

Finding Balance

by

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Introduction

Digitizing our unique cultural heritage collections and making them easily discoverable and accessible around the globe are priorities for archives and special collections. Increasingly, our users expect that our collections be digitized and available online,



Earth observation time lapse taken by the Expedition 43 crew. Photo courtesy of NASA.

and our donors similarly assume that their collections will be available on the web once they are donated. For repositories with an educational or research mission, providing open and equitable access to our collections requires expanding access to all users, not just those who can afford to travel to our reading rooms or who are able to take time during a work week to consult our collections. For most cultural heritage institutions, creating and maintaining robust digital access to our collections are critical components of fulfilling our mission and meeting our users' needs, but we often struggle to scale our digitization programs to meet these expectations.

While most institutions share the goal of digitizing and disseminating the unique resources in our collections, traditional digitization workflows limit our ability to do large-scale digitization. Selecting, imaging, describing, and assessing rights for digitized content can be enormously resource-intensive and time-consuming. Rights clearance work, in particular, is highly labor-intensive, requires specialized knowledge, may require significant research, and has traditionally been conducted at an object level. Because of these complexities, determining copyright status and

managing licensing and permissions workflows for copyrighted work are areas that have proved particularly challenging and time consuming for many institutions, and have led us at Emory University Libraries to reassess and ultimately reimagine new copyright workflows that move from object-level rights clearance to assessing and managing risks and rewards associated with digitization. In our efforts to rethink our approach to managing rights workflows in order to facilitate larger-scale digitization, we brought together archivists and scholarly communications librarians to propose practical strategies for making collaborative, thoughtful decisions about copyright and other risks to scale-up digitization programs in a sustainable and responsible way.

One strategy to achieve this goal is designing policies and workflows that address the many legal, ethical, and practical risks related to copyrighted, private, or restricted material in our collections by assessing and managing risks categorically rather than at an item level. We recognize that while risk is inherent to digitization, not all risks are equal. By looking at collections categorically, it is possible to make some broad-brush assessments about where you might encounter various types of risk and how to identify the types of risks you or your institution are and are not willing to incur. We hope that this resource will be useful for any cultural heritage organization interested in coordinating a digitization project or program using a risk-management rather than a risk-negation approach. The tools and insight in this resource are intended to help organizations make thoughtful, informed decisions about how to implement risk-analysis frameworks and workflows to perform rights analysis at scale. Ultimately, we hope that these tools will help our institutions maximize the amount of material we can make available online while working within our institutions' risk-comfort zones.

Project Background

From 2019 to 2021, the authors worked on an internal project at Emory University Libraries to develop a streamlined cross-functional workflow for copyright assessment for building digital collections (see Chapter 6: Case Study: Emory University Libraries). We believe that the evaluative steps taken and lessons learned in completing this project can be valuable to the broad profession in considering how to manage copyright evaluation as digital collections grow in size, complexity, and scale.

Through the support of the Scholarly Communications Notebook, we offer this open educational resource (OER) to the cultural heritage community with the hopes that it will help others develop effective digital collections workflows. This OER provides practical tools for scholarly communications and archival colleagues to work together to develop shared workflows, expertise, and tools to manage approaching rights and risk assessment in a scalable way. If you work in an organization that does not have scholarly communications experts, this resource is still a useful and practical guide for archivists and generalist librarians to make decisions around digitization and rights analysis.

The OER was open for public comment from August 1, 2022, through November 23, 2022. Based on feedback from the community, we revised it and published the first edition on the Pressbooks instance at the University of Kansas (KU). Ongoing questions or comments can be shared at FindingBalanceOER@gmail.com.

The Team¹

Carrie Hintz is the associate director of the Stuart A. Rose Manuscript, Archives, and Rare Book Library at Emory University Libraries where she provides vision and leadership for all aspects of library operations, including archival processing, digital collection management, and research and engagement activities. She has led special collections technical services programs at Emory University's Rose Library and Columbia University's Rare Book & Manuscript Library. (ORCID iD: <https://orcid.org/0000-0002-3040-2145>)



Carrie Hintz (photo courtesy of Rose Library, Emory University Libraries; photographer: Erin Glogowski)

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1. Important note: None of us are attorneys, and nothing in this document should be taken as legal advice. If you need legal advice, please seek the counsel of an attorney specializing in intellectual property law. For information on working with your general counsel's office, see Chapter 2: Identifying Your Institutional Risk Tolerance.

Melanie T. Kowalski was the copyright and scholarly communications librarian for Emory University Libraries from 2013–2022. In this role, she was primarily responsible for copyright outreach, education, and consultation with faculty and students. Additionally, she was responsible for copyright consultation and analysis for digitization and managing rights metadata within the



Melanie Kowalski

Libraries. In February 2022, Melanie moved on to a new role as the open knowledge licensing coordinator for the Center for Research Libraries, where she is working to operationalize an open knowledge strategy for licensing library content and serves as the primary resource for copyright information policy. (ORCID iD: <https://orcid.org/0000-0002-1815-9410>)

Sarah Quigley was the head of collection processing at the Stuart A. Rose Manuscript, Archives, and Rare Book Library at Emory University Libraries from 2019–2022. Prior to this, she was a manuscript archivist at the Rose from 2011–2019 and came to this project with significant experience processing collections and providing strategic oversight of the



