



## **Special Issue on Special Collections and Archives in the Digital Age**

**T**he ARL Working Group on Transforming Special Collections in the Digital Age is focusing on a range of issues including the realignment and mainstreaming of special collections functions in ARL libraries, indicators for the strengths of special collections, and development of skills in the areas of digital and data curation. Other issues for the working group are legal concerns and evolving professional practices around digitizing special collections and archival materials.

This issue of *RLI* addresses the latter two issues. ARL member libraries have embraced digitization—performed in-house or through commercial vendors—as a critical strategy to increase access to their unique collections. In their introduction to this special issue, Peter B. Hirtle, Anne R. Kenney, and Judy Ruttenberg highlight the ongoing commitment to increasing exposure, access, and discovery of archival and manuscript material in the research mainstream, reaching undergraduates to senior scholars. Access to digitized archival material has dramatically changed the way research can be done. This change has challenged libraries and special collections librarians and curators to consider evolving professional practices and legal obligations. Also in this issue is a model digitization contract for use with outside vendors, as well as model “deeds of gift” that can secure permission from rights holders to make donated material accessible on the web. Finally, Kevin L. Smith, Director of Scholarly Communications at Duke University, presents a critical essay on a new way of thinking about copyright and risk management in digitizing special collections.

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## 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 Age<sup>1</sup>**

**A**RL 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*<sup>2</sup> 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.<sup>3</sup> 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](mailto: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](http://www.arl.org/bm~doc/principles_large_scale_digitization.pdf).

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**To cite this article:** Peter B. Hirtle, Anne R. Kenney, and Judy Ruttenberg. "Digitization of Special Collections and Archives: Legal and Contractual Issues." *Research Library Issues: A Quarterly Report from ARL, CNI, and SPARC*, no. 279 (June 2012): 2–4. <http://publications.arl.org/rli279/>.

## Model Deed of Gift\*

### DEED OF GIFT

#### 1. Transfer of Ownership

I (we), [insert donor's name here] [and spouse, if any here], of [insert address here] hereby irrevocably donate and convey to [NAME OF LIBRARY OR UNIVERSITY (the "Library" or "University," as appropriate), for the benefit of the University Libraries, all rights, title, and interest that I (we) possess in the materials described on Exhibit A to this Deed of Gift (the "Donated Materials"), except as noted in this Deed of Gift.

By signing this Deed, I (we) understand and agree that the location, retention, cataloging, preservation, and disposition of the Donated Materials by the University will be conducted in its discretion, in accordance with University policy and with applicable law. Common discretionary uses by the University include, but are not limited to, exhibition, display, digitization for preservation and access purposes, and making works available for research and scholarship. I (we) acknowledge that the Library may dispose of any Donated Materials not selected for permanent retention. Retained Donated Materials shall be made accessible for research, subject to the terms and conditions, if any, stated below:

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#### 2. Copyright

##### A. Current copyright ownership and control

To the best of my knowledge, (please select *only one* of the following statements):

- I control **all** copyrights in the Donated Materials (i.e., all works were created by me, or I acquired the copyrights in all Donated Materials.)
- I control **some** of the copyrights in the Donated Materials (i.e., some of the Donated Materials were created by me, or I acquired the copyrights in some of the Donated Materials, but the Donated Materials also contain works for which other individuals or organizations control the copyrights.)
- I control **none** of the copyright(s) in the Donated Materials.

Further information about the control of copyrights in the Donated Materials is found in the attached documentation.

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\* This model deed of gift is made available by the Association of Research Libraries with the understanding that ARL is not rendering legal advice. Please consult an appropriate professional for legal services. If you are using this document in connection with a contract or other actual transaction, please treat it as if copyright had been waived per Creative Commons Zero (CC0). If you are using this document or a variation of it as a model or template, please treat it as licensed under the Creative Commons Attribution (CC-BY) 3.0 Unported License. ARL suggests the following attribution: *Courtesy of the Association of Research Libraries, and adapted from a form developed at the University of Minnesota Libraries.*

**B. Transfer of copyright ownership:**

Please select *only one* of the following options.

- I irrevocably assign to the University any and all copyrights I control in the Donated Materials.
- I retain full ownership of any and all copyrights I currently control in the Donated Materials, but I grant the University a nonexclusive right to authorize all uses of these materials for non-commercial research, scholarly, or other educational purposes pursuant to a Creative Commons Attribution, Non-commercial license.
- I do not transfer or intend to transfer copyright ownership to the University.

Regardless of my above choice as to transfer of copyright ownership, I acknowledge that some of the discretionary uses incidental to the Donated Materials' inclusion in the collections of the University (including, but not limited to, exhibition, display, and research access) may implicate copyrights. To the extent that such activities are not already permitted under statutory copyright exceptions such as fair use, I grant the University an irrevocable non-exclusive royalty-free worldwide perpetual license for all reasonable discretionary uses.

SIGNATURE OF DONOR:

I (we) represent and warrant that I am (we are) the sole owner(s) of the materials described above; that I (we) have full right, power, and authority to give the materials to the University; and that the information I (we) have provided is accurate. The terms of this Deed of Gift shall apply to all of the Donated Materials described on Exhibit A and on any subsequently delivered Exhibit notwithstanding that some materials may be delivered before or after the date of this Deed of Gift.

Signed:(DONOR) \_\_\_\_\_  
 this [insert day here] day of [insert month here], 20[complete year here].

Signed:(DONOR) \_\_\_\_\_  
 this [insert day here] day of [insert month here], 20[complete year here].

ACCEPTANCE BY UNIVERSITY:

[NAME] Libraries hereby accepts this gift on behalf of the [University] with appreciation and agrees to the conditions stated in this Deed of Gift.

