



Aprille C. McKay, JD
University of Michigan

THIRD PARTY PRIVACY AND LARGE SCALE DIGITIZATION OF MANUSCRIPT COLLECTIONS: LEGAL AND ETHICAL OBLIGATIONS



PRIVACY ETHICS FOR ARCHIVISTS

SAA Code of Ethics

- “Archivists protect the privacy rights of donors and individuals or groups who are the subject of records”

http://www.archivists.org/governance/handbook/app_ethics.asp

- A competing obligation to provide good access



THIRD PARTIES PRIVACY: PAPER MANUSCRIPTS

Legal duty of confidentiality

- Fiduciary or agency relationships
 - Attorney-client
 - Employer-employee
 - Doctor-patient
- Court order
- Law or regulation
 - HIPAA
- Contract
 - Non-disclosure agreements
 - Legal settlements
 - **Donor agreements**

What if the donor breached a duty?

Brown & Williamson v. Regents of the University of California
<http://www.library.ucsf.edu/tobacco/litigation/>

Caveat

- Only a trial court opinion – not binding precedent
- In San Francisco
- But the judge's reasoning could be persuasive to other courts
- Especially if there is a strong public interest in access to the records

Key points

- If the donor breaches a confidentiality duty, liability is the donor's first
- Archives not automatically liable, particularly if the archivist had no knowledge of the confidential material
- There is very little case law in this space which may mean
 - Archivists are careful to prune confidential material
 - Collections are not accessible intellectually
 - Out-of-court settlements

Breach of donor agreements

- Who's suing?
- The donor? You lose
- Third party? Not clear
 - Must show that they were an intentional "third party beneficiary" of the donor agreement
 - He or she knew of the contract at the time it was made
 - Relied upon it to his or her detriment

Duty to not disclose

- Hard to sue archives for invasion of privacy or disclosure of private information for paper records
- Practical obscurity
- Limited distribution
- Paper archives are clearly not publishers
- Others (journalists, scholars) do the tale telling and are more obvious targets

What's different?

- Agency of the archives
- Uncertainty about standards of care to prevent disclosure
- Wider distribution and access
 - More findable
 - Can do more damage to reputation
- Potential status of the archives as a publisher
 - Publication of private facts
 - Defamation
 - False light



THIRD PARTY PRIVACY LIABILITY DIGITAL MANUSCRIPTS

Publication of private facts

- **True information** about the private life of a person that would be highly offensive to a reasonable person and not of legitimate public concern
 - Sexual activity
 - Health – including mental health, addictions
 - Economic status
 - But criminal acts are of legit public concern

Publication of private facts (cont)

- Passage of time can be good or bad
 - Sensitivities can fade with time
 - But so can newsworthiness
- Protects only living people, not corporations
- Only if information never exposed to the public eye – particularly in public records
- Consent is a defense

Publication of private facts (cont)

- Community standards
 - Law does not protect the overly sensitive
 - Community standards have changed
 - Pre-marital sex
 - Out-of-wedlock births
 - Race of parents
 - Sexual orientation
 - Means that case law is not always relevant

North Carolina?

- North Carolina does not recognize a legal claim for the publication of private facts
Hall v. Salisbury Post, 372 S.E.2d 711 (1988)
- But little comfort: If the injured party is in another state, that state's law could apply.



Defamation

- Slander – spoken words or perhaps IM
- Libel—written words
 - Published: computer screens count
 - Subject identified: including corporations
 - Harm: seriously shames, ridicules, disgraces or injures reputation. Not just embarrassing
 - Fault: What would a reasonable archivist have done?

Limits on libel

- Short statute of limitation: 1 year in NC
- Only living people
- Only **untrue** information
- Only non-consenters
- Only that which damages reputation
- Only facts, not opinions
 - That which cannot be proven untrue
- If public figure, publication must have been malicious

False light

- Almost the same as libel
- Not all states recognize it (NC does not)
- Protects mental well-being rather than reputation
 - Publication by the defendant about the plaintiff
 - Made with **actual malice**
 - Which places plaintiff in a false light
 - Highly offensive

Reports from the field

Archives with materials on living people, accessible on the Internet, with a track record



- Collect with permission from copyright owner
- Not open to Google
- 2-3 dozen takedown requests over 10 years including copyright, litigation holds, libel, and "cleaning up web footprint"
- Access restriction technology granularity
- Websites were originally public (implied consent?)

Paul Koerbin: pandora.nla.gov.au

Reports from the field (cont)



- Respond to requests to redact records for privacy reasons – mostly social security numbers
- Number of requests has gone up since exposure of metadata to Google last year
- Now 1-4 requests a month

Kim Klausner: legacy.library.ucsf.edu

How big of a problem?

- What would expected volume of complaints be? It depends:
 - The sensitivity of the particular collection
 - How it is exposed for search
 - Age of the collection

MANAGING RISK



PARADIGM (UK)

Workbook on digital private papers:



"[C]ontent is generally not made accessible to the public until many decades after it is received. Therefore the digital archivist has ample opportunity to exercise 'reasonable care' and review archive material before it is made available."

<http://www.paradigm.ac.uk/workbook/legal-issues/defamation-digitalarchives.html>

PARADIGM (cont)

“These considerations all suggest that it is safer to provide controlled, meditated, access to archives relating to living individuals.”

But UK has stronger libel & data protection laws

Select material thoughtfully

- Balance public value vs. risk
- Older material less likely to be problematic
- Apply lessons learned processing paper
- Interview donor about confidential material using a checklist
- If donor not available, review donor file for restrictions

Selecting materials (cont)

- Conduct more thorough review of series experience says are more likely to have sensitive materials
- Consider opinion vs. fact

Input from third-party

- Consider asking for consent if third-party is living. Might be combined with copyright clearance.
- If your planned site includes Web 2.0 functionality, such as commenting, allow affected party to tell his side of the story

Create a takedown policy

- Plan what you will do if someone objects
- Be respectful and treat complainers politely
- Consider removing item from public access until it can receive thorough review
- Will buy time
 - To consider how important the documents are
 - To consider the concerns of the third party

Tailor access

- Think carefully about what is exposed to Google and other search engines
- For very sensitive collections, require IRB approval, and a plan for protecting third-party privacy
- Or allow only onsite access and no digital copying

Questions?

Aprille Cooke McKay
aprille@umich.edu