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Digitize Your Yearbooks: Creating Digital Access While Considering Student Privacy and Other Legal Issues

April K. Anderson-Zorn
Illinois State University, aander2@ilstu.edu

Dallas Long
Illinois State University, dlong@ilstu.edu

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DIGITIZE YOUR YEARBOOKS: CREATING DIGITAL ACCESS WHILE CONSIDERING STUDENT PRIVACY AND OTHER LEGAL ISSUES

These “Annuals” satisfy a desire, fill a place in the life of the student and teacher alike, which nothing else can do. The perusal of these books calls to the mind of the student those weary midnight hours in which lessons hard and long, questions complicated and perplexing, have “murdered sleep”; and, with the remembrance of those seemingly unfortunate hours, come thoughts of the pleasant associations, acquaintance, comical experiences, and lasting impression with which the student’s life is blest.

—Illinois State University, *The Index*, 1892

Initiatives to scan student yearbooks and make them digitally accessible for users are not new. In 2010, digital identity company Classmates.com launched an endeavor to digitize more than 100,000 high school yearbooks within three years as a paid subscription service.¹ More recently, genealogy companies such as Ancestry and MyHeritage sought out donated yearbooks and made indexed digital yearbooks available to subscribed users.² However, archives and libraries have been slow to digitize their collections of school yearbooks and make these resources available to their users for free. Lack of funding, staffing, or other resources are often cited as significant barriers to the digitization of local materials, but student yearbooks present other challenges too. Student yearbooks are often created by multiple contributors, including professional photographers hired by schools and institutions of higher education. Because of this, content may be protected by complicated copyrights and contractual agreements. Student privacy may also be a significant barrier to digitization if the yearbooks are subject to privacy laws such as the Family Educational Rights Privacy Act (FERPA). This may be especially true for yearbooks produced by K–12 schools.

The Dr. JoAnn Rayfield University Archives at Illinois State University (ISU) digitized its collection of the *Index*, the university’s series of student yearbooks published between 1892 and 1972, as part of a funded project in 2012. Based on the success of alumni engagement with the digital version of the *Index*, administrators at the university’s two laboratory schools (K–12) asked Milner Library administration to digitize the schools’ respective yearbook collections. The school administrators explained that the schools’ alumni frequently requested copies of yearbooks those alumni had lost over the years. However, the schools had maintained few copies of past years and wished to direct alumni to digital surrogates. As part of the schools’ endeavor to create digital collections out of the yearbooks, we recognized a multitude of legal and ethical concerns that must be considered as part of an overall project plan for digitizing student yearbooks.

¹ Todd Bishop, “Classmates Launches Yearbook Initiative Posting More Than 30,000 High School Yearbooks for Members to View Online,” *Business Wire*, September 15, 2010, <https://www.businesswire.com/news/home/20100915005267/en/Classmates-Launches-Yearbook-Initiative-Posting-30000-High>.

² Mike Mansfield, “Discover Your Family in School Yearbooks,” *MyHeritage Webinars*, May 8, 2018, www.familytreewebinars.com/download.php?webinar_id=787.

The purpose of this article is to analyze the digitization and public display of student yearbooks within the context of student privacy and other pertinent U.S. laws. Additionally, it recommends practices designed to reduce the risk of privacy violations and copyright infringement for archivists and librarians. This piece is divided into three parts. The first describes student yearbooks as cultural records and important primary sources of institutional heritage. In the second section, we explore the relationship between student yearbooks and privacy laws. The third part discusses strategies for archivists and librarians that reduce the risk of privacy violations and copyright infringement while satisfying the educational mission of their work.

Part 1: Student Yearbooks as Cultural Records

As school and college traditions go, obtaining a copy of one's annual yearbook was once a must-do on any student's list. Filled with photographs of that year's student body, lists of student organizations, campus events, athletic teams, and images of dances and homecomings, yearbooks were the student-authored history of their institutional and cohort experience. In her 2007 thesis "Yearbooks as Genre: A Case Study," Melissa Caudill states, "The purpose of yearbooks is to preserve images, stories, and facts from each year for one specific group of people, linked by age and geographic community." Caudill later points to the rise in student populations for both secondary and postsecondary institutions, thus indicating an eventual increase in the production of yearbooks.³ In a 2010 article by National Public Radio, yearbook publisher Jostens noted a decline in college yearbook production, citing 1,000 institutions that still published yearbooks, down from 2,400 in 1995.⁴ At the time, Jostens did not view social media as a factor in the decline of physical yearbook sales. Yet, the publication of physical yearbooks has continued to drop. New generations of budget-conscious college students shun the often exorbitant price of a printed annual to instantly post experiences for free on their social media. Institutions such as Western Illinois University, the University of Arizona, and Oregon State University have all stopped publishing their yearbooks in the last fifteen years, the last having ended its run in 2014.⁵ However, as the popularity of yearbooks declines, institutions have increasingly prioritized the digitization of their class annuals. Research, documentation, and outreach are among the many factors driving institutions to digitize their yearbook collections.

College yearbooks provide important primary-source data for an institution, particularly for the books' student-driven content. The physical growth of the campus can be traced in yearbooks by showing photographs of a changing footprint and the construction (or demolition) of historic buildings. The founding of colleges and departments are often depicted in yearbooks, as well as changes in the institution's administrative staff. Yearbooks also document individuals associated with the institution by including them in photographic lists of class participants, faculty lists for each college and department, administrators, and "In Memoriam" pages for the (sometimes unexpected) passing of notable individuals. In the case of Rutgers University, yearbooks have helped not only

³ Melissa Caudill, "Yearbooks as Genre: A Case Study" (M.A. thesis, Clemson University, 2007), 8, 2–3.

⁴ Sandy Hausman, "Yearbooks No Longer 2 Good 2 Be 4-Gotten," NPR, March 14, 2010, <https://www.npr.org/templates/story/story.php?storyId=124667610>.

⁵ Sequel Yearbook Collection (Western Illinois University), CARLI Digital Collection, http://collections.carli.illinois.edu/cdm/landingpage/collection/wiu_sequel; University of Arizona Yearbooks, Special Collections Library, University of Arizona, <https://speccoll.library.arizona.edu/collections/university-arizona-yearbooks>; Yearbooks of Oregon State—120 Years of Memories, Hayseed–Orange–Beaver, 1894–2014, Oregon Digital, Oregon State University, <https://oregondigital.org/sets/osu-yearbooks/page/hayseed-orange-beaver>.

to tell the often (incorrectly) assumed history of the institution but to document student publishing from as early as the 1870s.⁶

Yearbooks not only serve to document the institution; they also document the student. In her study of early twentieth-century girls' high school yearbooks, Amy J. Lueck argues that yearbooks were once meant to "foster a sense of community and shared experience" among an institution's students. Citing a "memory crisis," Lueck suggests students created memory books, journals, and school annuals as material evidence to accompany faded memories. School annuals developed into yearbooks, which changed focus from that of group reflection to one of institutional memory: "In time, though, the yearbook became increasingly central to the work of recording and perpetuating a shared school identity, functioning as the central space for recording school memories for many students."⁷

Paul Connerton argues that memory is found in traditions or "ritual performances," which are what carry memory in societies. In identifying one's memories, "These memory claims figure significantly in our self-description because our past history is an important source of our conception of ourselves; our self-knowledge, or conception of our own character and potentialities, is to a large extent determined by the way in which we view our own past actions." Connerton later connects his theory with Maurice Halbwachs's *La mémoire collective* and argues that it is through shared group experiences that social memory is developed and recalled.⁸ Yearbooks serve as a small part of the collective social memory; the institution's membership recalls the year's memories and places them in a printed work for posterity.