\_\_\_\_\_

Date: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

EXHIBIT A TO DEED OF GIFT

Description of Donated Materials



## Model Deed of Gift, including Mixed IP Rights\*

### DEED OF GIFT

I (we), [insert donor's name here] [and spouse, if any here] of [insert address here] (hereafter referred to as "DONOR") am (are) the sole and absolute legal owner(s) with full right and authority to enter the Deed of Gift and grant the rights granted herein for the gift materials fully described in Exhibit A attached hereto and incorporated herein.

The gift materials include: (a) items for which the DONOR owns the copyrights and transfers the copyrights with the physical property (referred to hereafter as "Materials Transferred With Copyrights"), (b) items for which the DONOR owns the copyrights but is not transferring the copyrights with the physical property (referred to hereafter as "Materials Transferred Without Copyrights"), (c) items for which the DONOR does not own the copyrights and hence is only transferring the physical property (referred to hereafter as "Materials with 3<sup>rd</sup> Party Copyrights"), and (d) materials that are in the public domain (referred to hereafter as "Public Domain Materials"). All gift materials are referred to collectively as the "Materials."

1. DONOR desires to transfer the Materials as a gift for inclusion and unrestricted access and use in the collection of the [insert name of repository here] ("THE LIBRARY").
2. For Materials Transferred With Copyrights, DONOR hereby irrevocably assigns, transfers, and gives all of his (her, their) right, title and interest, including the sole and exclusive copyright in all tangible materials (including without limitation written, audio, video, multi-media material or material in any other tangible form now known or hereafter invented), to the Materials Transferred With Copyrights to THE LIBRARY. To the extent that copyright may be shared with others, DONOR hereby assigns to THE LIBRARY all his (her, their) right, title and interest in the copyrights and waives and releases all such rights, whether partial or complete.
3. For all Materials Transferred Without Copyrights, DONOR hereby irrevocably assigns, transfers, and gives all of his (her, their) right, title and interest exclusive of any copyrights he (she, they) may have in the Materials Transferred Without Copyrights to THE LIBRARY.
4. For all Materials with 3<sup>rd</sup> Party Copyrights, DONOR hereby irrevocably assigns, transfers, and gives all of his (her, their) right, title and interest in the tangible materials to THE LIBRARY.
5. For all Public Domain Materials, DONOR hereby irrevocably assigns, transfers, and gives all of his (her, their) right, title and interest to the Public Domain Materials to THE LIBRARY. The parties believe in good faith, and understand, that all Public Domain Materials are in the public domain and, thus, are not in anyway restricted in their use, reproduction, or publication.
6. After execution of this Deed of Gift by DONOR and acceptance by THE LIBRARY, title to the Materials shall pass to THE LIBRARY upon acknowledgement of receipt of the Materials by THE LIBRARY.

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7. No term or provision of this instrument shall be interpreted to limit or restrict the fair use rights of THE LIBRARY or users of the Materials as provided by U.S. Copyright Law, Title 17, U.S.C. ("Fair Use Rights).
8. To the extent that copyright may be shared with or owned by others and notwithstanding the Fair Use Rights and rights related to the Public Domain Materials, DONOR grants THE LIBRARY a non-exclusive, royalty free, perpetual license:
  - a) To make copies of the Materials for purposes of preservation and creation of a usable archival copy and to permit others to make copies of the Materials consistent with the Fair Use Rights.
  - b) To display and reproduce the Materials in exhibitions, catalogs, University publications or advertisements both on and off campus.
  - c) To digitize the Materials or use any technological substitute THE LIBRARY deems appropriate to preserve and provide access to the Materials.
  - d) To use the Materials for The LIBRARY's educational, research, and other non-commercial purposes. Such uses could include, but are not limited to, the reproduction, display, performance, and preparation of derivatives of the Materials.
  - e) To provide the public access to, including Internet or other wireless or digital access, and unrestricted use of Public Domain Materials.
  - f) For Materials Transferred With Copyright, to make full-text or full version of the materials available to the public pursuant to a Creative Commons license of THE LIBRARY's choosing. This means that at a minimum, the copyrighted work, if copied and distributed, must credit the author, but not in any way that suggests that the author endorses the use of the work.
  - g) For Materials Transferred Without Copyright, to make full-text or full version of the Materials available to the public pursuant to a Creative Commons Attribution, Non-commercial license. This means that the Work may be copied and distributed for any non-commercial purpose, provided that the author is given credit for the original work (but not in any way that suggests that the author endorses the use of the work). See <http://creativecommons.org/licenses/by-nc/3.0/>. Commercial uses that exceed what is permitted under Fair Use will require the permission of the DONOR.
  - h) For Materials with 3rd Party Copyrights, to make the material available to the public to the extent allowed by copyright law.
9. DONOR shall indemnify, defend and hold THE LIBRARY harmless from any losses, claims, damages, awards, penalties or injuries incurred, including reasonable attorney's fees, which arise from any claim by any third party of an alleged infringement of copyright or any other property right arising out of the access and use of the Materials.
10. DONOR shall provide THE LIBRARY with all information and documentation regarding the provenance of the Materials, including any information relating to intellectual property rights.
11. The Materials will be organized by the THE LIBRARY and a bibliographic record and/or finding aid will be created to describe the content and arrangement.
12. The Materials will be physically stabilized and preserved by THE LIBRARY including, as appropri-



ate, placing the Materials in non-damaging containers and storing in facilities that provide appropriate temperature and humidity control and security.

13. THE LIBRARY is authorized to dispose of any duplicate or other material not relevant to the collection which it determines to have no permanent value or historical interest.
14. In the event that DONOR may hereafter donate additional materials to THE LIBRARY, such gifts shall be set forth in an Addendum to this Deed of Gift and will be governed by the terms and conditions stated above. The Addendum shall include a description of the additional materials so donated and any conditions necessary and pertinent to those specific, newly-donated materials and shall be signed by the DONOR and THE LIBRARY.