Sarah Quigley (photo courtesy of Rose Library, Emory University Libraries; photographer: Erin Glogowski)

library's processing program. In July 2022, Sarah became director of Special Collections and Archives at the University of Nevada, Las Vegas, Libraries where she provides vision and leadership for the division, including collection development, digital collections, public services, and technical services departments. (ORCID ID: <https://orcid.org/0000-0001-7186-6483>)

Jody Bailey is the head of the Scholarly Communications Office at Emory University Libraries and leads a team of librarians and library specialists who are responsible for all library services surrounding copyright, open access and publishing, research data management, and open



Jody Bailey, Scholarly Communications Office, Emory University Libraries (photo courtesy of Emory Libraries)

educational resources. The team also manages two scholarly repositories for Emory faculty and students. Before joining Emory University Libraries in 2018, Jody was director of publishing at the University of Texas at Arlington Libraries where she oversaw all publishing and open education services. (ORCID ID: <https://orcid.org/0000-0002-4226-4173>)

The Method

The project team used Google Docs for developing documentation for this OER, including meeting notes, outlines,

schedules, and drafts. While we did evaluate several platforms for publishing this OER, we determined that Google Docs was the most appropriate tool to utilize for the open peer review portion of the project. All project meetings were held via Zoom from February 2022 through August 2022.

The project team utilized the following project plan to complete this OER:

1. Brainstormed several options for publishing/presenting our work to the broader cultural heritage community.
2. Held several brainstorming sessions to document the following project components:
 1. Form (i.e., book, course module, interactive tool, etc.)
 2. Timeline
 3. Content
 4. Structure
3. Applied for and received support from the Scholarly Communications Notebook (SCN) to develop an OER to help guide students and practitioners in this work.
4. Modified project components based on the needs/specification of the SCN supporting grant
5. Executed a project timeline
 1. Developed an outline of content
 2. Evaluated a publication platform
 3. Developed and revised a style guide document
 4. Assigned initial drafting pairs for each section
 5. Assigned initial reviewing pairs to review and comment on section drafts
 6. Drafting pairs reviewed and revised based on reviewing pairs feedback
 7. Conducted independent read through
 8. Participated in several revision sessions to resolve final outstanding comments and revisions
 9. Conducted final independent read through
 10. Published draft version for open peer review as a

comment-only, publicly available Google document
with instructions for review and comment

11. Published final version on the University of Kansas
Pressbooks platform

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We thank the following colleagues for their support in the development of this work.

- **Jennifer Gunter King** (director of the Stuart A. Rose Manuscript, Archives, and Rare Book Library at Emory University Libraries) and **Lisa Macklin** (associate vice provost and university librarian at Emory University Libraries) chartered the task force that we all worked on, and they both gave us valuable help and feedback as we iteratively developed the workflows and tools.
- Workflow beta testers in the Rose Library, including **Laura Starratt** (senior collections archivist), who graciously tested an early prototype of the Post-Processing Rights and Risk Report, and **Katherine Fisher** (head of digital archives), who was an enthusiastic partner in socializing and implementing the workflow.
- Readers who reviewed and provided helpful comments on the beta version of this work in fall 2022.

We also extend our gratitude to the University of Kansas Libraries, which hosts the Pressbooks version of this book.

1. Teamwork Makes the Dream Work: Building the Right Team

Building an effective team is essential for delivering a successful product. Copyright workflows are complex, require specialized knowledge, and often cross organizational units. Here are some tips for building and managing your team.



Photo by Mapbox is available on Unsplash.

Who Is Involved in the Rights-Review Workflow?

Digitizing and sharing archival materials online require expertise in both copyright and archival best practices. In the case of Emory Libraries, this resulted in a collaboration between special collections and scholarly communications professionals, but regardless of who is involved, practitioners need to be able to strategically select and evaluate collections of interest and scholarly value for digitization while also evaluating copyright and other legal issues. Scholarly communications and archives learning materials address copyright and digital collections respectively, but they rarely overlap. Scholarly communications practitioners can assess collections for legal risk, but they do not usually have training in

archival collection management and processing best practices. Conversely, archivists can strategically select collections for digitization and evaluate the condition of materials, their provenance, and any donor-relations issues that may inhibit or advance digitization and distribution of materials, but they do not usually have deep copyright expertise. As a result, practitioners often collaborate with peers to distribute digital archival collections without a shared perspective or language, which can lead to errors, conflict, inconsistent assumptions, and duplicative work.

When putting together a team for rights-review work, you may be tempted to align responsibilities with individual actors, position titles, or slots on your org chart. Instead, it might be more helpful to focus on aligning responsibilities by competencies needed to perform a task. The benefit here is twofold: You can more evenly distribute work across multiple individuals when tasks are broadly distributed, and you can more easily scale the scope of work given the size of your staff.

In considering how to build your team, reflect first on the competencies needed to perform rights-review work. While not exhaustive, we have compiled a list of eight competencies:

- **Metadata/cataloging.** Libraries and archives produce digital collections to make those materials discoverable to a virtual audience. To do that, you need robust metadata (author, title, format, year of creation, etc.), which gives you the context needed to perform rights-review work. Metadata can also capture access decisions made about an object and allow for some automated processing in the future. Robust metadata may also let you quickly identify public domain material based on publication date or allow for automated rights assignment by license status. For example, let's say you digitize an object and make it accessible with permission of the copyright owner. You can capture that decision in the metadata record,

including the copyright owner, via a name authority record. In the future, you could run reports to assess if your institution has already secured permissions to make this work available based on the name authority record.

