manuscripts that arise from NIH funds to the digital archive PubMed Central *upon acceptance for publication*. To help advance science and improve human health, the Policy requires that these papers are accessible to the public on PubMed Central no later than twelve months after

publication.”¹⁷ For NIH-funded authors, copyright policies of journal publishers must be addressed in order to ensure the authors are in compliance with the NIH Public Access Policy, or they risk losing future funding from the NIH.

Second, some open access journal publishers have not followed the traditional model of copyright transfer for their authors, instead providing for authors to retain their copyright and publish with a Creative Commons license (more on Creative Commons licenses later in this chapter). For example, as of this writing, BioMedCentral (BMC) includes in its “Reasons to Publish” page for authors the inducement that authors retain copyright, and license the article under a Creative Commons license.¹⁸ BMC is only one example, and many other open access journal publishers also allow authors to retain copyright and to publish their articles under a Creative Commons License because this approach is more in keeping with the sharing philosophy of open access.

Since many journal publishers are international, it is worth noting that policies of European funders and government initiatives have also had an impact on evolving publisher practices regarding copyright and author re-use of their own work, including depositing in an institutional repository. However, a full discussion of international open access initiatives and the possible impact on journal publisher policies is outside the scope of this chapter.

For books, academic authors are often presented with a longer contract that includes a copyright transfer clause, as well as royalties, permissions, indexing, and other clauses not typically found in a journal author agreement. In general, academic authors are often more willing to read and negotiate a book contract than a contract for a journal article due to the extensive work and effort required to author a book and the possibility of receiving royalties. A book is not a publication that academic authors give away in the same way as journal articles, for which publishers seldom are willing to pay royalties. However, the academic author’s success in negotiating to retain rights to deposit a portion or the entire book in an institutional repository can vary greatly by publisher. In a 2010 article, Melissa Levine outlined an approach to seek permission from academic authors to include their books in HathiTrust where the copyright that had been transferred to the publisher had reverted back to the author. The Copyright Office of the University of Michigan Library will also assist authors in understanding their book contracts.¹⁹ Although HathiTrust is not an institutional repository, IR managers could use this approach to solicit content for their IR.

While the academic publishing landscape continues to shift, and the options for authors continue to expand, managing copyright for published papers submitted to an institutional repository is an ongoing challenge.

Copyright and Published Works in Repositories

Both the NIH Public Access Policy and the growth of open access journals have helped raise awareness among academic authors that a transfer of copyright is not a requirement for journal publication. However, many academic authors still do not negotiate their author agreements for articles. Some publishers also discourage authors from negotiating by stating on the author agreement that the terms cannot be modified or changed. Libraries have engaged in several strategies to assist authors in retaining their rights under copyright and in facilitating broad distribution of scholarship.

Many libraries will encourage faculty to negotiate and amend their journal author agreements to include rights to self-archive their articles. In 2006, the Scholarly Publishing and Academic Resources Coalition (SPARC) started an initiative to encourage academic authors to retain their rights under copyright (www.arl.org/sparc/author/addendum.shtml). Included in this effort is the SPARC Author Addendum specifically designed to be attached to a publisher author agreement as an addendum to the terms of the agreement. This addendum retains the following rights for the author:

Author retains: (i) the rights to reproduce, to distribute, to publicly perform, and to publicly display the Article in any medium for noncommercial purposes; (ii) the right to prepare derivative works from the Article; and (iii) the right to authorize others to make any non-commercial use of the Article so long as Author receives credit as author and the journal in which the Article has been published is cited as the source of first publication of the Article. For example, Author may make and distribute copies in the course of teaching and research and may post the Article on personal or institutional Web sites and in other open-access digital repositories.²⁰

Some libraries have modified the SPARC Author Addendum to include additional terms, such as compliance with the NIH Public Access Policy implemented in 2008. One example is the Massachusetts Institute of Technology (MIT) which offers an MIT specific author addendum for their authors as part of their repository services.²¹ Although a publisher may or may not accept an author addendum, authors asking questions of a publisher and articulating their needs under copyright encourages publishers to consider more author friendly copyright policies.