Signed:(DONOR) \_\_\_\_\_

this [insert day here] day of [insert month here], 20[complete year here].

Signed:(DONOR) \_\_\_\_\_

this [insert day here] day of [insert month here], 20[complete year here].

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**FOR DEPARTMENTAL USE ONLY**

Accepted for THE LIBRARY:

Date: \_\_\_\_\_

Title:\_\_\_\_\_

## Model Digitization Agreement\*

### DIGITIZATION AGREEMENT

[NAME OF LIBRARY]

This AGREEMENT is entered into as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ (“Effective Date”), between [Library Name] (“The Library”), acting on behalf of [University Name] (the “University”), with principal offices at [university address] and \_\_\_\_\_ (the “Publisher”), with principal offices at \_\_\_\_\_.

WHEREAS, the Publisher desires to make digital copies of selections from certain Collections in the [NAME OF COLLECTION, DEPARTMENT, OR LIBRARY] (“the Selection”); and

WHEREAS, the Publisher desires to incorporate the digitized images of the Selection in an electronic commercial product (“the Publication”) To authorized users so that they can access, display, refine, and print images from the Selection for research and private study, and

WHEREAS, the Library desires to preserve and enhance the accessibility of the Selection to the academic community and the general public in a manner in accordance with the Library’s public service and educational mission, and consistent with the “ARL Principles to Guide Vendor/Publisher Relations in Large-Scale Digitization Projects of Special Collections Materials of June 2010” ([http://www.arl.org/bm~doc/principles\\_large\\_scale\\_digitization.pdf](http://www.arl.org/bm~doc/principles_large_scale_digitization.pdf)) and the terms and conditions set out below;

THEREFORE, in recognition of mutual consideration, the Library and the Publisher (collectively the “Parties”) enter into this Agreement to allow the Publisher to access and make Digital Copies of selected Works from the collections of the Library as described in this Agreement in accordance with the terms set forth below. A general description of the project is set forth in Appendix A.

#### 1. License to Access the Library Collections and to Make Digital Copies

(a) As the holder/owner of certain rare or special collections, the Library grants to the Publisher, during the Term, as defined in Paragraph 2(a) below, access to the Library’s collections for the purposes of researching and selecting works to be included in Publisher’s digitization project. Access will be granted to the collections of the Library during the times as specified in Appendix A.

(b) In its capacity as the holder/owner of certain rare or special collections, and subject to the terms and conditions of this Agreement, the Library grants to Publisher the nonexclusive right to digitize those works from the Library’s collections (the “Digital Copies”) That the Publisher selects and that the Library agrees to provide (the “Works”).

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(c) Nothing in this Agreement prevents the Library from digitizing any or all of the materials included in the Works and making them freely available to the public, or permitting third parties to digitize or otherwise reproduce the Works and making them available to third parties.

(d) Neither Party, nor any agent or person or entity acting on behalf of any Party in the execution of this Agreement, shall claim any copyright or other literary or legal right in or to the Digital Copies, reproductions, metadata, compilations, or images of the Works, except as may be specified in Appendix A.

## 2. Term and Termination

(a) The term of this Agreement (the "Term") shall commence on the Effective Date and end at the end of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_. The Parties may by written agreement extend the end date of the Term. Expiration or termination of the Agreement shall not terminate the right of the Parties to continue using the Digital Copies already created pursuant to this Agreement at the time of expiration or termination, except that if termination is due to Publisher's material breach of the Agreement, Publisher shall cease all use of its Digital Copies if so requested by the Library.

(b) Either Party may terminate this Agreement for material breach by the other Party and failure to cure such breach within ten (10) days. At any time during the Term, either Party may terminate this Agreement without cause upon thirty (30) days' written notice to the other Party.

(c) The following Paragraphs of this Agreement shall survive the expiration or termination of this Agreement: Paragraphs 1(d), 4(e)-(k), 5, 6, 7, 9, and 10.

## 3. Rights and Responsibilities of the Library

(a) The Library shall permit the Publisher to use the websites and search engines of the Library as allowed for use by the public or as otherwise consistent with agreements with third parties. The Library will use reasonable efforts to locate and pull the Works identified by the Publisher, or cause the Works to be located and pulled by a third-party contractor.

(b) As the Works are selected, the Library shall make reasonable efforts to provide the Publisher with metadata as specified in Appendix A, when such metadata is available to the Library.

(c) Digitization will occur on-site in the Library, using specialized equipment approved the Library as per the instructions specified in Appendix A. Scanning may only be done by contractors selected and/or approved by the Library. In certain cases, it may be possible to conduct scanning in an off-site secure facility that meets appropriate standards and if the collections are appropriately ensured when not in the Library.

(c) The Library may choose to exclude any of the Works designated by Publisher, if the Library determines in its sole discretion, for any reason, that such Works are unsuitable or unavailable for scanning or digitizing. The Library shall notify the Publisher if it makes such a determination and such material will not be included among the Works to be digitized. The Library is under no duty to explain the reasons for its refusal to digitize particular materials to the Publisher.

## 4. Rights and Responsibilities of the Publisher

(a) The Publisher shall select those Works that it wishes to be digitized by periodically submitting a list of such Works to the Library. It shall be Publisher's obligation to determine it has the legal authority to digitize the work. If the Publisher wishes only to digitize works in the public domain, it is the Publish-

er's obligation to make such determination prior to selecting a particular Work for digitization. If the Publisher elects to digitize in-copyright works, it will ensure that it has the legal basis to do so.

