

Digitization of Special Collections and Archives: Legal and Contractual Issues

Peter B. Hirtle, Senior Policy Advisor, Cornell University Library

Anne R. Kenney, Carl A. Kroch University Librarian, Cornell University

Judy Ruttenberg, Program Director for Transforming Research Libraries, ARL

on behalf of the ARL Working Group on Transforming Special Collections in the Digital Age¹

ARL libraries hold and continue to make significant investments in the digitization of their archives and special collections. This work has included highly curated and selective exhibits drawn from multiple sources and, increasingly, mass digitization of entire archival and manuscript collections.

Even within ARL, the library, archives, and museum (LAM) community includes considerable variation in its organizational structures and relationships to parent institutions, and to a great extent in its myriad of relationships among repositories and their individual donors and collection creators. But the community shares a commitment to increasing exposure, access, and discovery of archival and manuscript material in the research mainstream—from undergraduates to senior scholars and across the disciplines. Digitization is one key strategy in this movement toward expanded access, and with it are associated complex, evolving professional practices and legal obligations with respect to donors, intellectual property, and risk.

The ARL Working Group on Transforming Special Collections in the Digital Age has assembled four significant documents in this issue of Research Library Issues to serve as a community toolkit for navigating some of the decisions involved in expanding access to special collections via digitization.

With the development of network technologies, the nature of access to donated archival material has changed. Collections that were once made available to scholarly researchers under the watchful eye of special collections librarians in a physical reading room can now be made readily accessible to the entire world via the Internet. Donors who were willing to allow access to materials in a controlled setting could be taken aback by the trajectory of increased access. It is to the library's advantage to secure, if possible, explicit permission to make copyrighted materials available on the open web. While the recent ARL *Code of Best Practices in Fair Use for Academic and Research Libraries*² makes a strong case that a fair-use argument can be made to support much library digitization, the issue becomes moot when formal permission has been received.

Two ARL Model Deeds of Gift, published here, were developed to address these changes in the provision of access to special collections. These Deeds of Gift make explicit to donors that the repository may make the donated material available online. The Deeds of Gift also discuss in more detail than was customary in the past the nature of the copyrights in the donated material and they seek to secure a copyright transfer or a license grant that would allow a repository to digitize the material.

In discussions with ARL member representatives, it became clear that the staff and legal counsel at various ARL institutions follow different approaches to deeds of gift. Some worry that legalistic documents may intimidate possible donors and so prefer documents that are as simple as possible (while still securing all needed rights). Others favor a document that is very explicit in laying out rights

and responsibilities. Based on Peter Hirtle's good work in surveying the landscape, the working group presents here two generic documents that conform to the two approaches. ARL institutions can select the model that best suits their expectations and the style of their legal advisors and use it to craft their own document. The ARL models were derived from documents developed at UCLA and the University of Minnesota; the working group thanks them for their permission to adapt their documents. Developing community standards that recognize explicitly enhanced access via digitization will go a long way in making such use of special collections materials a commonplace practice.

ARL's "Principles to Guide Vendor/Publisher Relations in Large-Scale Digitization Projects of Special Collections Materials" articulates some general guidelines that libraries should follow when outsourcing digitization projects to commercial vendors.³ The document does not specify, however, the precise contractual terms that would implement its principles. The working group, therefore, has prepared a Model Digitization Agreement that reflects the latest thinking on what should be included in a vendor's contract. In the event that a vendor does not have a standard agreement in place, the model agreement can serve as the basis for discussion. Even if the vendor has developed and wants to use its own agreement, as is likely to be the case, the model agreement can still be used as a check to ensure that provisions important to the library are either present or are added to the vendor's pre-existing document. Peter Hirtle developed ARL's Model Digitization Agreement based in part on a model agreement produced by the Copyright Advisory Office of Columbia University Libraries, led by Kenneth D. Crews, Director.

Finally, this issue of *RLI* includes a piece by Kevin Smith, Director of Scholarly Communications at Duke University, and author of the popular blog *Scholarly Communications @ Duke*. Smith's article, "Copyright Risk Management: Principles and Strategies for Large-Scale Digitization Projects in Special Collections," explores risk aversion or tolerance in matters of copyright within the broader context of risk that large organizations regularly confront and manage. The article, synthesizing recent professional trends, advocates for new practices within both the confines of and the opportunities inherent in the complexity of copyright law.

The working group hopes this set of documents is useful to ARL libraries in advancing digital access to critical scholarly materials. ARL welcomes questions and comments about this material and suggestions of other concerns in transforming special collections in the digital age; please direct feedback to Judy Ruttenberg, judy@arl.org.

1 The working group members are: Anne Kenney, Chair (Cornell University); H. Austin Booth (University at Buffalo, SUNY); Susan Brynteson (University of Delaware); Jackie Dooley (OCLC Research); Joshua Greenberg (Sloan Foundation); Nancy Gwinn (Smithsonian Institution); Thomas Hickerson (University of Calgary); Clifford Lynch (CNI); Ingrid Parent (University of British Columbia); Steven Smith (University of Tennessee, Knoxville); Gary Strong (University of California, Los Angeles); Ann Thornton (New York Public Library); Tyler Walters (Virginia Tech); Karin Wittenborg (University of Virginia). Staff liaisons to the working group are Lisa Carter (ARL Visiting Program Officer/Ohio State University) and Judy Ruttenberg (ARL).

2 ARL; Center for Social Media, School of Communication, American University; Program on Information Justice and Intellectual Property, Washington College of Law, American University; *Code of Best Practices in Fair Use for Academic and Research Libraries* (Washington, DC: ARL, 2012), <http://www.arl.org/fairuse>.

- 3 ARL, "Principles to Guide Vendor/Publisher Relations in Large-Scale Digitization Projects of Special Collections Materials," June 2010, http://www.arl.org/bm~doc/principles_large_scale_digitization.pdf.

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