

From Dusty Boxes to Data Bytes Acquiring Rights to Special Collections in the Digital Age

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Abstract

Acquiring the rights to special collections material is of increasing importance as special collections are increasingly being digitized and placed online. Greater access to materials can lead to greater risk of copyright infringement, but for materials being acquired currently, it is possible to reduce the risk by acquiring rights at the point of accession. At New York University, key stakeholders addressed these issues by creating a framework for special collections acquisitions agreements that covers common circumstances surrounding the transfer of intellectual rights to special collections material, specifically with an eye to the possible digitization and placement of the material online.

Keywords: archive agreements, digital collections, rights management, digitization, copyright

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Acquiring the rights to special collections material is of increasing importance as more and more special collections are being digitized and placed online for broader use by the research public. Greater access to copyrighted materials naturally leads to greater risk that a copyright holder may dispute the broad ways in which her work has been made available. Some level of risk is to be expected and may never be fully eliminated, but for materials being acquired currently, it is possible to greatly reduce the risk involved by acquiring necessary rights to the material and making clear to donors from the outset the extent to which their materials are going to be used. This type of discussion and negotiation is always a concern in the realm of special collections acquisitions but becomes even more important when access begins to extend beyond the in-person visitor to an archival reading room to any number of remote visitors accessing material over the Web.

The key is to take a holistic approach to managing the rights of special collections, taking care to craft and use clear and precise accession agreements that allow for widespread digitization and access of materials while providing for broad accessibility for the future. By taking the time to work with donors to craft and execute clear acquisition agreements that permit a broad spectrum of digitization rights, archivists and curators of special collections can ensure that materials are well-documented and fully accessible to the widest range of patrons.

At New York University (NYU), these challenges were of particular relevance to the special collections libraries: the Tamiment Library and Robert F. Wagner Labor Archives, the Fales Library and Special

Collections, and the University Archives. There was a recognized need to place more special collections materials online and make them available to patrons not physically present in the libraries. Bringing together such key university stakeholders as librarians, archivists, counsel, and technologists, the NYU Division of Libraries worked to craft a framework for special collections agreements that would clearly and effectively address the question of rights for new acquisitions. The result was a template for future acquisition contracts that reflects four common situations surrounding the transfer of intellectual rights to material: 1) using a Creative Commons license, 2) transferring full copyright, 3) granting a license, and 4) providing physical transfer only. With this template to clarify rights-related issues from the outset of the acquisitions relationship, the NYU Libraries are now better equipped to document intellectual ownership of newly acquired materials for future digitization endeavors.

Digitization and Rights in Special Collections

Managing rights to special collections materials is never an easy task and is but one of many that is involved in the successful acquisition, processing, preservation, and display of archived material (Briston, 2015; McKay, 2015). With the advent of the digital age and the increase in digitized collections, curators are faced with a greater need to document intellectual rights to the materials in their collections (Behrnd-Klodt & Prom, 2015; Hirtle, Kenney, & Ruttenberg, 2012). As Peter Hirtle (2015) notes,

The digital age presents new opportunities but also seemingly new threats. Digital reproduction and distribution can provide unparalleled access to our rich archival holdings. Yet at the same time, the visibility that digital access provides may increase the risk that a copyright owner could complain about archival practices. (p. 2)

Effectively managing rights to digitized collections centers on risk assessment and a collecting library's risk tolerance (Briston, 2015; Hirtle, Hudson, & Kenyon, 2009; Smith, 2012). As a general rule, archivists tend to be exceptionally risk averse, even going so far at times as to avoid potentially legitimate uses of material; yet complete avoidance of risk is by no means feasible (Briston, 2015; Smith, 2012). Archives with public missions to provide access to primary research materials, particularly those affiliated with educational institutions, have an obligation to navigate the risk involved and make their holdings as accessible as possible to their patrons (Briston, 2015; McKay, 2015). This responsibility to patrons

extends to providing clear and accurate rights information for collections so that patrons may make further use of the materials through scholarship and knowledge-building (Briston, 2015; McKay, 2015).