Another approach is to review the curriculum vitas of faculty members in

order to determine publications that may be eligible for deposit in the institutional repository and then deposit the work on behalf of the faculty member. Many IR managers will use SHERPA/RoMEO, based at the University of Nottingham, for journal publisher copyright policies (book publishers are not included). The SHERPA/RoMEO database (www.sherpa.ac.uk/romeo.php) has, as of this writing, recorded the publishers' default policies for 1,184 publishers. These are the default policies of publishers and do not reflect individual agreements. In a 2009 survey conducted by Ann Hanlon and Marisa Ramirez, "respondents reported that librarians and library staff were the parties most likely to engage in copyright clearance activities for IRs."²² It is also possible for the library to request permission on behalf of their faculty to deposit articles in the IR in much the same way that University of Michigan gets permission from authors to include books in HathiTrust. This can be a time consuming process, but the Emory University Libraries have had some success receiving permission from publishers to include older articles authored by its faculty in the university's institutional repository. However, this time-consuming process is not a scalable approach for all libraries or for all older articles authored by faculty.

In institutions where an adopted open access policy grants a prior license to the institution which precedes the author's grant to the publisher, the library may choose other approaches to include faculty authored articles covered by the policy in the institutional repository. These open access policies are often called opt-out policies because faculty authors must request a waiver, or opt-out, of the application of the policy for a particular article they choose not to include in the institutional repository. A fuller discussion of open access policies is included in the preceding chapter of this book *Implementing Open Access Policies Using Institutional Repositories*. With regard to copyright, the advent of the assertion of a prior license exercised by the institution is relatively new. The first such policy in the U.S. was passed by the Faculty of Arts and Sciences of Harvard University in February 2008.²³ This approach of an opt-out open access policy has subsequently been adopted by MIT, University of Kansas, Oberlin College, Duke University, Rollins College, Princeton University, Bucknell University, Utah State University, University of California at San Francisco and others.

As a matter of copyright law and institutional repositories, a university asserting a prior license for faculty-authored articles has not been tried in the courts. Eric Priest, Assistant Professor at University of Oregon School of Law, explores copyright questions raised by opt-out open access policies, which he refers to as permission mandates, in his 2012 article "Copyright and the Harvard Open Access Mandate." Specifically, Priest analyzed whether the faculty author is the copyright owner of the article under work made for hire rules in

copyright law, whether an opt-out policy or permission mandate vests non-exclusive licenses in the institution for scholarly articles authored by its faculty, and whether these prior licenses survive after the faculty author transfers copyright to the publisher. He concludes that “scholars should be deemed authors of their works, and permission mandates create in universities effective, durable nonexclusive licenses to archive and distribute faculty scholarship and permit the university to license others to do the same.”²⁴ While this analysis by a law professor is not legal advice, it does provide universities with opt-out open access policies an analysis of the legal issues that may inform the university’s implementation of their open access policy for depositing content in the institutional repository.

For institutions without an opt-out open access policy, the library will often seek to encourage deposit of content in the institutional repository by facilitating self-deposit of content. A concern often expressed by faculty is how much time it will take to deposit their work in the repository in order to self-archive. The time estimate to self-archive an article given by Steven Harnad is ten minutes.²⁵ When designing the institutional repository of faculty articles at Emory, named OpenEmory, the staff specifically aimed to use a limited number of required fields, auto-fill where appropriate, and include automatic look up of other Emory faculty who are co-authors of the article being deposited. In addition, for copyright compliance, the SHERPA/RoMEO API was implemented within the webform being completed by the depositor. See figures 1 and 2.

The intent of this workflow is to facilitate deposit, whether self-deposit by the faculty member or mediated deposit by the library, while also promoting compliance with publisher copyright policies. By providing information from the SHERPA/RoMEO database without requiring any additional steps or look up by faculty or staff doing article deposits, copyright information is integrated into the deposit workflow. Others have also integrated SHERPA/RoMEO into IR software to improve workflows. The BibApp software, developed by the University of Illinois and the University of Wisconsin, facilitates promoting and archiving university research and also includes functionality to do a look up in SHERPA/RoMEO from within the application.²⁶

The successful identification and application of publisher copyright policies is essential to building a repository of faculty authored articles. In 2012, David R. Hansen completed an analysis of author rights data through SHERPA/RoMEO for articles published in 2011 by researchers at five major U.S. research universities. Of 29,322 articles included in the study, he determined that for 8,456 articles (or 28.83%), the final .PDF of the article could be publicly archived; for 25,788 articles (or 87.95%), the post-print of the article could be