For many modern high school yearbook staff, time is spent early in the creation process determining a unified theme or message for the publication. For high school English teacher Christina M. Vettraino, the design of the yearbook is not the most important aspect of the publication: "A yearbook may have fantastic designs, but it is defined by crisp, clear, action photographs that capture the important moments of the year and depict the diversity of the student body." Although Vettraino reminds her staff that most students buy yearbooks to look at pictures of themselves, the publication is ever-evolving: "Yearbooks began as picture books, have evolved to include copy, and are now moving toward magazine design, where copy is broken into quick reads and fast facts."⁹

In a survey on yearbooks and memory, Lynn M. Hoffman interviewed high school alumni who recalled events they considered most important to them as they moved from adolescence to adulthood. Friendship, learning to compromise, independence, and community involvement were often found as important milestones and yearbook themes. As Hoffman explains, "The high school year-

⁶ Bernadette A. Lear, "Book History in 'Scarlet Letters': The Beginning and Growth of a College Yearbook during the Gilded Age," *Book History* 9 (2006): 179–212.

⁷ Amy J. Lueck, "'Classbook Sense': Genre and Girls' School Yearbooks in the Early-Twentieth-Century American High School," *College English* 79, no. 4 (2017): 381, 401.

⁸ Paul Connerton, *How Societies Remember* (Cambridge: Cambridge University Press, 1989), 22, 36–38.

⁹ Christina M. Vettraino, "Yearbook 101: A How-To Guide for Teaching the Yearbook Basics," *English Journal* 96, no. 5 (May 2007): 28.

book is unique because it serves to document elements of high school culture while being a significant element of the high school traditions it reflects.”¹⁰ In a similar study, Hoffman notes efforts of current high school students to diversify content and represent their school as a whole: “These yearbook students demonstrated sensitivity to their classmates as they worked to produce inclusive books, attempting to provide some positive coverage of all students regardless of their involvement in school.”¹¹

In addition to notable local events, yearbook staff try to focus on national and international events, social topics, and culture as they relate to a student body. In her examination of 1980s midwestern high school yearbooks, Pamela Riney-Kehrberg notes how one Iowa high school yearbook staff openly dealt with the unprecedented loss of their small town’s younger population. As family farms failed, young adults left their small hometowns with the intention of never returning. Yearbook staff also covered off-campus events like parties, “cruising” around town, and drinking. In another example, Riney-Kehrberg finds, “Ames High’s yearbook went far beyond discussing alcohol and included stories about gay students coming out, AIDS, abortion, and other controversies that engaged the adult public.” For historians researching more recent events, finding firsthand sources can be difficult as those materials have not yet found their way to a repository. So, for Riney-Kehrberg, “Yearbooks, written by teenagers, for teenagers, would seem to be a logical choice for exploring the ins and outs of youth culture.” However, Riney-Kehrberg notes how some physical yearbook collections are defaced, stolen, or otherwise damaged, perhaps to remove what a person perceives as an unattractive photograph of a former self. Alternately, “One librarian speculated to me that people were removing their exes from the historical record.”¹²

Like all original resources, researchers should examine yearbooks with a critical eye. Although yearbooks are products of a group documenting its memories, yearbook content is created by a select (or selected) few who speak for the much larger group. Often elected or selected by peers, that group may accidentally or purposely ignore other demographics, thus silencing them in the documented history in the yearbook. Perhaps an event occurred that the yearbook staff decided not to include in that year’s book. Or a student or student group had a message with which yearbook staff did not agree. Besides any oral history or ephemeral documentation, that message or event could be lost. In describing how political groups control a national narrative, Barbara A. Misztal states, “The official management of collective memory, while always designed to legitimize power, is seen as revolving essentially around two poles of censorship and celebration, or socially organized forgetting and socially organized remembering.”¹³

Early yearbooks.

Yale University is widely recognized as having the first college yearbook in 1806, though other institutions have shown earlier class compilations. As noted by Bernadette A. Lear, Harvard University produced a yearly “class book” starting around 1800. The single book featured student-

¹⁰ Lynn M. Hoffman, “Why High Schools Don’t Change: What Students and Their Yearbooks Tell Us,” *High School Journal* 86, no. 2 (December 2002–January 2003): 22–38.

¹¹ Lynn M. Hoffman, “Beyond High Stakes Testing: Rural High School Students and Their Yearbooks,” *Qualitative Report* 10, no. 1 (2005): 75.

¹² Pamela Riney-Kehrberg, “The High School Yearbook,” *Journal of the History of Childhood and Youth* 10, no. 2 (2017): 163, 159, 167. doi: 10.1353/hcy.2017.0022.

¹³ Barbara A. Misztal, *Theories of Social Remembering* (Philadelphia: Open University Press, 2003), 56.

written biographies that included an individual's achievements and awards as well as notes by the class secretary highlighting meeting minutes and a list of elected officers. Citing Benjamin Homer Hall, creator of one of the earliest known works on the American college experience, Lear also points to another early student compilation: autograph books. Different from yearbooks and class books, autograph books were created by Yale students to collect personalized notes from their friends, professors, and administrators. In all of these examples, none included photographs.¹⁴ At the time, photograph technology was not yet capable of producing images for publishers. Thus, Yale's yearbook, the *Yale Banner*, featured silhouettes of students, a list of names, and student stories.¹⁵ With the development of the daguerreotype in 1839, copies of photographs became easier to reproduce. According to Melissa A. Johnson, college students at Princeton saw this as an opportunity to classify themselves within their institutions. Johnson states, "Because the daguerreotype, and later the photograph, was able to capture permanently the appearance of a subject and depict it in great detail, some found in the new medium a tool that could be used to identify types and categories of people." Grouping themselves by birthplace, race, interests, and physical appearance gave students a sense of belonging within Princeton's institutional infrastructure. Students would then obtain copies of these photographs and create individualized albums.¹⁶

The evolution of daguerreotypes allowed printers to introduce halftone printing in 1869.¹⁷ Printing photographs in publications became easier to reproduce, and students were able to purchase copies for their personal libraries. As the yearbook tradition spread to colleges and secondary education schools, the content in the books began to evolve. Individual students no longer wrote their own biographies; instead, student-led editorial boards created yearbook content. Staff writers created institutional histories, listing famous founders, educators, and recollections for all classes. Yearbooks quickly became more than reflections on student achievements for the year; they served as documents for institutional memory. However, not all students felt their yearbooks were representative of their classes.

In their analysis of the University of Toronto's yearbook, the *Torontonensis*, authors E. Lisa Panayotidis and Paul Stortz explore the many controversies that surrounded the publication from 1890 to 1914. The authors discovered instances of students vocalizing their displeasure at the depictions of themselves or other students in the yearbook. Students claimed that the editors were attacking personal enemies while giving preferential treatment to their friends. Sales of the 1902 edition halted temporarily so that the University Council could review the biographies of three women who, as one class member called it, were "a case of childish spite on the part of the writer." The authors also note that the yearbook pushed male-dominated themes: "A gentlemanly normative behaviour and language seemed assumed and enforced, suggesting ways in which the produc-

¹⁴ Lear, "Book History in 'Scarlet Letters,'" 184–85.

¹⁵ Jennifer Billock, "Why Do People Sign Yearbooks?" *Atlantic*, June 2018, <https://www.theatlantic.com/technology/archive/2018/06/why-do-people-sign-yearbooks/561851/>.

¹⁶ Melissa A. Johnson. "Reflections on Photographing Princeton," *Princeton University Library Chronicle* 60, no. 3 (1999): 401–42, 406 (quotation).

¹⁷ Canadian Illustrated News, "Images in the News: 1869–1883," *Library and Archives Canada*, August 17, 2009, <http://www.collectionscanada.gc.ca/databases/cin/001065-2010-e.html#>.

tion of masculinity was bound up in biographical narratives and in the very gendering of the university.”¹⁸ The authors’ analysis of the *Torontonensis* provides a reminder that though yearbooks can serve as an important and scholarly resource for an institution’s historical and cultural memory, researchers should review them with a cautious eye toward purposeful or unintentional biases.