Thus, institutional mission can likely render some level of risk unavoidable and careful risk assessment a necessary process. Moreover, given the changing nature of copyright law and technology, the process of risk assessment is an iterative one, requiring curators to assess and reassess their activities to maintain a tolerable level of risk for the institution (Hirtle, 2015). As an added complication, rights assessment often requires examination on the item level, as there exist no standardized best practices for assessing the copyright status and associated risk for digitizing materials on the collection level (Briston, 2015).

Ideally, the best way to eliminate risk and provide the broadest possible access to a collection would be to clear rights with each copyright owner (McKay, 2015). Unfortunately, the world of special collections is not ideal and attempting to identify, locate, and contact copyright owners, or their heirs, to clear permissions can be a very messy, time-consuming, and cost-prohibitive process (Dickson, 2010; McKay, 2015). The next best approach, then, is to attempt to secure rights to materials at the point of accession whenever possible in order to conserve much-needed resources for other aspects of curating and maintaining a special collection (McKay, 2015).

Clarifying Rights at New York University

Given these issues of rights and risk associated with digitizing special collections materials, the Division of Libraries at NYU recognized a need to clarify effectively the rights status of materials being curated in its three special collections libraries. In addition, curators and archivists at NYU realized the importance of crafting deeds of gift that were simple and easy to understand from the perspective of donors without legal backgrounds and, as was often the case, without legal representation. The deeds of gift being used at the time varied between special collections libraries and even, at times, between collections. Moreover, they were several pages long and contained language that was difficult to understand and negotiate. The accession process, which can be lengthy even in the best of circumstances, took even longer because of hesitation on the part of donors unclear as to the legal ramifications of the documents they were signing. Even when collections were successfully accessioned and processed, there was hesitation on the part of the Libraries to digitize popular material for mass access because the rights status of the materials was never clear. While NYU may have acquired the rights to house, preserve, and provide in-person access to the materials, it was unclear whether the agreements, as they currently stood, allowed for the digitization and

online display of materials. As a particularly risk-averse institution, NYU's stakeholders were not willing to push too far in light of the rights expressed in deeds of gift or exceptions to copyright law when making materials available to the research public.

Thus, NYU librarians, counsel, archivists, and technologists came together to craft a framework for special collections acquisitions agreements that would help clarify the rights and responsibilities of both donors and the libraries. In particular, the goal was to craft template deeds of gift that would clearly and explicitly demonstrate the current and future uses the libraries could make of the materials being acquired. After several months of drafting and revision among the different stakeholders at the university, the result was a template for all future deeds of gift used by the special collections libraries. The NYU template is similar to the model deeds of gift created by the ARL Working Group on Transforming Special Collections in the Digital Age (Hirtle, Kenney, & Ruttenberg, 2012) in that it covers common circumstances surrounding the transfer of intellectual rights to special collections material, specifically with an eye to the eventual digitization and placement of the material online. The framework covers four main transfer options: 1) using a Creative Commons license, 2) transferring full copyright, 3) granting a license, and 4) providing physical transfer only.

A Word on Third-party Material

While the stakeholders at NYU focused on creating general templates for the rights information related to special collections materials, they nonetheless recognized the eclectic nature of rights involved in acquisitions. Very rarely will a new collection solely contain material created and owned by the donor. In many instances, third-party material will be implicated, requiring consideration of the intellectual and privacy rights of individuals not directly involved in the accession process. That being the case, NYU curators are careful to modify the template agreements to denote the exact extent of the donor's transfer of intellectual rights:

Donor agrees to give Library non-exclusive, worldwide, digital and print publication rights in perpetuity for non-commercial use of the collection. These publication rights apply only to those materials for which Donor owns copyright. This grant of publication rights to Library does not include material, such as third-party correspondence, artwork, images, etc., for which Donor does not own copyright. (NYU Libraries, 2014)