- **Copyright expertise.** When we talk about rights assessment for digitizing archival materials, we generally mean copyright assessment. In the United States, the copyright system was established by a federal statutory law that provides a set of exclusive rights to authors and creators for their original creations. Specifically, it protects “original works of authorship fixed in a tangible medium of expression” (see 17 U.S.C. § 102, Copyright Act, 1976b). The rights exclusively granted to creators or authors include the right to reproduce a work, the right to distribute it, the right to display it, the right to perform it, and the right to create a derivative work. These rights can be transferred to other parties either via legal contract or by the death of the work’s creator, and this protection lasts for the life of the creator plus 70 years under the current law. The work that cultural heritage institutions undertake to preserve and provide access to materials in our care can involve exercising the exclusive rights protected by copyright. While copyright offers some legal exemptions to facilitate this work, cultural heritage institutions need to have sufficient competency in the law to employ those exemptions appropriately or to seek permissions from rightsholders when indicated. We created this resource assuming our readers have a basic understanding of copyright. For those requiring a primer on copyright and the ways it can impact this kind of work, we recommend the following resources:

- Hirtle, P. B., Hudson, E., & Kenyon, A. T. (2009). *Copyright and cultural institutions: Guidelines for digitization for U.S. libraries, archives, and museums*. <https://hdl.handle.net/1813/14142>

- Fisher, W. (2022). *CopyrightX*. <https://pll.harvard.edu/course/copyrightx?delta=0>
- Gilliland, A., Macklin, L. A., and Smith, K. (n.d.). *Copyright for Educators & Librarians* [MOOC]. Coursera. <https://www.coursera.org/learn/copyright-for-education>

A strong understanding of copyright is imperative when conducting rights-review work. Staff doing rights-review work need to be able to accurately answer all of these questions:

- Is the work protected by copyright?
- If so, who is the copyright owner?
- Is the work protected by a license or contract?
- How do we get permission to do what we want to do with the work?
- When is permission not needed to create and share a digital collection? (Macklin & Smith, 2014)
- **Assessment of other legal issues.** Building digital collections requires some understanding of other legal concerns. Rights of privacy, cultural heritage laws, contract law, and obscenity law are just a few. While you don't need a full law degree to do this work, a basic understanding of how other areas of legal protection can limit building digital collections is important.
- **Curation.** Building digital collections generally requires making some decisions about what to include and what to omit. In some instances, you may build digital collections on a specific theme from multiple physical collection sources. In these situations, the art of curation is paramount. Supporting innovative and transformative research by building digital collections requires intentional decision-making about what to include or omit.
- **Arrangement and description of physical collections.**

These activities add important information, context, and data to rights-review work. To understand the best approach to reviewing the rights status of a collection, you need a strong understanding of its provenance and organization. For more information, see Chapter 4: Processing with Rights in Mind.

- **Project management.** Rights-review work involves many interrelated steps. Having a strong understanding of administrative principles and project management oversight is needed to bring a rights-review project to fruition.
- **Digitization.** Transforming a physical object into a digital one that can be displayed online requires skills in digitization. It is important to understand how digitization can impact use of the materials. For example, decisions concerning resolution and image size made at the time of digitization can determine the usability of the object later on as well as impact the long-term financial cost of maintaining the digital collection.
- **Management of repositories and digital collections.** Once an item is digitized, it needs to be ingested into a digital collections platform. Ideally, this platform would include preservation capacity. To ingest and maintain a digital collection over time, you need skills and knowledge in repository building and management. Rights-review work involves understanding your digital collections infrastructure, including how descriptive rights metadata might be displayed to users and what rights-related information might be publicly available or stored in the backend.

These competencies can vary by institution. Some organizations may have one individual holding all competencies at varying degrees of depth, breadth, or experience. In other organizations, these competencies may

be distributed across multiple teams, departments, or even libraries, and some may lack these competencies altogether. Identifying the people in your institution who possess these competencies and identifying any potential competency gaps will inform how you build your rights-review team. If you do have competency gaps, consider filling them by hiring consultants or obtaining training in these competencies for members of your project team.

While your immediate rights-review team is limited to those with the necessary competencies, rights-review work has a significant impact on other people in the library. At Emory, we call people impacted by rights-review work *stakeholders*. In constructing a team, be mindful of which stakeholders might be impacted so you can keep them informed of your work and how it may affect their experience or practice. A nonexhaustive list of potential stakeholders to inform might include the following:

- Donors
- Rightsholders
- Staff doing various digitization and ingest tasks and their supervisors
- Administrators at your cultural heritage institution
- Administrators at your institution's parent organization (if it has one)
- Researchers, students, and/or public users

There are many strategies for identifying and informing stakeholders about this work. We recommend conducting a stakeholder analysis to help you determine who your stakeholders are and their relative interest in your work (Smith, 2000).

Building Your Team

Match Competencies to Organizational Goals

Once you know who in your organization holds the needed competencies, where there may be competency gaps, and who your stakeholders are, you can begin to assemble your team. The first order of business when convening any team is to understand the team's purpose and clearly articulate the goals for the group. Is it a task force intended to deliver one specific set of deliverables? Is it a working group that will have ongoing responsibility to manage and oversee a particular organizational function? Is it a stakeholders group that will inform and advise on a project but not be engaged in the day-to-day work of the project? Each of these groups can be important in ensuring a project or program's success, but they serve very different purposes, require different expertise, and have varying levels of engagement.