Sales for printed yearbooks have declined in recent decades, and as author Brian F. Clark theorizes, this is due in large part to the rise in social media. For Clark, yearbooks memorialize all members of the institution, while platforms like Facebook allow an individual to create and document the groups and people important to that individual. In this way, “Both Facebook and yearbooks are forms of institutional memory, albeit of different institutions.” Clark takes this analysis a step further, saying that the individual is the institution, with “all the photographs of me being me, and my friends being my friends, and carefully sculpted to achieve a desired effect.” Clark acknowledges that while a paper yearbook can survive many years, a digital yearbook created on a social media platform is more difficult to document and preserve.¹⁹

Yearbooks in education and outreach.

For modern institutional archives, yearbooks serve a variety of scholarly and outreach functions. Yearbooks can be an engaging tool to teach young researchers how to use primary sources. Students can track the physical development of the campus; examine the organizational history of a college, department, or athletic interest; or find informational content on important figures in the institution’s history. Scholars researching the institution’s history can use yearbooks as timelines, marking significant changes with visual cues in the book’s photographs. Genealogists can track families in yearbooks, finding photographs of an ancestor where none may exist. Yearbooks often serve as the gateway resource to other archival resources, assisting new and seasoned researchers alike.

Yearbooks donated by alumni can also help establish and improve donor relations at an institutional repository. While a repository’s collecting policy will dictate the retention of a small number of class copies, yearbooks turned scrapbooks can serve as interesting views into student life on campus. Beyond the typical well wishes, written memories, and contact information often found in most yearbooks, some alumni turn their books into personal time capsules. Also found in yearbooks are items of importance that invoke memories of events: pressed flowers from a bouquet or corsage, dance booklets, ribbons, report cards, candid photographs, and more can hide in the pages of an alumni’s yearbook. As noted in her survey, archivist Jessica L. Wagner points to the importance of collecting student life materials as a way to document the largest group affiliated with an institution. While most archivists find it difficult to collect and manage these materials, they recognize their scholarly value in providing evidence for social, political, and popular movements throughout the history of the institution. Student life materials “provide a unique window into the

¹⁸ E. Lisa Panayotidis and Paul Stortz, “Contestation and Conflict: The University of Toronto Student Yearbook *Torontonensis* as an ‘Appalling Sahara,’ 1890–1914,” *History of Education* 39, no. 1 (January 2010): 35–53. doi: 10.1080/00467600802356728.

¹⁹ Brian F. Clark, “From Yearbooks to Facebook: Public Memory in Transition,” *International Journal of the Book* 10, no. 3 (September 2013): 19–25. doi: 10.18848/1447-9516/CGP/v10i03/36989.

cultural expression of a group and an era, including documentation of taste, style, trends, politics, and attitudes about society that may not be as easily and honestly documented elsewhere.”²⁰

College yearbooks can serve as introductions for library and archives staff to make connections with alumni. At the University of Central Florida, the library development officer opined that exploring yearbooks and other university publications “can be a powerful motivational tool” which could later lead to that alumni’s philanthropic support.²¹ As experienced by the archives staff at Illinois State University’s Dr. Jo Ann Rayfield Archives, yearbooks are among the most requested resources by university staff, alumni, and local community members. Many areas within the university use the yearbooks as documentary evidence for their respective units. Alumni staff, in particular, use the yearbooks as a way to engage with alumni who are potential donors. Given their popularity, the yearbooks held by the Rayfield Archives were a top priority for digitization. However, a spotty publication history, multiple titles, and varying location holdings made the digitization of ISU’s yearbooks a difficult endeavor.

Digitizing ISU’s yearbooks.

ISU’s yearbook collection lists five titles, three of which are for the university and two that are publications for the university’s two lab schools, University High School and the Thomas Metcalf School.²² The flagship publication, the *Index*, is the university’s first yearbook. Initially published in 1892, the yearbook has documented the university’s history, including its founding as an early normal school (an institution dedicated to training teachers) and the first publicly funded higher education institution in the state of Illinois. The *Index* was published for ninety years until budgetary concerns changed the format of the publication to a quarterly magazine in 1972. After a few years of negative reviews, mostly from students who wanted a return to the class photograph format, two new publications were created in 1975: the *New Student Record* (for freshman and transfer students) and the *Graduate Student Record* (for seniors). The publications were well-received and proved popular for several years until more budget complications and lack of student interest led to their ultimate demise in the mid-1990s. University High School shared space within the pages of the *Index* early in its publication until the lab school created its own yearbook, the *Clarion*, in 1929. Students of the Thomas Metcalf lab school were often mentioned in the *Index* and *Clarion*, but those students were never featured. However, in 1975 the lab school began printing its yearbook, the *Thomas Metcalf School Yearbook*. Both the *Clarion* and the *Thomas Metcalf School Yearbook* continue to be published today.

Our digitization project began with the *Index*, which was the subject of a large number of patron inquiries over the years. Many alumni wished to find their graduation yearbook or replace worn copies. Other alumni wanted to verify names of former classmates or faculty members, and asked library and archives staff to scan and email pages on their behalf. Most were vocal about their

²⁰ Jessica L. Wagner, “The Student as Subaltern: Reconsidering the Role of Student Life Material Collections at North American Universities,” *Archival Issues* 35, no. 1 (2013): 37–51, 38 (quotation).

²¹ Elizabeth Konzak and Dwain P. Teague, “Reconnect with Your Alumni and Connect to Donors,” *Technical Services Quarterly* 26, no. 3 (2009): 217–25. doi: 10.1080/07317130802520252.

²² The lab schools at ISU were founded along with the university in 1857. These schools, a grammar and high school respectively, are attended by students from the surrounding community. Students of the university traditionally taught the students of the lab schools as an opportunity to practice the pedagogies the university students were learning.

desire for digital access to the yearbooks. Because of the persistent patron demand, the series appeared to be a good candidate for digitization. With funding from a consortium-sponsored grant, the yearbook series was digitized by an outside vendor, and the Internet Archive hosted the digital content for public access in 2012. The digital yearbook series saw high user engagement, so ninety volumes of the University High School yearbook series, the *Clarion*, was digitized in-house and added to the Internet Archive in 2018. The following year, the Thomas Metcalf School administrators noted the digital collection and approached library and archives staff about the feasibility of digitizing volumes of its yearbook series. While the school's library maintained its collection of yearbooks rather than the university library or archives, the school faced similar demands from patrons for digital access as replacements for personal copies lost over the years. Ultimately, twenty-nine yearbooks from the Thomas Metcalf School were added to the digital collection in March 2019. Since 2012, ISU's digital yearbook series has been either downloaded, searched, or otherwise accessed over 450,000 times.²³

However, we did not take lightly the decision to digitize the *Clarion* and the *Thomas Metcalf School Yearbook* series. Unlike the *Index* series, the students featured in the other series were minors at the time the yearbooks were produced. Moreover, many students featured in several recent years' worth of yearbooks had still not reached legal adulthood. Would digitizing the yearbooks violate FERPA or other privacy laws? How were parents' permissions documented? How could the potential objections of patrons be noted? How should copyright be addressed if the school had commissioned photographers to produce pictures of students? In the next part of this article, we explore these legal and ethical issues.