Publication Information		Publication Date:	
Journal Title *	<input type="text" value="Epigenomics"/>	Day	<input type="text" value=""/>
Publisher *	<input type="text" value="Future Medicine"/>	Month	<input type="text" value="10"/>
Volume #	<input type="text" value="2"/>	Year *	<input type="text" value="2010"/>
Issue #	<input type="text" value="5"/>	Page Range	
Version *	<input type="text" value="Post-print: ."/>	Start	<input type="text" value="657"/>
	<input type="text" value="Archiving restricted"/>	to	End
		<input type="text" value="669"/>	<input type="text" value=""/>
Publisher Restrictions		Language	<input type="text" value="English"/>
Permission must be sought		Embargo duration	<input type="text" value="no embargo"/>
3 months on a personal website			
12 months on institutional and not-for-profit subject servers			

Figure 1. OpenEmory article deposit webform. The SHERPA/RoMEO API integrates publisher copyright policies for self-archiving into submission process.

Publisher copyright policies & self-archiving

En

One journal found when searched for: **epigenomics**

Journal:	Epigenomics (ISSN: 1750-1911, ESSN: 1750-192X)
RoMEO:	This is a RoMEO yellow journal
Paid OA:	A paid open access option is available for this journal.
Author's Pre-print:	 author can archive pre-print (ie pre-refereeing)
Author's Post-print:	 subject to Restrictions below , author can archive post-print (ie final draft post-refereeing)
Restrictions:	<ul style="list-style-type: none"> • Permission must be sought • 3 months on a personal website • 12 months on institutional and not-for-profit subject servers
Publisher's Version/PDF:	— archiving status unknown
General Conditions:	<ul style="list-style-type: none"> • On authors own website or their institution's or funding body's online repository or archive • On a non-profit server
Mandated OA:	(Awaiting information)
Paid Open Access:	Open Access Option
Copyright:	Policy
Updated:	08-Apr-2011 - Suggest an update for this record
Link to this page:	http://www.sherpa.ac.uk/romeo/issn/1750-1911/
Published by:	Future Medicine - <i>Yellow Policies in RoMEO</i>
	<p>This summary is for the journal's default policies, and changes or exceptions can often be negotiated by authors. <i>All information is correct to the best of our knowledge but should not be relied upon for legal advice.</i></p>

Figure 2. Screen shot from SHERPA/RoMEO database for the journal Epigenomics.

publicly archived; and for 22,359 (or 76.25%), the preprint of the article could be publicly archived.²⁷ This study, based on citation data from Thomson Reuter's Web of Science, does indicate that a version of the majority of science articles published by U.S. academic authors can be included in institutional repositories. It is fairly certain that a similar survey of humanities and social sciences citations would have different results, but the challenge remains to capture and make available appropriate versions of faculty authored articles in institutional repositories where publisher policies already allow deposit of a version of the article.

Another approach being used by libraries to negotiate rights to deposit faculty works in institutional repositories is including author rights language in library content licenses. In April 2010, the Association of Research Libraries issued Author Rights Model License Language in an article authored by Ivy Anderson. This model language is intended to facilitate the broad-based implementation of making scholarly content more widely accessible.²⁸ This approach of negotiating faculty author rights with publishers as part of negotiations for library content is still relatively new, and success will be dependent on willingness by libraries to engage in these negotiations and agreement by publishers to accept these terms.

Copyright and Third Party Content in Published Works

In addition to questions regarding the right to deposit works in the institutional repository, there can also be copyright questions regarding third party content included in the work but not created by the author. For example, images not created by the author are often included in books and journal articles. When an academic author publishes an article or book, the publisher typically requires that the author seek permission to include the third party content in the publication, as well as pay any permission fees.

For works deposited in an institutional repository, the permission to publish the third party content most often extends to distribution in the institutional repository. However, if the permission received for the third party content was only for distribution in a print book or journal, questions may arise if that permission is sufficient to also distribute the work electronically in an open access institutional repository. This question most frequently arises with images that are used as an essential part of the scholarship in the visual arts and art history. Copyright owners, such as professional photographers and others

who sell copies of their images, may be reluctant to have their images freely distributed on the web in an institutional repository. Since faculty in the visual arts and art history are often very cognizant of copyright issues as a part of engaging in their scholarship, their expertise and knowledge of the permissions they sought may be relied upon to determine if it is appropriate to distribute a journal article or book chapter in an institutional repository.