Once the goal and purpose of the team is clear, it is far easier to assess what kinds of expertise, authority, and ability are required to make a team successful. Assembling the right team for managing copyright and other legal risks associated with digitizing and disseminating special collections material entails combining individuals with the competencies identified earlier and those with institutional influence and authority. In some smaller organizations this may be a team of one, but in most organizations, especially larger and more complex ones, the team will include people from across different departments or functional units. Each team member should have a clear purpose for being part of the group. It can be tempting to include all potential stakeholders on a team, but keeping the core project team focused and employing

other communication strategies to engage stakeholders will lead to more efficient and targeted work. The right team is like the Planeteers in the old cartoon *Captain Planet*—each person individually brings a unique skillset to the table, but it is when everyone's skills, expertise, and positionality are combined that the team becomes more than the sum of its parts.

For our group at Emory, the core project team consisted of two members of our Scholarly Communications Office (the head of that unit and the copyright librarian) as well as two archivists (the head of collections processing and the associate director) from the Rose Library, our principal special collections library. Because our group included the functional leads for manuscript processing and for copyright analysis, we could therefore easily implement workflow changes in these areas. It also included administrators who had the ability to direct and approve policy changes and had direct lines of communication to higher level stakeholders and decision makers in the organization. Our task force was chartered by and received its charge from the director of the Rose Library and Emory Libraries' associate dean for Research, Engagement, and Scholarly Communications. This project team ensured that key high-level decision makers in the organization were committed to our outcomes from the earliest phases of the project; that the core team had the authority and the functional knowledge to make policy and workflow decisions. Our team composition also ensured that in the course of our daily job responsibilities, we were communicating with stakeholders at every level of the organization and every phase of the workflow. Building a team primed for success will differ for varying organizational sizes and cultures, but keys to our success included the following:

- Our group was small enough to be nimble and effective.
- We had a clear charge with obvious buy-in from senior

administrators.

- Our team members had the authority to make changes where they were needed.
- Finally, we had relationships or spheres of influence to introduce change into parts of established workflows that were owned or managed by people outside of the core team.

Identifying Your Stakeholders

Organizational Leaders

It is critically important to have buy-in and support from leaders in your organization when you undertake any project, but especially one that may have implications for individuals across different parts of an organization or that will require changes in organizational policy. The leaders you should be working with are not necessarily the people at the highest levels of your organization (though they could be!); they should be the people who have the right amount of traction and institutional clout to keep an initiative moving and whose support carries weight. Additionally, organizational leaders assume any institutional risks inherent to the project, so they need to be in full support of decisions around risk assessment.

Communication with leaders in the organization should start very early in the process. The leaders should be active partners in identifying project goals and crafting a charge and scope of work (for an example, see Appendix A) for the project team. Once the project's team, goals, and scope of work are established, leaders will likely not have much direct involvement, but the project team should share regular status updates, inform their leaders of any major roadblocks (and

request help in clearing them if necessary), and present these leaders with a final product, report, and/or set of deliverables at the end of the project.

Colleagues Directly Affected by the Project

At most organizations, the work that goes into selecting material for digitization, imaging the material, assigning metadata, building or maintaining digital repository infrastructure, ingesting digitized content into systems, and managing rights and risks associated with making digital collections available online is done by more than one person and often more than one organizational unit. Any changes to managing rights work could impact or change workflows for a number of people. If your project team is going to create workflows or policies that will impact other individuals or teams within your organization, those colleagues should be considered important stakeholders in the project, even if they will not be working on it directly.

We recommend sharing the goals of the project and the likely consequences for each person's work with relevant colleagues very early in the process. This communication can be as formal or informal as is useful in your organization, but there is significant value in giving colleagues affected by the project ample time for the following:

- Sharing any ideas and expertise that may strengthen the project outcomes,
- Identifying barriers or roadblocks the core project team may not be aware of, and
- Adjusting to change and mentally preparing for new workflows.

It is very likely that the core project team will need to consult with these colleagues throughout the process to test and verify any potential changes. At the end of a project, this set of stakeholders also may need additional training on new workflows.

Colleagues Indirectly Affected by the Project

Even colleagues who are not directly impacted by changes in a digitization or rights workflow may have a stake in the process. It is almost always useful to share broadly that you are undertaking a new initiative and explain its goals and the anticipated timeline for implementation or completion. Informing a broad base of colleagues that a project is happening helps build organizational buy-in and a shared sense of purpose whereas hearing about a completed project after the fact may make someone feel blindsided, excluded, and undervalued. These colleagues likely only need a broad, general introduction to a project, potentially a midpoint milestone update, and a note upon its completion rather than ongoing engagement throughout the process.

Assembling a Successful Team

Following are a few questions to ask to build the right team:

- What is the goal of this project?
- What competencies do we need members of the team to have? Do we need each competency at each part of the process?
- Do we have people from the appropriate levels of

organizational hierarchy involved?

- What, specifically, is each team member bringing to the team and how are they expected to contribute?
- Do the key people we really need to advance this project or program have the bandwidth to take it on in a way that will promote success?
- What competency gaps does the team have, and do we have a plan to address them?
- Who else needs to be on board with the project (even if they are not involved directly)?

In summary, three key kinds of stakeholders will need to buy into and support your team from a project's inception: organizational leaders, colleagues directly affected by the project, and colleagues who are near to, but not directly impacted by, the work of the team. Each of these types of stakeholders require different types and levels of engagement, but it is important to engage and communicate with all of them.