Part 2: Legal and Ethical Issues

There is only a small amount of literature detailing the digitization of student yearbooks by educational institutions, libraries, or archives. Carol Valentino-Barry and colleagues describes the equipment, software, and staffing necessary for digitizing fifty years of yearbooks produced by a high school in the Chicago area.²⁴ While they partnered with teachers, alumni, and current students to create an interactive digital experience of which yearbook were only a part, their article does not address any potential legal or ethical issues inherent in the project. James Lowery and Matt Blessing selected their archives' collection of student yearbooks for digitization as part of programming for Marquette University's 125th anniversary. Their case study details the technical decisions and steps related to preparing the collection for publication in CONTENTdm, their content system for digital collections. They too do not address any legal concerns.²⁵

In perhaps the only scholarly work specifically concerning legal issues inherent in the digitization of student yearbooks, Craighton Hippenhammer claims yearbook are often perceived as obvious digitization projects because digital yearbooks create positive interactions with alumni and represent good public relations moves for libraries and archives. However, he asks whether yearbooks

²³ Current information on additions to the collection of online texts for ISU at the Internet Archive can be found at <https://archive.org/details/illinoisstateuniversity?tab=about>.

²⁴ Carol Valentino-Barry et al., "Digitize Your School's Yearbooks: Partnering to Preserve Our High School's Heritage," *Computers in Libraries* 39, no. 9 (November 2018): 1, <http://www.infotoday.com/cilmag/nov18/Valentino-Barry-Barnas-DiGuido-Bullen-Digitize-Your-Schools-Yearbooks.shtml>.

²⁵ James Lowery and Matt Blessing, "An Anniversary Opportunity: Digitization of Student Yearbooks," *Microform and Imaging Review* 35, no. 4 (Fall 2006): 129–33. doi: <https://doi.org/10.1515/MFIR.2006.129>.

are “disasters waiting to happen” because yearbooks are a morass of possible copyright claims. Hippenhammer considers whether professional photographers own the individual portraits of students or whether institutions signed agreements indicating otherwise. Additionally, he examines whether the yearbooks were created by university employees, in which case the university is more likely to own the copyright, or whether students created the yearbooks as part of a course. Since students are not typically university employees, the copyright to the yearbooks may remain with the students who designed and produced the works.²⁶

No other sources discuss the digitization of student yearbooks specifically. Peterson Brink, Mary Ellen Ducey, and Elizabeth Lorang address ethical issues of digitizing campus humor publications at the University of Nebraska–Lincoln. They note that much of the “humor” in the student-run campus humor magazine *Awgwan* depended on negative depictions of women and people of color during its run in the early twentieth century before changing its style and format. Brink, Ducey, and Lorang were concerned about perpetuating a legacy of racist, sexist, xenophobic, and classist power structures but concluded the research value in the ways humor served oppression outweighed the magazine’s deplorable messages. To mitigate negative reactions from potential users of the digitized issues, they considered the development of an FAQ page that would caution users regarding the offensive materials in the digital collections and a statement of the archivists’ rationale in selecting the publication for digital access. In the end, they chose not to make the *Awgwan* available despite completing the necessary digitization activities. They concluded that the amplification of the oppressive voices in the *Awgwan* would be too strong without simultaneously producing teaching materials to place the voices in appropriate historical contexts.²⁷

Oliver Batchelor explores controversies spurred by the unearthing of sensitive or embarrassing content when racist imagery and other forms of prejudice are revealed after the digitization of yearbooks, student newspapers, and other resources documenting campus life, such as students in blackface. He focuses on institutions’ responses once controversies erupted among students and alumni. Many found positive outcomes in the aftermath. The University of Richmond acknowledged its racist past after students delved into the institution’s history using archival sources. A photograph in a 1980 yearbook showed several students in Ku Klux Klan garb with an African American student whose neck was encircled by a noose. The students found other racist imagery in alumni magazines and fraternity photographs. The University of Richmond responded by creating the “Race and Racism at the University of Richmond Project,” which brought students, faculty, staff, and alumni together to have difficult discussions about the university’s racist past. Eventually, the university was able to move forward by confronting its legacy of racism. Batchelor’s case studies of institutions are not specifically about student yearbooks but his work highlights a factor librarians and archivists should bear in mind when approaching digitization projects.²⁸

²⁶ Craighton Hippenhammer, “Digitizing Yearbooks: Avoiding Pitfalls” (paper presented at the Digital Commons Great Lakes User Group annual meeting, Olivet Nazarene University, August 3, 2012), 2, 10, https://scholarworks.gvsu.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/scholar?hl=en&as_sdt=0%2C14&q=digitizing+yearbooks&oq=digi&httpsredir=1&article=1002&context=dcglug.

²⁷ Peterson Brink, Mary Ellen Ducey, and Elizabeth Lorang, “Ethics of Digitization and Access for Archives,” *Reading Room* 2, no. 1 (Fall 2016): 10, 18, <https://readingroom.lib.buffalo.edu/PDF/vol2-issue1/the-case-of-the-awgwan.pdf>.

²⁸ Oliver Batchelor, “Navigating the Campus Past: College Yearbook Controversies,” *Reference Services Review* 48, no. 1 (2020): 5–14. doi: doi.org/10.1108/RSR-09-2019-0059.

In a podcast for the Library Collective, Irina Logova, Tara Coleman, and Cliff Hight discussed “yearbookgate,” or controversies that have emerged at universities after digitized materials revealed racism. They recounted a situation at Hollins University, whose president reportedly asked librarians to remove digital content from their institutional repository for fear it would alarm the university community. The archivists balked, citing professional ethics and statements from the American Library Association and the Society of American Archivists. Ultimately, the removed content was reinstated, with a trigger warning message appended to the digital collection. The podcasters concluded that while archivists have a duty to not censor digital collections, marginalized communities do not trust institutions based on those institutions’ mistreatment. Rather, archivists need to acknowledge that mistreatment existed and actively work with marginalized communities to have a voice in sharing their own stories.²⁹

Ellen LeClere considers the ethics of digitizing information about persons involved in notable or controversial activities but who are themselves not otherwise well known. She interviewed thirteen archivists at four institutions who collaboratively created a digital archive of civil rights movement-era material. She found that “in large-scale digitization work, halting the process to evaluate materials at the item level was unjustifiably time-consuming.” A metadata librarian associated with the project said, “When you’re talking about 35,000 pages of materials, if we had attempted to do privacy at an item level, we simply would not have done the collection.” While they did review items, they scanned for medical or educational information protected under current U.S. statutes; such information would be cropped out or obscured with a black box. They felt the historical value of the material outweighed other privacy considerations. Only one individual objected to his papers being part of the archive, and the archivists decided not to include his papers in the digital archive. LeClere asserts that digital archives serve public interests but notes how archives have maintained power structures and denied marginalized groups agency over their own heritage materials.³⁰

Our literature search yielded no other case studies or articles addressing the digitization of student yearbooks, particularly of the legal or ethical issues that should be considered when developing a plan for digital access. Consequently, we consulted with the Office of the General Counsel at our university to review the scope of our plans and to help identify potential barriers for digitization. We collaboratively developed a plan to assess our yearbook collections before we moved forward with digitization. Accordingly, we hope our case study addresses the gap in the literature regarding legal and ethical issues surrounding the digitization of student yearbooks and offers a road map to archivists and librarians who are considering digitization of yearbooks at other institutions.

Copyright.

Original intellectual works are protected from infringement by copyright under Title 17 of the U.S. Code. An original work must embody a minimum amount of creativity. Almost any spark of creativity constitutes sufficient originality: a business directory has sufficient originality resulting

²⁹ Irina Logova, Tara Coleman, and Cliff Hight, “Trigger Warning: What to Do with the Ugly History in Your Archives,” recorded presentation, Kansas State University, February 2, 2021, K-State Research Exchange, <https://krex.k-state.edu/dspace/handle/2097/41268>.

³⁰ Ellen LeClere, “Breaking Rules for Good? How Archivists Manage Privacy in Large-Scale Digitization Projects,” *Archives and Manuscripts* 46, no. 3 (2018): 289–308. doi: doi.org/10.1080/01576895.2018.1547653.

from its categorization of information under subject headings.³¹ These original works include literary pieces such as novels, poems, and plays; audiovisual material such as motion pictures, radio and television broadcasts, musical compositions, and choreography; artistic works such as paintings, photographs, drawings, and sculpture; and technical items such as architecture, maps, and software programs.