(b) In consideration for the rights and license granted by the Library hereunder, the Publisher shall pay fees to the Library in accordance with the fee schedule set forth in Appendix A. In addition, the Publisher shall pay all taxes, duties, and any assessments imposed by any foreign, U.S. federal, state, local, municipal, or other government.

(c) The Publisher shall ensure that all Digital Copies meet the quality standards and technological requirements as specified in Appendix A. The Publisher shall bear all costs of making the Digital Copies, including all labor, equipment, materials, and other costs. The Library reserves the right to approve the types of equipment that will be used to digitize the Works. The Publisher shall, upon reasonable request by the Library at any time during the Term, permit the Library to examine samples of the Digital Copies to assess their quality. Publisher will make whatever changes are reasonably needed in its digitization process if the Library determines that the samples do not meet such quality standards and / or technological requirements.

(d) The Publisher shall provide the Library with a Digital Copy of each Work on a delivery schedule as specified in Appendix A.

(e) The Publisher may use its set of Digital Copies as part of its products or services and may permit its customers or patrons to use the Digital Copies as permitted under applicable law. The Parties may specify in Appendix A any conditions or limits on the use of the Digital Copies by the Publisher.

(f) The Publisher hereby grants free online access to the Library faculty, students, staff, and other affiliates of the University, to all products and services of the Publisher that include any of the Digital Copies.

(g) The Publisher shall adhere to the Library guidelines for the handling of the physical materials, as specified in Appendix A.

(h) The Publisher shall use its best efforts to protect the editorial integrity, completeness, and appearance of the Works. Any product or service of the Publisher that includes the Digital Copies shall meet prevailing commercial and research standards for layout, file formatting, and quality. All Digital Copies shall include an appropriate publication citation information or relevant metadata, including credit for the source of the original material as follows: \_\_\_\_\_ [*the collection name*], [*name of Library*] ("*Citation*"). If Publisher makes Digital Copies available to any third parties, Publisher shall require such third parties to retain the Citation in the Digital Copies.

(i) The Publisher shall return the Works from its on-site or off-site facility to the Library promptly upon the earlier of (i) completion of making the Digital Copies, (ii) Publisher's decision not go forward with digitization of the Works in question, (iii) Publisher's receipt of a request from the Library to return the Works in question, or (iv) \_\_\_\_\_ months after receipt of the Works from the Library.

(j) The Publisher shall bear the risk of loss or damage to the Works from the digitization process. If the Library determines that a Work was not returned in substantially the same condition as when it was delivered to the Publisher, the Publisher shall, at the Library's discretion, replace the Work or pay the Library for the repair or replacement of the Work.

(k) The Publisher will hold in confidence any personally-identifiable information associated with the use of images scanned from the Library's collection. The Publisher will regularly remove all personally-identifiable information associated with the use of scanned images from its log files and content man-

agement systems. Alternatively, the Publisher can offer users the option of reading and working anonymously.

## 5. The Library's Use of the Digital Copies

Following receipt of the Digital Copies from the Publisher, the Library may use the Digital Copies in any manner that it deems appropriate, consistent with applicable law. Among other things, the Library may, without limitation: (i) permit any users of the Library's services to access, search, download, print, and otherwise use the Digital Copies; and (ii) provide copies of the Digital Copies to other libraries and nonprofit institutions, including digital archiving repositories, and permit such entities to similarly use the Digital Copies. The Parties may specify in Appendix A any conditions or limits on the use of the Digital Copies by the Library.

## 6. Representations and Warranties

(a) THE LIBRARY IS MAKING THE WORKS AVAILABLE TO PUBLISHER "AS IS," AND MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY TYPE WHATSOEVER, INCLUDING ANY WARRANTY THAT THE USE, SCANNING, OR DIGITIZATION OF THE WORKS WILL NOT INFRINGE UPON THE RIGHTS OF ANY THIRD PARTY.

(b) Publisher shall be solely responsible for copyright infringement, invasion of privacy, or other legal liability arising from the Publisher's use of the Works and Digital Copies.

(c) Publisher shall be solely responsible for its arrangements with its customers and any other third party to whom it makes available any part of the Digital Copies, including for any claims, damages, injuries, and losses of any type whatsoever that such parties may assert as a result of Publisher's inclusion of Digital Copies in any content provided by Publisher to third parties or any use made by such third parties of Digital Copies or the Works.

(d) Each Party shall notify the other promptly if the Party has reason to believe that an infringement claim has occurred or is likely to occur with respect to any of the Digital Copies. The Parties are not, under this Agreement, required to utilize the "notice and takedown" provisions of Section 512 of the U.S. Copyright Act or similar provisions of the laws of any other countries. However, each Party shall notify the other promptly upon receipt of any such "takedown notice" with respect to any of the Digital Copies.

(e) The Library's decision to deliver any of the Works, or to otherwise permit the Publisher to copy any of the Works, shall not be construed as legal advice or as a legal opinion.

(f) Each Party represents and warrants that it has the full authority to enter into this Agreement and to perform all of its obligations and responsibilities herein.

## 7. Indemnity

(a) Publisher will indemnify, hold harmless and defend the Library, its Trustees, officers, faculty, students, agents, and employees against any and all damages, suits, claims, liabilities, judgments, costs and expenses arising out of or relating to (i) any personal or bodily injury (including death) or property damage caused by Publisher's negligent, unlawful, or willful acts or omissions or breach of this Agreement; (ii) any infringement or misappropriation of any third party intellectual property or proprietary rights (including, without limitation, trademark, trade secret, copyright or patent) in connection with



the Works; or (iii) any claim or action of any type whatsoever by any customers or subcontractors of Publisher.