Working Together

Establish Purpose and Ground Rules

Team-Building Strategies

Cross-functional teams are powerful because they have the potential to harness the expertise and experience of people with very different knowledge, training, and professional perspectives. This rich set of inputs can lead to extremely fruitful and creative problem-solving, but only if team

members approach each other and their work with candor, respect, humility, genuine curiosity, and shared commitment to excellent results. Building an effective team requires pulling together the right people, but it also requires having a clear sense of purpose and a shared understanding of how you will approach the collaboration.

As noted above, a team contract or charter (see an example in Appendix A) is a useful tool to establish the norms, communication strategies, and other expectations for being part of a team. These agreements usually lay out the goals and values of the team, identify expectations for team communication (including frequency, communications tools or applications, and a documentation strategy for major decisions and deliverables), and identify the roles and responsibilities of team members. Team contracts help set shared expectations and foster each team member's sense of responsibility, accountability, and trust.

Build Communication and Decision-Making Strategies

A key part of forming and functioning as a group is communication. Each individual in a group likely has preferred communication methods and styles, and different organizations have norms and requirements around communication that need to be observed. What do you need to consider when determining your communication plan for your team?

The group needs to come to a consensus on their communication style and preferences so that the team can develop a communication strategy that will be effective. How often does the team need to communicate? Do you prefer email, phone, messaging, or face-to-face interactions? Do you

process information quickly or need time to absorb and reflect before you discuss a topic? These are all good questions to discuss with your team to make sure that group members agree on them. If three team members prefer to use a particular messaging application, and the fourth refuses to install or engage with that application, selecting it as your primary communication tool will alienate one group member and lead to knowledge and communication gaps.

Similarly, determine how decisions will be made, recorded, and communicated. Will you employ consensus-based decision-making or democratic decision-making? Who makes the final decision in the event of disagreement? All members must commit to the final decision whether their preference wins out or not.

There are several things to consider when setting up communication and decision-making strategies:

- **Know your institution's communication culture.** While it is important that your team agree on a communication strategy for intergroup relations, you are likely working within a larger organizational context with requirements and norms of its own that need to be observed.
- **What needs formal documentation?** For our project in the Emory Libraries, we needed to formally charter our team and have the charter along with project scope approved by upper levels of library administration. We also had to deliver a formal report and set of predetermined deliverables to our project's sponsors who shared them with library leadership. Every organization will have its own governance structure, approval processes, and norms for proposing projects, finalizing new processes, and documenting significant decisions. In some organizations these norms and processes are very formal, and in some they are not, but knowing how to advance a project and what documentation is required is key for any initiative to

achieve buy-in from leadership and be successful.

- **What can be shared more informally?** While our group charter, final report, and deliverables were managed in a formal manner, most of our group's communication both internally and with external stakeholders was managed more informally. We used our organization's cloud-based collaborative workspace to manage our documentation, we regularly shared information with each other via email and Slack, and we met weekly to discuss progress, plan next steps, and perform synchronous collaborative work as needed. We shared our work with our supervisors and project sponsors in our regular standing meetings and provided updates about our work to various stakeholders at staff and project meetings. Even within an organization with fairly rigid governance structures, the majority of our communication happened in more informal channels or preexisting meetings because they were already established venues for information-sharing in our organization.

Build Empathy by Sharing Knowledge

Sharing Current Workflows for Each Person

Once a team is established, knows what it needs to accomplish, and has agreed on ground rules for how it will operate, the next step is for team members to develop a deeper understanding of each other's work and how it impacts the work of the group. The fastest way for someone to feel unappreciated or invisible in an organization is for colleagues to not see or understand the contributions and skills that they bring to the table. In a cross-functional or cross-divisional team, basic misunderstandings or erroneous assumptions about current

workflows in other areas can easily derail collaboration or lead to less than ideal project outcomes. In our example, one of the first things we did as a project team was conduct a mini “Processing 101” workshop in which the archivists on the team walked through what archival processing is, covered some of the basic principles and archival theory that inform archival processing work, provided an overview of terminology (e.g., *heterogenous files*), and discussed how archivists decide what gets foldered together and why. When team members have a solid understanding of how everyone on the team does their work and why they do it that way, it demonstrates respect for the labor and knowledge that have contributed to the existing workflows and helps to ensure that proposed workflow modifications are genuinely useful. It also helps avoid the trap of suggesting changes that may be economical for one particular process but aren’t aligned with the professional norms and best practices of a part of the field with which you are not familiar.

Training

Once you have identified and built your rights-review team, you also want to consider what additional training might be required. As we discussed before, rights-review work requires a number of different competencies. While expertise in each competency is not required for every team member, it is helpful for everyone to have a basic understanding of each for two reasons:

- It facilitates shared language, understanding, and empathy, which limits misunderstanding and miscommunication.
- It provides better insight into areas where conflicting views or practices might arise.

At Emory, we began our project by ensuring that all team members had an understanding of two areas essential to our work: copyright and archival processing. The team members without much copyright expertise completed Harvard's CopyrightX online course in spring 2020. Also, as mentioned above, the two archivist team members provided a step-by-step training overview of archival processing best practices and institution-specific workflows for the other team members. Prioritizing training in this way not only ensured that all team members understood one another's work well but also built trust among the team.

Conclusion

Developing a successful copyright workflow starts by building the appropriate team and setting them up for success. You can create your best team by first considering where all the competencies required for a rights review workflow might be in your organizational context. Then, determine how to fill any competency gaps, either internally or externally. Also consider your team in the context of the stakeholders you will report out to. Finally, set your team up for success by ensuring they engage in team-building exercises that establish trust and allow for productive information-sharing. A successful team will understand the work and practices of all team members who will be involved in the workflow. If that understanding is not in place at the beginning, start with information-sharing and training before moving onto developing your workflow.