To be eligible for copyright protection, an original work must also be “fixed in any tangible medium of expression.” “Fixed” is defined by statute as a physical form that exists for more than a transitory duration. Examples of fixed works could include video, notes written on napkins, or electronic documents stored on servers or USB devices. Works do not need to be formally published, deposited, or transmitted to other parties to be vested with copyright. Copyright protection does not require the piece to be registered with the federal government, printed with a copyright notice, or appear with a copyright symbol.³²

Some items are specifically excluded from copyright protection. These include facts, which are not original; ideas, which are not transfixed in a tangible medium; works of the federal government, which are intended for the public good; titles, names, and short phrases; and works that contain exclusively factual information, such as height and weight charts. These materials without copyright protection are deemed to belong to the public domain, meaning anyone can freely use them without liability for infringement. A number of works that were previously protected by copyright have passed into the public domain. Any piece published prior to 1925 has entered the public domain due to the expiration of its copyright. Other, more recently published works have entered the public domain due to failure to comply with certain formalities required under copyright law, including

- Works published between 1925 through 1977 without a copyright notice appearing on the work;
- Works published between 1978 and 1989 both without a notice and without formal registration with the Library of Congress within five years of publication; or
- Works published between 1925 and 1963 with a copyright notice but whose copyright was not actively renewed with the Library of Congress.³³

For items created after 1977, copyright protection lasts for the life of the author and an additional seventy years. For something made for hire—meaning the work is created by an employee within the scope of his or her employment—the copyright is assumed to be owned by the employer and lasts for 95 years from the year of its first publication or 120 years from the year of its creation, whichever expires first. During this period of copyright protection, the copyright owner has specific rights. The rights are often called a “bundle of sticks” because the rights can be sold or assigned to other parties in whole or in part. These rights include

- The right to reproduction, that is, to make copies of the work;
- The right to adaptation, that is, to create derivative works from the original or to adapt the work to a different medium;

³¹ *Bellsouth Advertising & Publishing Corp. v. Donnelly Information Publishing, Inc.*, 999 F.2d 1436 (11th Cir. 1993).

³² U.S. Copyright Act, 17 U.S. Code § 102 (2005).

³³ U.S. Copyright Act, 17 U.S. Code § 301–5 (2005).

- The right to distribution, that is, to make the work available to others;
- The right to public performance, that is, to authorize the recitation, play, or act in a public space or within the view of the public; and
- The right to display, that is, to display the work anywhere a substantial number of unrelated people are gathered.³⁴

Additionally, some works may contain many underlying works that together make up the larger piece. These are commonly known as multilayered works. A court concluded a poster's inclusion on the stage set of the television show *Roc* required the artist's permission to display despite being visible in the episode's broadcast for only twenty-seven seconds.³⁵ While motion pictures are more commonly multilayered works when they contain musical soundtracks, books can be multilayered works if they include illustrations or photographs by others.

Copyright infringement occurs when someone reproduces, adapts, distributes, performs, or displays the protected work without obtaining the permission of the rights owner. Infringing activity may subject the infringer to legal action in civil courts, and the rights owner can recover compensatory damages. The compensation established by statute can include the recovery of any profits made by the infringer, actual damages ranging between \$200 and \$150,000 per work infringed, and attorney's fees.³⁶

Copyright analysis of yearbooks.

Because the damages associated with infringing copyright is potentially high, conducting a copyright analysis of each yearbook was paramount for our project. With the assistance of the university's general counsel, we considered the following questions as part of the copyright analysis:

1. Did the yearbooks demonstrate sufficient originality to be protected by copyright at all?
2. Did the yearbooks represent multilayered works?
3. Which yearbooks were still protected by copyright and had any passed into the public domain?
4. If the yearbooks were protected by copyright(s), did the university own the copyright?
5. If the yearbooks were protected by copyright and the university did not own the copyright, or the copyright status was uncertain, did a fair-use assessment favor our intended use?

The photographs of students, faculty, and campus buildings in each yearbook demonstrated some measure in creativity in light and dark, color, and so on. This alone led us to the conclusion that the yearbooks were now, or were at one time, protected by copyright. The amount of other forms of originality varied tremendously from yearbook to yearbook. The oldest yearbooks contained florid descriptions of the institution's history and personal biographies of presidents and faculty members, whereas this information was often lacking from more recent decades. Other than the photographs, information regarding the students was often factual in nature, such as name, year in

³⁴ U.S. Copyright Act, 17 U.S. Code § 201–5 (2005).

³⁵ *Ringgold v. Black Entertainment TV, Inc.*, 126 F.3d 70, 1997 U.S. App. LEXIS 24443, Copy. L. Rep. (CCH) P27,693, 25 Media L. Rep. 2387, 150 A.L.R. Fed. 813, 44 U.S.P.Q.2D (BNA) 1001.

³⁶ U.S. Copyright Act, 17 U.S. Code § 501–5 (2005).

school, major, and sometimes a listing of organizations to which the students belonged. The yearbooks' covers were often elaborately designed, particularly in the earliest years. The *Clarion* and the *Thomas Metcalf School Yearbook* series tended to reflect much less creativity, with entries organized by class and alphabetical name and offering few to no other details. Covers were simplistic in design, often no more than a typeset of the school's name and the year. Nonetheless, we concluded all the yearbooks represented sufficient originality to meet the threshold for copyright protection. A copyright analysis of each yearbook was warranted.

Next, we created a spreadsheet for each yearbook indicating the year of publication, whether a copyright notice appeared in the work, whether any third-party materials appeared in the works, and whether there was any identifiable information about the photographers, designers, or other personnel associated with the yearbooks. This spreadsheet permitted us to make copyright analyses of each yearbook separately.

The yearbooks were highly variable in whether they represented multilayered works. The photography included in most volumes of the *Index* and *Clarion* appeared to be attributed to individuals employed by the university as photographers, suggesting the photographs were mostly likely work-for-hire under existing copyright law. Information regarding the design work of the yearbooks was either unattributable or plainly attributed to university personnel. Until the 1980s, the yearbooks contained no advertising or other material that appeared to be created by parties outside of the university. During and after the 1980s, many volumes contained advertising from local businesses. The photographs of students and faculty members featured in the *Thomas Metcalf School Yearbook* series were clearly attributed to a specific photography studio but lacked any advertising or other pieces that appeared to be produced by parties outside of the school. We were concerned the photography studio might assert its copyright over the photographs it had taken and thus we attempted to locate the business records associated with the studio. However, we were unsuccessful. Similarly, we were concerned the advertising and other third-party materials from local businesses might complicate our intent to digitize these yearbooks. Again, no business records could be found, and many of the local businesses were no longer operating. In almost all cases, we intended to digitize copies that had been marked as library or archives copies and did not contain any personal writing by alumni who owned yearbooks and donated them back to the university. There were some exceptions to this, as some volumes were missing from the library or archives collection. In these cases, the donated copies that we judged the freest of personal writing or signatures were included.

More concerning to us was the *Clarion* series of yearbooks produced by our University High School. It is common for high school yearbooks to be organized, designed, edited, and produced by students enrolled in journalism or communication programs under the supervision of a teacher.³⁷ Craighton Hippenhammer cautions that student work may be treated by a school or university differently, given that students are not ordinarily university employees and not producing the yearbooks as work-for-hire. The level of student involvement in the production of the *Clarion* series of yearbooks was not always evident. Most volumes listed no particular personnel associated with the yearbooks' creation. Yearbook personnel began to be listed beginning with the early

³⁷ Piotr Bobkowski et al., "Student Media in US Secondary Schools: Associations with School Demographic Characteristics," *Journalism and Mass Communication Educator* 67, no. 3 (2012): 252–66. doi: 10.1177/107769581244699.