(b) NEITHER PARTY WILL BE LIABLE TO THE OTHER FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL, OR EXEMPLARY DAMAGES OF ANY KIND, INCLUDING BUT NOT LIMITED TO ANY LOST PROFITS OR LOST SAVINGS, HOWEVER CAUSED, WHETHER FOR BREACH OR REPUDIATION OF CONTRACT, TORT, BREACH OF WARRANTY, NEGLIGENCE, OR OTHERWISE, WHETHER OR NOT THE PARTIES WERE ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGES ARISING FROM OR RELATING TO THIS AGREEMENT. IN NO EVENT WILL THE LIBRARY'S TOTAL LIABILITY EXCEED IN THE AGGREGATE \$10,000.

**8. Insurance** *(Note: Some institutions may elect not to include information on insurance in the digitization agreement itself, but reserve it for a digitization plan)*

(a) Publisher will secure and maintain (or cause any third parties performing services hereunder to secure and maintain, as applicable) the following coverages, with the following minimum limits of coverage:

(i) Workers' compensation insurance and statutory disability insurance as required by law for all persons employed in connection with the project, including, as a minimum, employer's liability limits of \$500,000 each accident / \$500,000 each employee for bodily injury or by disease / \$500,000 policy limit, with coverage (except for disease) to be included in the underlying schedule of any excess policy;

(ii) Commercial general liability insurance (which may be basic and umbrella coverage) with respect to injuries and death to persons and/or damage to property, written on an "occurrence" basis, with a combination single limit of not less than \$3,000,000 covering the project;

(iii) Professional liability insurance in an amount not less than \$3,000,000 per occurrence; and

(iv) Property insurance in an amount of not less than \$250,000 per occurrence (Publisher shall be responsible for any deductibles on this and any other insurance policy).

(b) Each of the foregoing shall name the Library and its trustees, officers, employees, and agents as additional insureds (to the extent of the contractual liability assumed by Publisher in this Agreement) with respect to general liability, professional liability, property, and umbrella insurance; name the Library as loss payee with respect to the property insurance; and contain a waiver of subrogation by Publisher's insurer with respect to the Library and the above-referenced additional insureds (with respect to general liability, professional liability, umbrella, property and worker's comp insurance). The Publisher may meet these insurance requirements through either (1) commercial insurance; (2) self-insurance; or (3) a combination of commercial insurance and self-insurance, at the Publisher's discretion.

## 9. Force Majeure

If either Party is delayed in the performance of its obligations under this Agreement by force majeure, this Agreement shall be suspended until such cause has ceased.

## 10. General

(a) Neither Party shall directly or indirectly sell, transfer, assign, convey, pledge, encumber, or otherwise dispose of its rights or obligations under this Agreement without prior written consent from the other Party.



(b) The Parties are independent contractors and nothing contained in this Agreement shall be construed as creating any agency, partnership, or other form of joint enterprise between them.

(c) The failure of either Party to require performance by the other Party of any provision of this Agreement shall not affect the full right to require such performance at any time thereafter; nor shall the waiver by either Party of a breach of any provision hereof be taken or held to be a waiver of the provision itself.

(d) Notices under this Agreement will be sufficient only if in writing and delivered as specified in Appendix A.

(e) Amendments to this Agreement shall not be effective unless in writing and signed by both Parties.

(f) If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, such determination shall not affect the validity or enforceability of any other part or provision of this Agreement.

(g) This Agreement shall be governed by and construed in accordance with the laws of the State of [Name] applicable to agreements made and fully performed in [Name].

(h) This Agreement constitutes the full and complete understanding of the Parties regarding the subject matter hereof.

IN WITNESS WHEREOF, the Library and the Publisher have caused this Agreement to be executed by their duly authorized representatives as of the day and year first written above.

**[NAME OF UNIVERSITY]**

By \_\_\_\_\_

[Title of authorizing official]

**[NAME OF PUBLISHER]**

By \_\_\_\_\_

Title \_\_\_\_\_

## Appendix A

General Description of the Project [insert here].

Paragraph 1(a): Times and hours of access to the Library collections.

Paragraph 1(b): Description of targeted collections of the Library.

Paragraph 1(d): Materials to which the Parties may claim copyright ownership.

[Note: the general desire is that neither the Publisher nor the Library will claim copyright in the Digital Copies or in the descriptive metadata. However, it is conceivable that the parties might choose to retain copyright on such substantive elements as abstracts and bibliographic notes that could be part of the metadata. To the extent that such assertions of rights are desirable, they should be itemized here. Nothing in this provision affects rights in the original works that any person might hold.]

Paragraph 3(b): Schedule for pulling and sending Works to the Publisher.

Paragraph 3(d): Description of metadata to be provided by the Library to the Publisher.

[Note: Add general description of the available metadata, e.g., data available in MARC records for each title.]

Paragraph 4(b): Fees to be paid by the Publisher to the Library and schedule of payments.

Paragraph 4(c): Standards for the Digital Copies.

[Note: Add technical details for the quality and standards for the Digital Copies. NARA's digitization strategy provides some examples: <http://www.archives.gov/digitization/strategy.html>.]

Paragraph 4(d): Schedule for making and delivering the Digital Copies.

Paragraph 4(e): Limits on uses of the Digital Copies by Publisher.

Paragraph 4(f): Guidelines for handling of physical materials.

Paragraph 5: Limits on uses of the Digital Copies by the Library.

Paragraph 10(d): Addresses for Notices.

[Note: Add mailing addresses and other contact information for the Parties.]