Exercise: Building your team

Review the competencies described above and identify colleagues at your organization who have these competencies. Who has expertise and knowledge in these areas? Where are the gaps?

Plan how you might bring these competencies together: Are the people who have the expertise and knowledge available to participate, or do others need to acquire new competencies? Will you fill competency gaps by cross-training, or might you need to identify outside consultants?

Bring your team together and conduct a stakeholder analysis. Given your knowledge of institutional culture and history, work with your team to decide how best to engage with and inform your stakeholders for success.

2. Identifying Your Institutional Risk Tolerance

Risk-Assessment Approach to Digitization

Identifying Institutional Goals and Determining Reward

Digitizing archival and cultural heritage material and sharing it online has huge societal benefits. It makes unique resources widely available to students and scholars, helps address inequities in access to cultural resources, and makes cultural production or historically important records easily discoverable to a diverse audience including artists, genealogists, and academic researchers.



Risk by Dave Photoz is available on Unsplash.

Because this work is central to the core service mission of cultural heritage organizations, it is important that a digitization project be well planned and well executed to best serve the needs of your institution and to have the maximum impact for your user communities. Before you start any

digitization project, you should have a clear and well-articulated sense of the goals of the project and how the project aligns with and will advance your institution's mission and support its values.

Assessing Your Institution's Risk Tolerance

The level of risk your institution is willing to take on depends on a variety of factors and characteristics. An academic special collections unit with an educational mission and a business archives established to document and protect a brand and its trademarks will have very different approaches to sharing collection materials online. Similarly, private institutions may be more risk averse than state institutions. State institutions are protected by sovereign immunity, which is the legal doctrine that "a state cannot be sued in federal and state court without its consent." Without sovereign immunity, private institutions found guilty of copyright infringement may be required to pay damages to the copyright holder as well as attorney's fees and court costs (McCann, 2017). How do you determine the level of risk that your institution is willing to take on and make reasonable and responsible decisions and recommendations based on that known institutional risk tolerance?

Determining Institutional Risk Tolerance

General Counsel

One of the best places to begin to learn about the level of risk your institution may be willing to assume is your general

counsel's office. These offices can vary widely: Some institutions may have numerous attorneys, paralegals, and administrative staff, whereas others may be sparsely staffed. Regardless of the number of staff, your institution's general counsel is best positioned to discuss institutional risk tolerance around copyright and other legal issues.

Sovereign Immunity

The consequences for infringing on copyright or other rights can be different and usually depend on your institution type and varying state laws. One issue to consider is whether your institution is protected by sovereign immunity, which is defined above. Some exceptions exist, including that sovereign immunity does not apply to counties and municipalities (Congressional Research Service, 2012).

This concept of sovereign immunity extends not just to state governmental entities but also to state institutions, such as state universities, state archives and libraries, and state museums. As a result, these cultural heritage institutions may have a higher risk tolerance because they cannot be sued for damages for copyright infringement. However, sovereign immunity does not completely eliminate copyright infringement liability. Individuals working at state institutions can be sued for injunctive relief (Burtle, 2021). And while the plaintiffs in these cases can't seek damages as remedy, the cost of litigation can be punitively restrictive. Thus, even though state institutions are somewhat protected, this type of lawsuit can still be quite costly and have a chilling effect on cultural heritage institutions' willingness to exercise their fair use rights.

Sovereign immunity applies only to state-supported and -affiliated institutions, not private ones and, as we have already mentioned, not counties or municipalities. Thus, entities such as private universities and public libraries, museums, and/or

archives affiliated with cities or counties can all be sued for copyright infringement damages. Therefore, these entities tend to have lower tolerances for risk in reusing copyrighted works or engaging in other activities that might be characterized as infringing.

Understanding Potential Consequences

Consequences of copyright infringement for nonstate institutions can vary widely and are similar to the consequences that may be imposed on individuals if a judge finds that they have engaged in infringing activities. Judges may award actual damages (i.e., the amount of money the plaintiff has lost because of the infringing activities, which can be difficult to establish) or statutory damages in the amounts of \$750 to \$30,000 per infringement. If the judge decides that the infringement was willful (i.e., the defendant engaged in the infringing activities intentionally and deliberately), they can award damages to the plaintiff of up to \$150,000 per infringement (see 17 U.S. Code § 504; Copyright Act, 1976g). In willful infringement cases, courts may also award court costs and attorneys' fees to the prevailing party (see 17 U.S. Code § 505; Copyright Act, 1976h).

Determining Risk

What Types of Risk Might You Encounter?

Copyright

Copyright is the biggest consideration for most of us when assessing the various risks and rewards of sharing collection material online. A significant portion of 20th- and 21st-century unpublished manuscript and archival material and a fair amount of published material are still protected by copyright. The likelihood that a copyright holder would pursue a copyright claim against your institution, however, varies greatly depending on the age of the record, the record type, and the record creator. While there are certainly times when the fact that an item is in copyright will be a dealbreaker in the digitization process, there are also many instances when digitizing and disseminating copyrighted material is low risk and high reward.