2000s, and we verified the associated names were not teachers and accordingly were likely students. Consequently, we reviewed the university's intellectual property policy for guidance. While the university did not claim ownership of copyrightable works produced by students as part of their academic coursework, the yearbooks appeared to be an exception because significant material support was provided to the students in the activities associated with publishing the yearbook. Therefore, it appears that student involvement in the publication of the yearbooks did not diminish the university's copyright over this particular yearbook series. Overall, we concluded that the risk of infringement was likely small in any regard if we moved forward with digitization, but we noted these issues in the spreadsheet we maintained.

Next, we examined the year of publication and whether a copyright notice appeared in the work. We were fairly confident the university owned the copyrights associated with all the yearbooks, but not every yearbook bore identifiable copyright attributions. Fortunately, a great number of the yearbooks appeared to fall into the public domain because copyright protection had expired due to the year of publication or because the yearbook did not comply with the requirements for copyright protection in force at the time. In fact, virtually all of the yearbooks published prior to 1978 seemed to belong to the public domain. This negated our concerns about multilayered works, such as claims by the photography studio and any included third-party materials. The yearbooks published in 1978 and after were, however, certainly protected by copyright. These were also the decades where the yearbooks contained far more material created by third parties, such as advertising from local businesses. In these cases, we relied on fair-use analyses to guide our decisions to digitize the yearbooks.

“Fair use” is a statutory exception in the U.S. Copyright Act of 1976. A person may use a protected work without permission from the rights owner if that use is deemed fair and reasonable. A fair-use analysis considers four factors: the purpose and character of the intended use, including whether such use is of a commercial nature or is for nonprofit or educational purposes; whether the nature of the protected work is creative or primarily factual; how much of the protected work is used; and the effect of the intended use on the market value of the protected work. In our analysis, three of the four factors of fair use found in favor of digitizing and making the yearbooks available. Our general counsel reviewed our findings and determined that the risk to the university was minimal.

Student privacy.

With copyright no longer the most pressing concern, we turned our attention to the other issues that complicated our decision-making. The question of how to balance our desire to create public access to the yearbook series as librarians and archivists with the personal privacy of the persons featured in the yearbooks was a thorny and compelling tension. We were familiar with legal standards for protecting students' privacy of their educational records, such as their grades and transcripts. While yearbooks are not necessarily products of student coursework, they nonetheless contain information about students. At the very least, names and likenesses would be made accessible for the world to see. In the case of the *Clarion* and the *Thomas Metcalf School Yearbook* series, the names and likenesses belonged to children or to people who were children at the time their personal information was collected and shared. Which privacy laws might control, or at the very

least influence, the decisions to digitize and publish the yearbooks digitally? To address this question, we examined the Family Educational Rights and Privacy Act (FERPA) and the Children's Online Privacy Protection Act (COPPA), the most relevant privacy laws affecting students. Additionally, we considered the emerging privacy concept of the right to be forgotten and what remedies, if any, could be employed to either honor or counter complaints of privacy violations.

FERPA.

The Family Educational Rights and Privacy Act is a federal law enacted in 1974 that protects the privacy of students' education records and controls the circumstances under which an educational institution may release information about students to others. Parents control students' education records, but the right to control those records transfers to students once they reach the age of eighteen or enroll at a postsecondary institution at any age. Under FERPA's requirements, educational institutions cannot release any information concerning a student's performance, conduct, or academic work without the student's written permission. However, there is considerable ambiguity in the FERPA language as to exactly what types of materials constitute such information, resulting in widely varying interpretations among educational institutions. FERPA's definition of student records is "those records, files, documents, and other materials which contain information directly related to a student; and are maintained by an educational agency or institution or by a person acting for such agency or institution."³⁸

Tamar G. Chute and Ellen D. Swain conducted a study of Association of Research Libraries (ARL) members to identify and compare archival practices concerning student record access in 2004. They found that the categories of student records for which the majority of ARL members applied FERPA restrictions included transcripts, student employment, financial aid, student conduct, admissions, advising, housing, and psychological or counseling services. The least likely of these records to appear in collections administered by archivists were psychological or counseling records, which Chute and Swain speculate was the result of different sets of privacy laws applicable to medical records. Perhaps surprisingly, transcripts and discipline records were the most likely student records to appear in archival collections. Given the relatively few archives that reported administrative responsibility for any of these categories of student records, Chute and Swain postulate that such records entered archival collections through the transfer of department files. Such accidental inclusion underscores the need for archivists to be familiar with FERPA regulations and to consult with their institutions' registrars and general counsels before collections are made available to researchers.³⁹

Sarah Buchanan undertook a systematic examination of FERPA's impact on student records management and access. She found institutions permitted researchers access to student records either by redacting personally identifiable information or by releasing student information only in the aggregate. However, she suggests such practices curtail many forms of research, such as genealogy, institutional history, and personal biography writing. Buchanan proposes that the archives

³⁸ Cornell Law School, Legal Information Institute, "20 U.S. Code § 1232g—Family Educational and Privacy Rights," https://www.law.cornell.edu/uscode/text/20/1232g#a_4.

³⁹ Tamar G. Chute and Ellen D. Swain, "Navigating Ambiguous Waters: Providing Access to Student Records in the University Archives," *American Archivist* 67 (Fall–Winter 2004): 212–33.

profession undertake research to establish the sociocultural value of personally identifiable information in student records. She notes that legislators have amended FERPA guidelines several times since 1974, including a change initiated by the Society of American Archivists clarifying that theses and dissertations authored by students were research works intended to be shared by educational institutions with the larger scholarly communities, so long as institutions made it explicit to students as part of curriculum requirements.⁴⁰

FERPA may affect archivists' and librarians' digitization plans. While the act of digitization itself would not violate FERPA, the publication of the digitized materials on a publicly viewable platform would constitute a release of information to unauthorized parties. Therefore, it is imperative that archivists and librarians understand the types of student information potentially contained in the yearbooks they intend to digitize and how that information is governed in the context of FERPA. Melissa Caudill notes that yearbooks primarily created and produced by students often feature student-contributed artwork.⁴¹ Under FERPA, artwork displayed outside of classroom activities is not permitted without consent from the adult student or minor student's parents or guardians. Educational institutions are increasingly employing releases for adult students or parents of minor children to sign, permitting educational institutions' limited uses of information controlled by FERPA. Thomas E. Myers recommends that such releases explicitly include the use of student artwork, but this suggests that archivists and librarians may need to evaluate student yearbooks carefully to determine whether any artwork is attributed to students.⁴²

Importantly, FERPA does not protect information that is considered "directory" in nature, such as students' names and other general information, and provides an exception for "official school pictures, class rings, yearbooks, or other traditional school-sanctioned commemorative products, events or activities."⁴³ Fortunately, this exception should assure archivists and librarians that the digitization and public display of photographs of students published in school-sanctioned yearbooks would not violate students' privacy under FERPA. Additionally, FERPA rights lapse upon a student's death; therefore, yearbooks that are sufficiently old and where no included student can be assumed to still be living may be exempt.⁴⁴ Again, we consulted with our general counsel and concluded that FERPA would not be a controlling factor in making our student yearbooks digitally accessible.

COPPA.

The yearbooks published by the two laboratory schools presented more complicated privacy issues. Most of the students featured in the *Clarion* and all of the students in the *Thomas Metcalf School Yearbook* series were minors at the time the yearbooks were produced; many of the students were still under the age of eighteen at the time we considered the schools' requests to digitize the yearbooks. Where minor children are concerned, the 1998 Children's Online Privacy Protection

⁴⁰ Sarah Buchanan, "An Evaluation of the FERPA (1974) on Student Records Management and Access" (M.L.I.S. thesis, University of California, Los Angeles, 2009), 22–34.

⁴¹ Caudill, "Yearbooks as Genre," 62–64.