## Copyright Risk Management: Principles and Strategies for Large-Scale Digitization Projects in Special Collections

**Kevin L. Smith, Director of Scholarly Communications, Duke University**

**T**he foundational premise of this article is that librarians and archivists frequently practice a form of self-censorship when making decisions about digitization of special collections and unique local holdings. This is hardly a controversial assumption, and it was nicely documented in ARL's 2010 report on "Fair Use Challenges in Academic and Research Libraries."<sup>1</sup> In that document, interviewees report reluctance to undertake digitization projects because of uncertainty, and a tendency to select only the safest and most homogenous collections. As one interviewee expressed this view, "We have a lot of things in the public domain, that's the 'easy pickins' for digitization.... We haven't gotten into controversial ground."<sup>2</sup> The authors of the report elaborate on this tendency when they write:

The challenge is particularly steep when librarians confront mixed collections that include "orphan" works (works whose copyright-holder is unknown or unreachable) and works, such as musical recordings or video, that implicate multiple rights and rights holders.<sup>3</sup>

In the early stages of library digitization projects, this preference for collections that were "safe" and easy to understand in terms of copyright analysis was not particularly problematic. But as the pace of projects increases, it is more and more troubling to realize that decisions are being made not based on scholarly needs or the importance of the material itself, but merely to avoid controversy and risk. In some cases the attitude is that it is better to have some digital material and to avoid risk than to have digital collections that are truly useful and beneficial to the scholarly community. These decisions are made in spite of the discomfort many librarians feel with the "distortion of mission and the incompleteness of [the] resulting digital collections."<sup>4</sup>

### Risk Management as a General Practice in Libraries

What often is not recognized in these discussions about copyright is that this is one of the only legal issues in higher education in which the attitude of "no risk at all" prevails. For a wide variety of other areas we undertake to manage risk for the very sound reason that we know we cannot eliminate it entirely. As administrators of large and heavily used buildings, for example, librarians know that there is always a risk of tort claims based on negligence. They put procedures in place to deal quickly with spills or broken furniture to reduce the likelihood of injuries and negligence claims, partly because this is good risk-management practice. In a similar way, libraries, like other employers, post information about channels and protections for employees reporting discrimination or harassment. This practice also is managing a risk that is omnipresent yet capable of reduction but not elimination. In this context, it is curious that copyright is often treated differently—not as a subject of risk management but as an obstacle that must either be avoided completely or allowed to completely block a desired digitization project.

This article contends that copyright should be treated in the same way as other risks of legal liability, as a subject of risk management. One reason that this may not often be the case is that copyright law

seems more complex than negligence or employment discrimination law. In those areas there are well-established practices that library administrators can follow in order to avoid some of the potential risks, whereas copyright law seems like a morass out of which it appears too difficult to select the right questions to ask and principles on which to rely for complex digitization projects. The purpose of this paper is to outline two fundamental principles of copyright risk management for mass digitization and four strategies to implement those principles.

Let me emphasize that nothing presented here is legally innovative or startling in any way. The principles and strategies proposed are entirely straightforward and commonsensical. The goal of this article is to prompt library practitioners to reconsider how they regularly think about copyright law and large-scale digitization, not to make any creative legal arguments.

## Principles in Copyright Decision Making

Librarians tend to focus on a single copyright principle when considering a specific potential digitization project. The reasoning often seems to be that digitization can only proceed if **all** of the subject materials are in the public domain, or only if a convincing fair-use argument can be made that applies to **all** of the material. There is no basis in the law for this assumption, and a risk-management approach can help clarify the way in which the different exceptions and limitations in copyright law can work together to reduce the risk of conflict or liability.

For large-scale digitization projects that involve heterogeneous materials from the period when copyright protection may persist, there are two simple principles that a library administrator seeking to manage risk should apply. First, try to reduce the number of risky items that a collection contains. Second, try to reduce the number of people who are likely to want to sue you over the collection. This may seem almost laughably obvious, but thinking about a project in terms of potential points of contention and potential litigants happens fairly infrequently and can be very productive in terms of risk management.

One obstacle to this kind of reasoning is sometimes that librarians simply do not want to think in terms of potential lawsuits. Even abstract reasoning about the potential of getting sued can make one nervous, and if librarians are talking with their university counsel it also may provoke an adverse reaction. But in reality we are thinking about potential lawsuits when we post discrimination and harassment procedures as well, although we are also considering the health of our working environment. All legal considerations in libraries involve some attention to avoiding legal conflicts, and there is no sound reason that copyright should be treated differently. Indeed, considering large-scale digitization in this way has a significant benefit. Once the questions about potential points of contention and potential plaintiffs are considered, the relatively low risk involved in many projects will become apparent, as will the strategies that can be pursued to further reduce that risk. What initially may seem a frightening subject to consider—who might sue us over what material—actually proves to be quite empowering when applied to many collections that might be considered for large-scale digitization.

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**First, try to reduce the number of risky items that a collection contains. Second, try to reduce the number of people who are likely to want to sue you over the collection.**

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## Four Strategies for Evaluating Risk

The **first strategy** for evaluating the risk associated with a digitization project is to recognize that, in many collections, at least some of the material will be in the public domain. This recognition helps us reduce, in our perception of a project, the number of risky items involved. As has been noted, the public domain is usually considered, in digitization planning, only when an entire collection is likely to be in the public domain. That means that all of the material must be published before 1923 or unpublished and created by persons who died prior to 1940.<sup>5</sup> But mixed collections of 20th-century material will also contain public-domain materials, although determining exactly which items are which may be difficult. Publication date and creator's death date are usually discoverable; what is more difficult is the determination of the copyright status of materials published between 1923 and 1989. John Wilkin has written a comprehensive analysis of this problem, which he calls "bibliographic indeterminacy."<sup>6</sup>

Indeterminacy is only a problem, however, if one is seeking certainty. From the perspective of risk management, it is enough to recognize that most collections of 20th-century materials will contain some public-domain materials. Some materials, for example, will have been published between 1923 and 1963 without copyright notice, or will not have had their copyrights renewed. This category of works is estimated to include about 55% of the books published during this period,<sup>7</sup> and it will often be true of newspaper or magazine clippings as well. Another group of materials will be works of the US federal government, which are not eligible for copyright protection. Amongst the unpublished works in a given collection, such as letters, some will have been created by people who have been dead more than 70 years. Once a risk-management approach is adopted, these categories can be seen as broad groupings that reduce the number of risky items in a potential digital collection. Even though exact determinations cannot be made, recognition of the categories and their potential application is an important step in deciding with some accuracy how risky or safe a particular proposal may be.