There are some specific provisions and statutes of copyright law to bear in mind when considering an institution's rights to digitize material and the associated risks:

- The Digital Millennium Copyright Act of 1998 (DMCA; U.S. Copyright Office, 1998) was passed to modernize and clarify how copyright is deployed in the internet age. Among other things, the act provides safe harbor provisions for online service providers (OSPs) in “four categories of conduct,” and each category “entails a complete bar on monetary damages, and restricts the availability of injunctive relief in various respects” (U.S. Copyright Office, 1998, pp. 8-9). In other words, as long as

OSPs follow the stipulations in the DMCA, they do not have to pay money to anyone who thinks that they have allowed a user to post infringing content on their site or network. It's important to note that in general, an OSP is defined very broadly as “a provider of online services or network access, or the operator of facilities therefor [sic],” so in lay terms, it can be thought of as any entity that has a website, which certainly includes almost all cultural heritage institutions (U.S. Copyright Office, 1998, p. 9) . The DMCA further stipulates that for an institution to qualify for the safe harbor provisions, it must have a DMCA agent (U.S. Copyright Office, 1998, p. 11). Most cultural heritage institutions designate an attorney in their general counsel's office as their DMCA agent, and all must have the agent's contact information on their website (see, for example, Emory University's DMCA agent contact page).

- Fair use is a powerful provision in the Copyright Act that allows for use and reuse of copyrighted material for purposes such as criticism or commentary, teaching, scholarship and research, news reporting, and other common goods (see 17 U.S.C. § 107, Copyright Act, 1976d; see also U.S. Copyright Office, 2021). While fair use is a well-established legal doctrine, there are no hard-and-fast rules to determine whether a particular use of copyrighted material is a fair one. Instead, if a copyright infringement lawsuit is brought before a judge, that judge looks at four different factors (the purpose and character of the use, the nature of the original copyrighted work, how much of the copyrighted work was used, and the impact of the use on the market value of the original work) and makes a case-by-case determination of whether a particular use counts as a fair use or a copyright infringement. Many cultural heritage institutions make the case that, as educational institutions making material available for research and scholarship, their use is likely to be a fair one. The

Association for Research Libraries' *Code of Best Practices in Fair Use for Academic and Research Libraries* (2012) identifies as one of its principles that "it is fair use to create digital versions of a library's special collections and archives to make these versions electronically accessible in appropriate contexts." While there is support for this argument in the cultural heritage community, the only way to know for sure if a particular use is fair is to be sued and go to court for a ruling, an expensive risk that, understandably, not all institutions are interested in taking. If you are making digitized archival material accessible online because you think that the use is fair, you will need to know that your institution supports taking that stance. It is a good idea to document how you came to this decision and what considerations you weighed to show that you made the decision thoughtfully and in good faith.

- Congress acknowledged the significance of libraries and archives specifically in 17 U.S.C. 108 – Limitations on exclusive rights: Reproduction by libraries and archives (Copyright Act, 1976e). Here, Congress recognizes the limitations of copyright's exclusive rights on the work of libraries and archives in preserving and providing appropriate levels of access to their materials. To uphold the public values of libraries, Congress put in place Section 108 to solidify the work of libraries and archives as a public good in alignment with the purpose of copyright to promote the progress of science and the useful arts. While the Section 108 exception is limited in the context of building digital collections, it does provide some brightline guidance around preservation and patron copies that can inform a risk assessment workflow. Additionally, Section 108(h) provides the structure for including cultural heritage materials in their last 20 years of copyright in digital collections.

Trademarks

Trademarks are symbols, logos, or words that represent a brand, company, or product and clearly distinguish it from other entities in the marketplace. A trademark gives the owner the exclusive right to use that trademarked word or image to distribute goods or services and helps protect against fraudulent impersonation of a brand or counterfeit products. Common examples of trademarks include corporate or brand logos such as the Nike swoosh or the Starbucks logo, product or brand names such as Tide or Doritos, words or phrases such as Super Bowl (trademarked by the NFL) or BAM! (trademarked by the chef Emeril Lagasse). Unlike copyright, which does have an expiration date, trademarks remain protected intellectual property as long as they are in active use.

Many collections contain items or documents that include trademarked brand names or logos. Sometimes these items are incidental within the collection such as when a CEO of a corporation writes a letter to a university president on company letterhead or when a grassroots LGBTQ organization has a file that includes a pamphlet published by the Human Rights Campaign that includes its distinctive equal-sign logo. In other instances, such as corporate archives, brand management and protecting and managing the use and dissemination of trademarked assets may be central to the purpose of the archive and its value to its parent institution.

While digitizing and disseminating collections that include trademarked material is not always or even often a violation of trademark law, it may still be worth considering whether the presence of trademarks in a collection could be problematic, especially if a brand is particularly protective of a trademark or regularly disseminates heritage brand content in a manner similar to a digital library-like presentation.

Right of Publicity

Right of publicity prevents an unauthorized commercial use of a person's likeness, name, or identifying attribute (such as voice) and protects an individual's right to have the exclusive ability to profit from their image or persona (International Trademark Association, 2022). The right of publicity is governed by state rather than federal laws, so it is explicitly protected only in some states. Others may include similar provisions in other laws related to personal privacy. It is important to note that while the right of publicity is explicitly about the commercial use of an individual's likeness, disseminating the likeness of a highly private person or a person who is protective of their public persona even in a noncommercial context could come with heightened risk, and risk levels will vary by state.

Privacy

When considering the risk factors for sharing archival or other cultural heritage material online, there are two types of privacy considerations you need to take into consideration: statutory and ethical.