Also, the inclusion of the third party copyrighted content in deposits in the IR may be a fair use. Multiple court cases have held that even denial of permission by a copyright owner does not foreclose the exercise of fair use. A consideration of the extent of fair use for content in repositories was raised in the *Code of Best Practices in Fair Use for Academic and Research Libraries*. Published in January 2012, the Code was created by interviewing sixty-five librarians from academic institutions in the U.S., and its purpose is to “enhance the ability of librarians to rely on fair use.”²⁹ In the Code, Principle Six addresses “Maintaining the Integrity of Works Deposited in Institutional Repositories” and states:

It is a fair use for a library to receive material for its institutional repository, and make deposited works publicly available in unredacted form, including items that contain copyrighted material that is included on the basis of fair use.³⁰

In addition to this principle, the Code recommends having an easy way for copyright owners to register objections to materials in the IR, depositing authors should be informed of the nature and scope of fair use, and full attribution should be given for all incorporated third party content. As additional enhancements, the Code recommends adopting a clear institutional policy for fair use of third party content and providing individualized advice on the application of fair use to the university community.³¹ It is appropriate to establish an institutional policy for distribution of third party copyrighted content in an institutional repository, and the Code can provide useful discussion points to share with university General Counsel and administrators in developing such a policy.

Copyright and Unpublished Works

The scope of many institutional repositories includes unpublished works. The most often deposited unpublished works are Electronic Theses and Dissertations (ETDs). ETDs are generally not considered publications in the same way as a journal article or a book, but there can be copyright questions and concerns when ingesting ETDs into an IR. Under most intellectual property poli-

cies at U.S. universities, while the academic advisor and the committee may serve as editors and mentors for the student, the student author is considered the copyright owner of his or her ETD. Therefore, although the institution may require deposit of the ETD in the institutional repository as a condition of granting the degree being sought, the institution must still have copyright permission from the student to distribute and display the ETD through an institutional repository. At Emory, the following language is used to obtain that permission from the student:

Part 1 - Author Agreement:

I hereby grant to Emory University and its agents the non-exclusive license to archive, make accessible, and display, subject to the conditions specified below in Part 3, my thesis or dissertation in whole or in part in all forms of media, now or hereafter known, including the display of the thesis or dissertation on the world wide web. I retain all ownership rights to the copyright of the thesis or dissertation. I also retain the right to use in future works (such as articles or books) all or part of this thesis or dissertation. I certify that my electronic submission is the version of my thesis/dissertation that was approved by my committee.³²

The reference to conditions specified in Part 3 refers to the election of an embargo period for the ETD. This portion of the ETD Submission Form is offered as one example of language for copyright permission on the submission of ETDs by students, and is not intended to be definitive language or legal advice. Each institution may have somewhat different language for ETD submission, and it is always advisable to consult with the institution's General Counsel when considering legal language that grants rights to the institution.

As the above ETD Submission Form language indicates, one question that students frequently have is whether depositing their ETD in an institutional repository will prevent the publication of their ETD as a book or chapters from their ETD as journal articles. In 2011, a study to investigate ETDs as prior publications was conducted. In the study, seventy-five journal editors and fifty-three university press directors responded to the survey, and only 4 percent indicated they would never consider submissions of works that were previously distributed as ETDs.³³ This is welcome news for graduate students who want to leverage the research that resulted in their ETD into future publications. The grant of copyright permission for distribution of the ETD by their degree granting institution should not preclude the alumni who authored the ETD from transferring or otherwise exploiting their copyright in future publications.

A related copyright question for ETDs is whether the final published version of journal articles authored by graduate students may be included as chapters in their ETD. As nascent scholars, graduate students seldom consider the implications of transferring copyright to a publisher for content they later will distribute as part of their ETD in an institutional repository. While SHERPA/RoMEO is a resource for determining publisher policies for including articles in an institutional repository, it does not include policies for including the same published articles within an ETD. In this author's experience, publishers have more liberal policies regarding distribution of the final published version of an article within an author's ETD, even an ETD that is distributed open access in an institutional repository. If graduate students do not have a copy of their author agreement, contacting the publisher directly or seeking permission through the Copyright Clearance Center can be successful approaches to getting no-cost permission to include the final published version of an article within an ETD where the publisher is the copyright owner.

Other examples of unpublished works within the scope of some institutional repositories include slide presentations, the texts of presentations that are not published in conference proceedings, learning objects, and other content sometimes referred to as grey literature or even ephemera. As discussed above, under most institutional copyright policies, the author owns the copyright in these works. Since these works are unpublished, a grant of rights from the author is all that is required to distribute the works in the repository. Again, this grant of rights ideally should not preclude the authors from distributing or publishing these works in any way they may choose in the future.