⁴² Thomas E. Myers, "Your Top Ten FERPA Questions—Asked and Hopefully Answered" (paper presented at the Education Law Association meeting, San Diego, November 2017), 33, <https://educationlaw.org/images/annual-conference/2017/2017Papers/G1-2-Myers.pdf>.

⁴³ Family Educational Rights and Privacy Act (FERPA), 20 USC 1232g 34 C.F.R, pt. 99.37(d) (2012).

⁴⁴ Myers, "Your Top Ten FERPA Questions," 41.

Act (COPPA) places parents in control over what personal information operators of websites and online services may be collected and how that information is used. Unlike FERPA, COPPA defines personal information to include names, any file that contains a child's voice or images such as photographs, geolocation information that would be sufficient to identify a child's street address or even city or town, and any combination of information that would permit a child to be identified. If that information is to be collected and made available online in any way, officials must notify parents and obtain consent.⁴⁵ Importantly, COPPA applies only to children who are under the age of thirteen, but the Department of Education recommends schools obtain parental consent prior to using students' personal information until the child reaches eighteen. Schools regularly disclose to parents how they collect and use personal information on their children and obtain parental consent before using children's images in school promotional materials, including school websites.⁴⁶ The Thomas Metcalf School has diligently conformed to this requirement. The University High School also adopted the Department of Education's recommended best practice for obtaining parental consent for students who were over the age of thirteen but younger than eighteen.

We concluded that the publication of student yearbooks digitally would potentially violate COPPA without greater exploration into the schools' records for obtaining parental consent. Personal information collected prior to 1999 is specifically exempted from the requirement to obtain parental consent. In 1999, the youngest students featured in the laboratory schools' yearbooks would have been approximately six years old. By the time the school administrators approached us with the request to digitize their school yearbooks, those youngest students would have reached majority age. Consequently, we concluded that any student yearbook published prior to 1999 would not pose any legal challenges presented by our compliance with COPPA and could be safely excluded from our search of records of parental consent and included in our digitization project. The yearbooks published subsequent to 1999 needed verification of parental consent.

With guidance from our general counsel, school administrators searched records for parental consent for students enrolled at both the Thomas Metcalf School and the University High School. This work was, frankly, the most difficult and time-consuming aspect of this project and required many months of tracking paperwork for students. Fortunately, we found the Thomas Metcalf School had specifically included language in their parental consent forms regarding the inclusion of students' names and photographs in student yearbooks, and no parent had withheld consent. The University High School's forms did not explicitly specify yearbooks but included language about photography; the school subsequently updated its language to specifically include yearbooks for future years. Again, no parent of a University High School student had withheld consent. At this point, we felt we were on firm ground for not violating COPPA. In the end, we decided that safeguarding the privacy of minors was paramount and should be held to a stricter standard than that of adults. Accordingly, we excluded from digitization the University High School and the Thomas Metcalf School yearbooks where we had any doubt that any student had not yet already reached the age of eighteen. We excluded the most recent three years of the *Clarion*, published by University High School, and the most recent fifteen years of the *Thomas Metcalf School Yearbook* series.

⁴⁵ Children's Online Privacy Protection Act (COPPA), 15 U.S.C. 6501–5 (1998).

⁴⁶ Anne T. Gilliland and Judith T. Wiener, "Digitizing and Providing Access to Privacy-Sensitive Historical Medical Resources: A Legal and Ethical Overview," *Journal of Electronic Resources in Medical Libraries* 8, no. 4 (2011): 387–88, 392. doi: 10.1080/15424065.2011.626347.

“Right to be forgotten.”

In addition to considering the specific privacy rights afforded to minors, we were sensitive to the growing trend of empowering people generally to exercise autonomy over their personal information. While student yearbooks are historical records, they may contain photographs and other information that people find embarrassing or disturbing about themselves in later years. Should people have the right to have their photographs and other personal information redacted or omitted? In 2018, the European Union (EU) passed the General Data Protection Act, which includes the right to be forgotten (RTBF). Under the act, EU citizens have control over their personal information online and have the right to ask for their personal information to be redacted. Typically, RTBF has taken the form of requests to search engines to remove links to personally identifiable information.⁴⁷ First created in 2010, Google’s Transparency Report aims to show “how the policies and actions of governments and corporations affect privacy, security, and access to information online.” Since a 2014 ruling by the Court of Justice of the European Union, Google reported it had received over 1.1 million requests to delist URLs related to an individual’s name. Google uses geolocation signals to restrict access to a URL from the country of the requester—most commonly France, Germany, and Spain. According to the report, Google will not delist URLs if the content is determined to benefit the public interest, including whether the information relates to the requester’s criminal record, public office, or notable professional life; is published in a government document; or is journalistic in nature.⁴⁸

The concept of RTBF is still taking root in the United States and Canada. In the United States, many pundits worry that the application of a comparable RTBF law could be applied outside of search engines to informational websites such as Wikipedia or to paper documents within records management systems and archives. Kristie Byrum argues that RTBF movements directly conflict with the U.S. Constitution’s First Amendment, violate the free flow of information in U.S. society, and imperil the marketplace of ideas.⁴⁹ Writing from a Canadian perspective, Steven McDonald claims that the vagueness of the EU’s RTBF is extremely problematic and that legislators or courts must explicitly define the nature of records and the types of information which individuals should be able to request to have restricted or redacted. He notes that restricting access to certain sources of information is not a new challenge for archivists, who have long debated what deserves restriction and what does not. He suggests that RTBF movements are unlikely to prevail in U.S. and Canadian legal systems where privacy lacks strong constitutional protections.⁵⁰

Virginia Dressler and Cindy Kristof surveyed librarians responsible for curating digital collections at ARL member institutions on their responses to several hypothetical scenarios that would result in a takedown request of materials librarians had digitized from their local collections. Among the scenarios was a request from an individual claiming that the appearance of their name in an openly accessible digital regional newspaper collection violated their privacy. We felt this scenario was

⁴⁷ Ashley Nicole Varva, “The Right to Be Forgotten: An Archival Perspective,” *American Archivist* 81, no. 1 (Spring–Summer 2018): 103. doi: 10.17723/0360-9081-81.1.100.

⁴⁸ “Requests to Delist Content under European Privacy Law,” Google Transparency Report, <https://transparencyreport.google.com/eu-privacy/overview?hl=en>.

⁴⁹ Kristie Byrum, “The European Right to Be Forgotten: A Challenge to the United States Constitution’s First Amendment and to Professional Public Relations Ethics,” *Public Relations Review* 41, no. 1 (2017): 102–11.

⁵⁰ Steven McDonald, “The Right to Be Forgotten: The Potential Effects on Canadian Archives,” *Dalhousie Journal of Interdisciplinary Management* 15 (2019), <https://ojs.library.dal.ca/djim/article/view/8981/7747>.

relatively analogous to our primary concern—that alumni might potentially object to their name or image made digitally accessible. The respondents had no consistent approach for this particular scenario. While some respondents expressed a willingness to redact or blur the name without removing the entire digital object, many respondents said they would not honor the request as they were merely providing access to an already available item and held a reluctance to alter the historical record.⁵¹

In a November 2020 blog posting for the American Library Association’s Choose Privacy Every Day section, Virginia Dressler reflects on the study she conducted two years previously. She acknowledges the tremendous divergence of professional attitudes and actions among librarians and archivists of patrons’ submissions of takedown requests based on their desire to protect their privacy: “This presents an interesting quandary; the tension between maintaining a comprehensive, searchable, discoverable digital archive and serving up anything else that could have been construed as edited, redacted, or partial. I’ve thought of the latter archive as having a ‘swiss cheese’ kind of effect—having gaps and holes around areas where information has been redacted or removed. The tension lies between access and privacy, with few easy answers.”⁵²

We too concluded that we were not willing to alter what we viewed as important primary sources for scholarship. However, we reviewed the takedown request procedures and policy that currently govern our university’s institutional repository to determine if that process could be suitably replicated for any similar takedown requests we might receive. We felt that the need for consistency in response in lieu of having a formal policy in place would help us be better prepared.