Curators also work conscientiously to obtain from the donor all information in her possession relating to third-party rights in the material. While the donor may not have the authority to transfer copyright or waive privacy concerns for a third party, she can still play an invaluable role in helping the library make contact with the authorized owners of third-party material. In the University Archives, for example, NYU holds a collection of radio programs from the 1980s and early 1990s produced by the campus radio station WNYU and featuring music by third-party creators. Because there is a marked research demand for these materials, the Archives have been working closely with WNYU to contact the copyright holders of third-party content and clear permissions for digitizing and providing access to these radio performances. As the donor, WNYU has contacts and information that can facilitate the clearing of necessary permissions far beyond what the staff of the Archives could do on their own. By collaborating with the donor of the material, NYU archivists will be able to pursue the permissions necessary for opening up this third-party content to researchers online. In this way, curators at NYU bear in mind and work to protect the intellectual and related rights of third parties while negotiating rights transfer options with donors within the deed of gift framework.

Creative Commons Licenses

The first transfer option within the framework, and perhaps one of the best options for a new acquisition, is for the donor to agree to place the materials under a Creative Commons license. Among the benefits of a Creative Commons license include the ability to choose from a variety of options that help to balance the free accessibility of the material with the donor's wish or need to exert some level of control over the materials' future use. With a Creative Commons license, not only the special collection but also the collection's patrons and scholars can make use of the material without having to check for rights and permissions with the donor or the curators. Once the material has been processed and fully accessioned into the collection, curators no longer need to worry about managing when and how access takes place or what further uses scholars or the archive may wish to make of the material. The material can be digitized and placed on the open web; it can be used in promotional materials; it can become the focus of special events—the options are wide and varied.

As part of the acquisitions process, the curator has a responsibility to review the Creative Commons licensing scheme with the donor and provide a full overview of the donor's options. While the curator is not

responsible for providing legal advice to the donor, there is a natural responsibility in the donor/curator relationship to provide as much information about the options as possible so that the donor may make a fully informed choice. In particular, it is essential that the donor understand the full ramifications of a Creative Commons license, particularly the fact that it is meant to be permanent and universal and, depending upon the option chosen, can potentially allow for commercial uses of the material.

Once the donor has selected a Creative Commons option for her material, the acquisition agreement should reflect the licensing chosen and the material itself should be marked accordingly. For example, if the donor should choose to use Creative Commons licensing to dedicate the material to the public domain, effectively relinquishing all intellectual rights to the material and allowing a full range of access and reuse, then the acquisition agreement could read as follows:

Title to the physical papers and other materials in the Collection shall pass to Library as of the date of the signing of this Agreement. All copyrights and related rights held by the Donor shall be waived and placed in the public domain to the fullest extent permitted by law. This transfer of rights will be marked by a Creative Commons CC0 license.

Transfer Full Copyright

Another option for acquiring rights to potentially digitized special collections is for the donor to transfer full copyright to the library:

Title to the materials in the Collection as well as all rights of copyright, privacy and publicity, which the Donor possesses in the materials in the Collection shall pass to Library as of the date of the signing of this Agreement.

With this option, the library owns all rights, physical and intellectual, in the material and can control how it is accessed and used. Materials can be digitized and placed online, and scholars and researchers wishing to reuse the material can be vetted and receive permission directly from the library. There is no need to return to the donor with permissions requests as they arise.

Transferring full copyright can also be a preferable option for collections that include sensitive material or items that raise privacy concerns. For example, the Downtown Collection in the Fales Library

chronicles the arts and culture scene of downtown New York City from the 70s to the early 90s and includes a number of materials of a graphic nature (Fales Library & Special Collections, 2011). All of these items form an important part of the history and culture of downtown New York and need to be preserved and made available to researchers; but there are also concerns for the privacy of the people written about or depicted in some of the work. For collections with such privacy concerns, NYU coordinates with donors to achieve the best balance between scholarly access and individual privacy. Some items are only available for viewing on-site, either physically or via a locked digital portal. Other items are placed in a dark archive for fifty years after accession, at which point they may be made available, both onsite and digitally, as future curators see fit. In all cases, curators take their roles to preserve and protect the material seriously; fulfilling these roles is made much easier when full intellectual rights have been transferred to the collecting institution. In the case of the Downtown Collection, NYU has obtained the copyright in many of those materials, facilitating the effective management of access and protection of privacy.