Copyright and Third-party Content in Unpublished Works

Copyright questions also arise for third-party content included in ETDs. ProQuest, which publishes Dissertation Abstracts International and sells copies of theses and dissertations, has issued a Copyright Guide which provides guidance on the scope of fair use and re-use of third party copyrighted content in theses and dissertations. In this Copyright Guide, ProQuest includes a sample permission letter and a list of kinds of materials for which they expect to see a permission letter, the responsibility for which is placed on the student.³⁴ Also, in 2000 Kenneth D. Crews wrote a more extensive publication, "Copyright Law & Graduate Research: New Media, New Rights, and Your New Dissertation," which is also available from ProQuest and includes more extensive copyright information.³⁵

In the late 1990s and early 2000s, as libraries began developing institutional repositories that included ETDs, some adopted the guidance provided by ProQuest either implicitly or explicitly in their copyright advice to graduate students. More recently, the *Code of Best Practices in Fair Use for Academic and Research Libraries* includes a principle on the fair use of third party copyrighted content in institutional repositories. This principle in the code, discussed earlier, applies to all content in repositories and specifically mentions ETDs.

The Visual Resources Association (VRA), which has endorsed the code, also authored a *Statement on the Fair Use of Images for Teaching, Research and Study*; it too includes a principle on fair use of images in theses and dissertations. The VRA Statement encourages the inclusion of images in theses and dissertations if the images are the subject of commentary by the student, incorporated at a size needed to support the scholarly argument, properly attributed, and distributed in a way that is consistent with academic practices, including online distribution.³⁶ Although the VRA Statement focuses only on images in electronic theses and dissertations, images often raise copyright questions and concerns, and the VRA Statement and the Code of Best Practices taken together provide a solid overview of fair use for institutional repositories. Although determining institutional policy and copyright risk must occur at each institution, the code and the statement provide a solid foundation on which to have discussions with university general counsel and administrators and formulate a local policy.

Re-use of Works in IRs

Although much of the focus of IR managers is naturally on the copyright challenges for depositing content, some consideration should be given to the copyright status and re-use of the content deposited. Institutional repository managers should be aware that some users equate open access, or free access, with free re-use rights. While this is the ideal of open access, in reality much of the content in most institutional repositories is protected by copyright, and there are multiple copyright owners. The potential copyright owners include alumni, faculty, the institution, and publishers. It is a good practice to include on the public pages of the IR a notice about copyright protection for the content included therein, and information on re-use.

In addition, for works that were published with a Creative Commons (CC) license, a good practice is to include this CC license information in the institutional repository. Creative Commons licenses provide the copyright owners, who receive the entire bundle of rights under copyright regardless of whether they want to exercise those rights, with the option to select a CC license that

publicly gives others the right to share, use, or build upon a work of the author. The Creative Commons website (www.creativecommons.org) gives a breakdown of the various licenses and tools to select and apply CC licenses. Since some open access publishers have adopted CC licenses for the works they publish as a way to facilitate greater sharing of these works, it behooves institutional repositories to make the CC licenses explicitly known for these works if these works are included in the IR.

For unpublished works where authors have not transferred copyright to another, such as ETDs, the institutional repository can choose to give those authors the option of assigning a Creative Commons license to their work in the IR. As with all matters of copyright, it is ideal for the authors to understand the nature of CC licenses and to make an informed decision regarding whether a CC license is appropriate, and if so, which CC license best meets their long-term intentions regarding the re-use of the works.

Conclusion

The need for libraries to explore various methods and approaches to address copyright issues and increase the number of works in their institutional repositories is vital if IRs are to be robust representations of an institution's intellectual output. While copyright provides challenges for faculty and students depositing works in an IR, and for the IR manager, there are also opportunities. Recruiting content for the IR provides an opportunity to discuss copyright with faculty and students in relation to their scholarship, thereby building a better understanding among these authors of their rights under copyright and their options with open access publishing and distribution. It also provides an opportunity to discuss and encourage the appropriate exercise of fair use. However, to fully realize the potential of institutional repositories as a means to preserve and openly distribute the intellectual output of the university, advocacy for author friendly publisher copyright policies, open access mandates from funding agencies, the exercise of fair use, and improved tools for repository workflows must continue. It is possible, although not always easy, to navigate copyright issues for institutional repository success.

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