Part 3: Recommendations for Archivists and Librarians

It has been eight years since we began making these yearbook collections available online. In that time, we have generated a list of recommendations for others to consider when planning their own yearbook digitization projects.

Inventory all titles.

Although the *Index* is considered the primary yearbook for ISU, two other titles were eventually created to replace the long-printed annual. Along with the yearbooks for the university’s two lab schools, and a yearbook specific to a university college created when it was an independent entity, the Rayfield Archives currently holds six titles in its yearbook collection. However, none of the additional titles outside of the *Index* were considered for digitization until an extensive inventory was performed. Given the immediate popularity of the online version of the *Index*, we knew requests for digitizing the other five titles would soon follow. Most of the titles were different in style, content, publication standards, and intended audiences, which made blanket decisions on copyright and privacy issues impossible. Conducting a basic inventory of all titles, including the

⁵¹ Virginia Dressler and Cindy Kristof, “The Right to Be Forgotten and Implications on Digital Collections: A Survey of ARL Member Institutions on Practice and Policy,” *College and Research Libraries* 79, no. 7 (2018): 978–80. doi: 10.5860/crl.79.7.972.

⁵² Virginia Dressler, “The Right to Be Forgotten in Digital Archives,” Choose Privacy Every Day, American Library Association, November 12, 2020, <https://chooseprivacyeveryday.org/the-right-to-be-forgotten-in-digital-archives/>.

number of books for each title, approximate pages, primary content, and intended audience, prepared us for inquiries into making each yearbook accessible. In addition, this allowed us to plan in advance for expanded digital storage and preservation needs.

Define best practices and consult general counsels.

When embarking on a yearbook digitization project, we recommend that archivists and librarians contact their institution's general counsel offices for guidance and advice. We recognize that some institutions and repositories do not have this kind of aid at their disposal. For those that do, including legal counsel will give project organizers peace of mind in making what can often be complex copyright and privacy decisions. In our project, the ISU's general counsel was particularly helpful in suggesting a deeper evaluation of certain titles as they applied to potential legal concerns. For those institutions that do not have easy access to legal counsel, performing the necessary evaluation work upfront and hiring a lawyer to evaluate copyright and privacy decisions would be advisable.

With the help of legal counsel, project coordinators can document and define best practices for evaluating individual yearbooks for copyright and privacy concerns. Legal counsel can also help institutions determine best practices when presented with a removal request by an individual in an online yearbook. Although a yearbook may have passed all copyright and privacy tests applied by an institution, it is possible an individual may still request that their image and all likenesses be removed from the online format. Regardless of an institution's policies that either grant or deny the request, the institution should be consistent in its practice and language for all requests.

Create a checklist.

All yearbook digitization projects should evaluate copyright and privacy issues. This work should be performed for each book in a title, not as a blanket evaluation. We recommend making a spreadsheet for each title and listing the years covered. At a minimum, the spreadsheet should ask evaluators to identify a copyright holder for each year (or notate a work in the public domain or one that would qualify for fair use), note works and advertisements in each book that might have separate copyright claims, indicate if a book contains images of anyone younger than eighteen years of age, and identify images of student work or artwork outside of FERPA exceptions. Use this information to determine eligibility for each book's inclusion in the digitization project.

Not all yearbooks are created equal.

Once an institution has performed copyright and privacy evaluations on a yearbook title, it may find some or all issues cannot be included in a digitization project. During our evaluations of the *Clarion* and *Thomas Metcalf School Yearbook* series, we determined that later issues of those titles had too many privacy concerns to include them in that round of digitization. As a solution, the problematic issues were given a later digitization date that would place them within the privacy standards set by the institution. Project evaluators should consider alternative access options for titles and issues they find do not meet their set standards.

Reflecting on “the right to be forgotten.”

Several years passed between the time we began this project and the year we authored this article. U.S. society has changed in that time. There is much greater attention on the lives of transgender and nonbinary persons, some of whom no longer identify with misgendered names and photographs memorialized in yearbooks and other documentary sources.⁵³ A reporter writing for a national newspaper, *USA Today*, exposed hundreds of students memorialized in blackface and Ku Klux Klan photos in a study of nine hundred college and university yearbooks across the United States, including Virginia governor Ralph Northam in his 1984 medical school yearbook at Eastern Virginia Medical School.⁵⁴ None of these issues was necessarily brought to light by the digitization of any particular set of yearbooks, but complex, potentially embarrassing issues such as these caused us to reflect on our multiyear digitization project. In developing our project plan, we were primarily concerned with legal issues surrounding the act of digitization and digital public access. In hindsight, we would likely include additional conversations with our project team and legal counsel about the Right to Be Forgotten and its implications.

Conclusion

Student yearbooks are important pieces of an institution's cultural history. These student-driven publications offer researchers glimpses into an institution's past, documenting its physical, cultural, administrative, and academic changes as seen by students. Yearbooks also record behaviors within specific communities and reactions to national and international events. However, yearbooks can only represent a singular view of the past, excluding groups who yearbook creators may have seen as problematic or disruptive to their chosen narrative of the year's activities. While such books serve as important documentary evidence for an institution, researchers should evaluate them with caution.

Kenneth E. Foote stated that archivists view archives as "important resources for extending the spatial and temporal range of human communication." With this notion, "attitudes toward the past, as well as visions of the future, can sometimes condition collecting policies."⁵⁵ For institutions that have trouble collecting student-created ephemera and memorabilia, yearbooks can often serve as the connection to an institution's largest community group. Alumni can reminisce about their school years with family and friends by showing them images of people and places that may have long ago disappeared. Some alumni use their yearbooks as scrapbooks, saving ephemera, photographs, and memorabilia highlighting their individual experiences. These personal history capsules serve as tangible evidence for a younger generation who may not otherwise have a connection to political, cultural, or social movements of the recent past.

With consideration for copyright and privacy, student yearbooks may also serve as a valuable addition to an institution's web-accessible offerings. Institutions considering their yearbooks for digitization should perform a thorough inventory of each yearbook title, making sure to include all

⁵³ Taylor Baker, "Policy vs. Practice: Why Transgender Students Can't Change Their Name in the Yearbook," *Red and Black: The Student News Site of Jefferson City High School*, November 14, 2018, <https://jcredblack.com/6041/news/policy-vs-practice-why-transgender-students-cant-change-their-name-in-the-yearbook/>.

⁵⁴ Brett Murphy, "Blackface, KKK Hoods and Mock Lynchings: Review of 900 Yearbooks Finds Blatant Racism," *USA Today*, February 21, 2019, <https://www.usatoday.com/in-depth/news/investigations/2019/02/20/blackface-racist-photos-yearbooks-colleges-kkk-lynching-mockery-fraternities-black-70-s-80-s/2858921002/>.

⁵⁵ Kenneth E. Foote, "To Remember and Forget: Archives, Memory, and Culture," *American Archivist* 53, no. 3 (1990): 378–92. doi: doi.org/10.17723/aarc.53.3.d87u013444j3g6r2.

issues and title changes. At a minimum, evaluators should determine copyright ownership, note outside advertising or other potential copyright concerns, identify works by students, and determine if the students featured are over the age of eighteen. Project coordinators should evaluate all copyright concerns and determine if their yearbooks infringe on FERPA or COPPA standards. Once the evaluation is complete, project coordinators should consider meeting with legal counsel to verify their findings, help draft institutional standards, and create policies for addressing potential removal requests.

Yearbooks are an important source of history for any institution. With an understanding of their origins and their place in an institution's memory, and with careful evaluation of copyright and privacy, yearbooks should be considered as the next project for an institution's digitization program.