License Digital Rights

Donors may not wish to relinquish their copyright ownership in the material or make it available under a Creative Commons license, and when that is the case, the best option within the framework is to secure a license for digital rights for the library. NYU drafted its template license clause to be clear and broad, permitting the library to provide sufficient access to the material to researchers. In addition, the terms allow for new uses that may become necessary for providing access to the material in the future. Technology changes rapidly and it would be far better for the library to already possess a license that encompasses potential new uses rather than having to reconnect with the original donor or locate new rights holders as time progresses. For example, one of the earlier iterations of the NYU deed of gift provided for “print and online” publication rights, limiting potential digitization rights to those involving web publication. That clause was later modified to encompass “digital” publication rights, allowing for digitization efforts that may result in publication in alternative forums other than the Internet.

Thus, an effective license under the framework grants universal and unending noncommercial rights to the library, allowing for current and future scholarly and research uses of the material: “Donor agrees to give Library non-exclusive, worldwide, digital and print publication rights in perpetuity for non-commercial use of the collection.” Obtaining a

license to publish the material online at the point of accession allows the library to avoid having to rely on the uncertainty of copyright exceptions, which is often the case when the agreement only constitutes a physical transfer of the material.

Physical Transfer Only

While not ideal, there are instances when the donor does not wish to transfer or license any intellectual rights to the material. In that case, the library can still make the material available to patrons, including in digital format, under the framework but will have to rely on exceptions in copyright law to do so. In particular, the doctrine of fair use in section 107 and the library exceptions of section 108 make allowances for libraries providing access to research material (Copyright Act of 1978). Under fair use, libraries will need to consider the four factors—purpose and character of the use, nature of the work, amount and substantiality of the use, potential market effect—when providing access to the material (Copyright Act of 1978). Under the library exceptions of section 108, the library may create limited copies of the material and make it available to patrons, in both digital and print format, for use on library premises (Copyright Act of 1978).

At NYU, two resources have proven invaluable for assessing risk and evaluating fair use and section 108 claims for digitizing special collection material. One is the Society of American Archivists' *Rights in the Digital Era* (Behrnd-Klohdt & Prom, 2015). In particular, Module 4 on the basics of copyright law and risk assessment (Briston, 2015) has been helpful for NYU curators seeking greater understanding of how to manage risk and assess use of copyrighted materials under fair use. Another is the Association of Research Libraries' ([ARL], 2012) *Code of Best Practices in Fair Use for Academic and Research Libraries*. Practice #4 details the considerations and limitations that should be considered for digitizing material in archives and special collections (ARL, 2012). While it is generally considered fair use for libraries "to create digital versions [of material] and to make these versions electronically accessible," it is important that libraries implement appropriate restrictions to limit access and distribution of the material and to ensure the protection of privacy (ARL, 2012, p. 20). Taking these extra steps of caution is particularly important in reducing the risk associated with digitizing and providing access to copyrighted material for which permissions are not granted.

Rights Metadata

Having a clear statement of rights in the acquisition agreement allows the collecting library to maintain clear rights metadata relating to individual items in the collection and to the collection as a whole. The goal is to be able to provide as much rights information as possible for scholars looking to reuse materials in their research. As the stakeholders at NYU Libraries developed its template deed of gift, they did so with the ultimate goal of making information about those rights clearly available to library users.