The **second strategy** for risk management in digitization projects is to ask permission from the people or organization that would be most likely to object to the digital display. Again, we should recognize that it will usually be impossible or impractical to identify every rights holder and ask permission, and no project need depend on meeting such an impossible standard. The principle of reducing the number of people likely to sue suggests that asking permission even from only a few rights holders, especially those who seem likely to hold rights in a substantial portion of the included material, is an important step in risk management. If there is a large number of clippings from a particular newspaper whose publisher still exists, or a large number of letters by a single author whose heirs can be identified, these are good candidates for permission. Literary estates, which often police the use of works by a particular author, are also good candidates for permission. But it cannot be emphasized too often that asking permission from some large or prominent rights holders does not mean that permission must be obtained for every item in a digital collection. The goal is to reduce the number of likely plaintiffs and to head off those who seem most likely to object as part of an overall risk-management strategy. This approach can significantly increase confidence without creating an insurmountable obstacle.

Also stemming from the principle of reducing potential plaintiffs is a **third strategy** of having, in advance, a take-down policy for any materials made subject of a complaint. Digital collections generally



garner few complaints, but in the rare circumstances where a family member objects that an ancestor's letters, for example, are being displayed to the world, they will often be mollified if the material is removed from public view and the objector is invited to discuss the matter. Sometimes these discussions may result in eventually reposting the work(s) in question, in paying a small licensing fee, or in deciding to leave the material out of the collection. But a responsive take-down policy will inevitably have the effect of preventing most complaints from ever becoming lawsuits.

It is important to note that a take-down policy in the context of library-created digital collections does not have a legal status; it does not create the "safe harbor" that the take-down process outlined in the Copyright Act offers to Internet service providers.<sup>8</sup> There is therefore no guarantee that a rights holder could not or would not sue for an alleged infringement even after the offending materials were removed. But from a risk-management perspective, this is an effective way to defuse conflicts if they arise and will further reduce the anxiety around a digitization project.

The **final strategy** in this arsenal of risk-management techniques is, of course, recognizing that many collections will be supported by a strong fair-use argument. While it is not necessary to rehearse all of the details about what such an argument would look like, two points are important. First, most of the mixed digital collections of 20th-century material to which these strategies would apply will clearly be transformative; such collections will repurpose the individual materials around a research theme, in most cases, that will be far different than the original purpose of the works and will not in any way compete with that original purpose. Second, there is unlikely to be any market for the original in many of these cases, even if licensing markets are taken into account. So the two arguably most important fair-use factors, the first and fourth, will often favor the creation of these digital collections.

When we discuss fair use it is important to consider its application and impact on digital collections decision making. In a mixed and heterogeneous collection, any fair-use argument fabricated in advance of a specific complaint will not apply equally well to all materials. But as we have said, this approach does not require absolute certainty or universal application. When the goal is to evaluate the level of risk in order to undertake sensible digitization projects, it is enough to recognize that fair use would be a plausible defense, and that a good-faith fair-use defense reduces the availability of damages when the user is a nonprofit educational institution.<sup>9</sup> This is especially the case where fair use is understood to be a part of a wider strategy; a "last line of defense" that would further deter potential plaintiffs if all of the other strategies proved, in some rare instance, to have failed to prevent a complaint. For that limited pool of material that is neither in the public domain nor subject to permission, and for that rare plaintiff who is not satisfied by a take-down process, fair use still provides a boundary to the copyright, and raising it would increase the probability that the plaintiff would decide that a lawsuit was likely to prove too expensive and too unprofitable to undertake.

## Applications

This four-prong strategy has been successfully applied to two projects in which I have been involved. In the case of a collection of historic TV commercials, recognition of the public domain and efforts to obtain permission from major rights holders were instrumental in a decision to proceed with the digitization.<sup>10</sup> The fair-use argument provided a kind of "backstop," especially in a couple of instances where a putative rights holder told the library that they were not comfortable giving the asked-for permission. In those



cases, where the rights holders were careful not to deny permission but only to refuse to grant it, the library recognized that its fair-use argument still provided enough security to proceed. In almost two years, this project, which seemed very risky on first evaluation, has generated no complaints (and thus no need to use the take-down policy associated with it) while proving very popular with researchers and the general public. In the other case, a joint venture between four libraries, the importance of the strategies was more administrative; it allowed the libraries involved to convince all of the four provosts of their universities to endorse the project, which was an important step toward obtaining grant funding.

## Orphan Works

It is an interesting exercise to consider how orphan works—works that are putatively still protected by copyright but for which no rights holder can be located or successfully contacted—fit into the strategies that have been outlined above.

Orphan works are, by definition, not part of the public domain. But the first strategy, that of recognizing the scope of the public domain relative to a proposed digitization project, may have the effect of helping the librarians planning the project understand that the orphan works problem is smaller than they feared. As Wilkin points out in his article on bibliographic indeterminacy, we often lack enough information to decide, for example, whether a work did have its copyright renewed, so that it is potentially an orphan, or whether it did not and is therefore in the public domain.<sup>11</sup> So analysis of a collection in regard to the likelihood of public-domain materials would also help reduce anxiety over the size of the orphan work problem.