Rights Statements

Ideally, a clear rights statement will accompany each item in the collection, informing patrons of the copyright status of the work in question. These statements are simple for materials over which the library maintains copyright ownership. For example, the United Automobile Workers District 65 photograph collection housed at the Tamiment Library and Robert F. Wagner Labor Archive (Fig. 1), for which NYU owns the copyright, includes the following rights statement in its finding aid description:

Any rights (including copyright and related rights to publicity and privacy) held by United Automobile Workers of America, District 65, the creator of this collection, were transferred to New York University in 1997. Permission to publish or reproduce materials in this collection must



65ers picket Woolworth in support of Southern Negro Anti-discrimination Drive (Pepper, 1960).

be secured from the Tamiment Library. (Tamiment Library & Robert F. Wagner Labor Archive, 2014)

On the other hand, rights statements can become more complex—and more important—for materials with copyright residing in the donor or a third party. NYU collections for which the library does not own copyright are accompanied by an indication of the collection's copyright status as well as the identity, if known, of the copyright holder:

These materials are protected by copyright. Transmission or reproduction of protected items beyond that allowed by fair use requires the written permission of the copyright owners. Requests for permission to use the work should be directed to the copyright owner at [name and contact information].
(Hathcock, 2015)

Curators also request that donors contractually agree to provide contact information for patrons requiring copyright permissions and to respond to such requests in a timely manner:

The Donor shall use all reasonable efforts to respond to requests for assistance from researchers and other persons working with the Collection at the Library including, without limitation, giving prompt consideration to all requests for copyright permission and assisting such persons in obtaining permissions from third parties in connection with the Collection. Such requests shall be made to the donor, in writing, at [contact information]. (NYU Libraries, 2014)

Noting this permissions information in the acquisition agreement, particularly when copyright has not been transferred to the library, can ensure that patrons have adequate access to the material for possible reuse.

Take Down Policies

At times, despite a curator's best efforts and even the clearest of acquisition agreements, the library is unable to identify or contact the copyright holder of digitized material. When that is the case, it is important to have a clear take down policy in place to help mitigate potential liability and possibly prevent arising disputes (McKay, 2015; Smith, 2012). Take down policies are based on the safe harbor provisions available to service providers in copyright law (Copyright Act of 1978, sec. 512) and, while not legally applicable to online special collections, can still prove useful

in managing risk related to digitization projects. NYU Libraries uses the following take down policy for all of its special collections and many other of its digitized collections:

Digitized collections are made accessible for purposes of education and research. NYU Libraries have given attribution to rights holders when possible; however, due to the nature of archival collections, we are not always able to identify this information. If you hold the rights to materials in our digitized collections that are unattributed, please let us know so that we may maintain accurate information about these materials. If you are a rights holder and are concerned that you have found material on this website for which you have not granted permission (or is not covered by a copyright exception under US copyright laws), you may request the removal of the material from our site by submitting a notice [W]e will remove the allegedly infringing material from public view while we assess the issues identified in your notice. (Fales Library & Special Collections, 2014)

The take down policy includes a request for the copyright holder's information, including a description of the allegedly infringing material, a statement of the copyright holder's good faith belief in her ownership of the material, and a physical or electronic signature. While it is always preferable to be clear about the rights status of materials, effective takedown notices allow libraries to make available materials that may otherwise remain hidden from view.

Conclusion

Digitization is becoming an increasingly common practice among special collections, rendering greater visibility to materials that were otherwise limited to physical reading rooms. With this increased visibility comes increased risk when it comes to providing access to copyrighted materials. One of the most effective and low-risk means for special collections to manage the risk of putting materials online is to clarify rights status in donor agreements at the point of accession. At NYU, having a framework for future acquisition contracts that reflects common situations surrounding the transfer of intellectual rights—1) using a Creative Commons license, 2) transferring full copyright, 3) granting a license, and 4) providing physical transfer only—has been invaluable in clarifying the rights status of newly acquired materials in each of the special collections

libraries. Having explicitly delineated rights where possible has in turn reduced the need for engaging in complex rights assessment for those materials. Acquiring rights, through the use of well-executed agreements, to the materials curated in special collections allows archives to provide a broad level of access to patrons both within the immediate library communities and throughout the world, access that can continue for years to come.

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