Permission is impossible for orphan works, again by definition. But we should recall that the reason for seeking permission from major or potentially litigious rights holders is to reduce the number of likely plaintiffs a library might provoke. Because rights holders in orphan works cannot be located, and in many cases probably do not even know that they hold rights (as is probably the case, for example, with the heirs of a letter writer), they should not be counted in the pool of potential plaintiffs. Also, if a rights holder for a work previously considered an orphan does surface, a take-down policy and the willingness of the library to discuss the matter will be especially likely to defuse the problem, since the rights holder would have little expectation of profit from the work.

Fair use, of course, applies equally to orphan works as it does to in-copyright works for which the rights holders are known or discoverable. Indeed, fair use is probably itself the best “solution” to the orphan works problem, at least in the context of large-scale digitization of library collections. In addition to the support for a fair-use argument that has already been discussed, the fact that a rights holder has not been discoverable or willing to respond to a permission request further strengthens the fourth-factor argument that the use in question does not harm the market or potential value of the work. By definition, again, orphan works are not subject to normal commercial exploitation or to regular licensing, so the fair-use defense becomes quite strong.

The fair-use defense for digitizing large special collections is not, of course, entirely uncontroversial, as is shown by the recent litigation brought against HathiTrust and five of its university partners by the

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**...fair use is probably itself the best “solution” to the orphan works problem, at least in the context of large-scale digitization of library collections.**

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Authors Guild.<sup>12</sup> In considering that lawsuit, however, it is important to distinguish between the legal arguments being made in the case and the long-term goals of the plaintiffs. The actual legal arguments do not involve orphan works for the simple reason that no one who holds rights to an orphan work, properly defined, is a plaintiff in the suit. Although the alleged errors on HathiTrust's initial list of potential orphan works received a good deal of attention, none of those works were ever distributed to the public, and the attention received by the case actually showed that the system of making a list of possible orphan works available in advance of their actual distribution was very effective. In an ideal situation, the Authors Guild would work with HathiTrust to be sure that similar errors do not occur in the future.

In a filing made in this lawsuit in February 2012, the Authors Guild has made a unique and troubling argument about fair use and libraries.<sup>13</sup> In essence they suggest that the explicit library exceptions contained in section 108 of the Copyright Act are the sole provisions for libraries, such that fair use is unavailable as a defense for library activities. If accepted, of course, this argument would severely curtail the options for digitizing special collections. But it seems very unlikely that a judge would accept such a suggestion. For one thing, this position would place libraries at a distinct disadvantage against all other potential users of copyrighted content, an outcome clearly at odds with the privileged position usually afforded to libraries by Congress and the courts. Even more decisive, however, is the inclusion in section 108 itself of a provision that reads, "Nothing in this section...in any way affects the right of fair use as provided by section 107."<sup>14</sup> So while this case bears watching and should be a matter of concern to all librarians, the clear intention of Congress ought to prevail, so that fair use will remain a significant option for libraries contemplating digitization projects.

## Conclusion

None of the strategies outlined in this article are unique or innovative. The important thing is for librarians to understand how they can work together to provide a more complete picture of the copyright situation involved in a proposed digitization project and a more accurate assessment of the potential risk. Copyright law often seems unmanageably complex, leading librarians to focus too much on a single aspect of a project and, when that aspect proves inapplicable, to give up the proposed digitization. But the multifaceted nature of the law, especially its variety of limitations and exceptions, should really be seen as an invitation to a holistic evaluation that focuses on risk and considers how each facet can contribute to a risk-reduction strategy. If this is done consistently as digitization projects are undertaken, the risk of infringement litigation will usually be seen to be much more manageable, and a great deal of unnecessary self-censorship will be avoided.

1 Prudence Adler, Brandon Butler, Patricia Aufderheide, and Peter Jaszi, "Fair Use Challenges in Academic and Research Libraries," December 20, 2010, [http://www.arl.org/bm~doc/arl\\_csm\\_fairusereport.pdf](http://www.arl.org/bm~doc/arl_csm_fairusereport.pdf).

2 Ibid., 12.

3 Ibid., 11–12.

4 Ibid., 12.

- 5 The best resource for comprehensive consideration of what items may be in the public domain is still Peter Hirtle's chart on "Copyright Term and the Public Domain in the United States," <http://copyright.cornell.edu/resources/publicdomain.cfm>.
- 6 John P. Wilkin, "Bibliographic Indeterminacy and the Scale of the Problems and Opportunities Of 'Rights' in Digital Collection Building," Ruminations series, Council on Library and Information Resources, February 2011, <http://www.clir.org/pubs/ruminations/01wilkin/wilkin.html>.
- 7 Ibid., citing data from the Copyright Review Management System at the University of Michigan.
- 8 17 U.S. Code § 512.
- 9 See 17 U.S. Code § 504 (c)(2).
- 10 "AdViews," Duke University Libraries, <http://library.duke.edu/digitalcollections/adviews/>.
- 11 Wilkin, "Bibliographic Indeterminacy."
- 12 The documents in this case can be found on the Justia.com website at <http://dockets.justia.com/docket/new-york/nysdce/1:2011cv06351/384619/>.
- 13 See entry number 55 in the above docket report.
- 14 17 U.S. Code 108(f)(4).

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**To cite this article:** Kevin L. Smith. "Copyright Risk Management: Principles and Strategies for Large-Scale Digitization Projects in Special Collections." *Research Library Issues: A Quarterly Report from ARL, CNI, and SPARC*, no. 279 (June 2012): 17–23. <http://publications.arl.org/rli279/>.

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Association of Research Libraries  
21 Dupont Circle, NW, Suite 800  
Washington, DC 20036  
P: 202-296-2296  
F: 202-872-0884

ISSN 1947-4911

Executive Director: Charles B. Lowry  
Editor: M. Sue Baughman  
Assistant Editor: Kaylyn Groves

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