Certain state and federal laws govern what kinds of personal information about an individual or other entities or institutions can or cannot share. Common examples are the Family Education Rights and Privacy Act (FERPA), which governs what information about a student educational institutions can make public, and the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which governs when and to whom a health care provider or insurer can release a patient's medical records or medical information. HIPAA regulations do not apply to the majority of cultural heritage institutions, but if your institution is a HIPAA-covered entity or a hybrid entity like a healthcare

center or an insurer, or you will want to confirm your status and make sure that you understand what information you can legally disclose and the legal risks associated with unauthorized disclosure of personal information. Similarly, if you work for an educational institution, you will want to be more mindful of the student records in your collections in light of FERPA. No current federal statutes afford privacy protection after death, so the age of records may be a factor in determining the risks associated with sharing the records online.

In addition to applicable laws, cultural heritage professionals have an ethical obligation to consider the privacy of the people and entities represented in our collections, and questions of personal privacy appropriately factor into decisions to digitize and make widely available documents in our collections. The Society of American Archivists in its Code of Ethics (2020) states, “Archivists recognize that privacy is an inherent fundamental right and sanctioned by law. They establish procedures and policies to protect the interests of the donors, individuals, groups, and organizations whose public and private lives and activities are documented in archival holdings.” Archivists must be mindful of third-party privacy concerns for two reasons: (1) to fulfill our ethical stewardship obligations and (2) to understand the risk of litigation or institutional reputational harm should we digitize and widely disseminate information about an entity that they could reasonably consider private or confidential.

For example, perhaps you work for a small historical society, and a respected local physician donates their papers to your organization. The papers they donate include the records of their private practice such as individuals’ medical records. Assuming that the historical society is not associated with a health-care organization and is therefore not a HIPAA-covered entity, you are not legally required to restrict or discard those records. But you may well decide that you have an ethical

responsibility to protect the patients' privacy, or you may determine that sharing patient records online in your small, close-knit community represents a violation of the community's trust that you and your institution are unwilling to take.

Donor Relations

Cultural heritage institutions maintain personal, professional, and financial relationships with donors and other parties over time. These relationships are often of significant value to organizations. Donor relationships can be ongoing when agreements include future donation of additional material from a particular person or organization. A donor relationship can assist with collection development or help an organization establish and maintain financial and fundraising relationships. Donor relationships also inform parallel relationships within the communities we document. Digitizing and broadly disseminating records that would be embarrassing or uncomfortable for a donor or community partner carries the risk of doing damage to an important institutional relationship.

Institutional Reputation/Reputational Harm

Similarly, even when making the records in our repositories widely available poses no legal or ethical concerns, they may contain information that could do reputational harm to our archives or parent institutions either because they expose embarrassing truths about our organizations or because they could invite unwelcome scrutiny of our collaborative partners. In some types of repositories, the institutional transparency and accountability associated with disseminating records

related to untoward institutional activities may be considered a positive fulfillment of the archival mission and a welcome deployment of archival values. In other organizations this exposure might be unwelcome. These factors are likely not legal risks to the organization, but the potential impact to an institution's reputation and relationships should be considered and discussed candidly with administrators or senior decision makers when assessing a digitization proposal.

Practical Considerations

While much of the risk we have discussed so far is about legal, ethical, or reputational breaches, sometimes dealing with the fallout of a decision to digitize material simply isn't worth the time and effort. Even if you are perfectly within your legal rights and making something available is both ethically sound and in line with your institutional mission, you may decide that engaging with challenging third parties or doing risk analysis on a particularly heterogenous or complex collection isn't worth the risk of lost staff time or money that could occur. In the past two decades, resources for cultural heritage institutions have decreased significantly. We have fewer staff doing mission-critical work and fewer dollars to spend on things like licensing, so it is critical for us to deploy the resources we do have responsibly. If your limited staff do not have the capacity to conduct item-level rights research in high-risk collections and contact each rightsholder for permission to digitize works, it may be more strategic and a better use of resources to focus projects on low-risk collections or collections entirely in the public domain. It is always worth considering the opportunity cost of investing a significant amount of time and labor doing work on a project (whether that is doing copyright clearance or damage control) that results in other meaningful, mission-driven projects not getting done.

Identifying Risk Factors for Your Repository and Its Collections

We have just identified a number of potential factors that we may want to consider when determining how much risk our institutions may incur when making something from our collections publicly available online. But, of course, not all of these risks apply equally to all institutions, and the missions and purposes of different types of repositories will also influence a cultural heritage institution's approach to sharing digitized material online. This section will provide some strategies for determining which of the risk factors we just identified are most likely to be present in a given type of collection or institution. By thinking categorically about record types and institutional goals, we hope to present scalable solutions for approaching risk and assessing digitization projects in a variety of organizations.

Institutional Purpose and Mission

There are many types of cultural heritage institutions, each with distinct missions, purposes, and obligations to parent institutions, boards, or community stakeholders. A repository that documents its parent institution such as a college or university archives or a corporate archives is likely managing a collection created primarily by their parent institution. These repositories will likely be less concerned about copyright risks (as their parent institution owns much of the copyright and intellectual property in a collection) and may be much more focused on matters of institutional reputation or trademark protection when considering what risks to incur when sharing digital content.

Alternatively, an archival repository with an educational or

community-memory mission such as an academic library special collections department, a local historical society, or a community-based archives will likely weigh these considerations differently. These mission-driven special collections likely do not hold copyright in their collections, but they do hold material that is valuable to their users, so these institutions may spend more of their time weighing how much copyright-related risk they are willing to take on in order to advance their mission or fulfill other obligations to their communities of donors and users.

What Types of Collections Do You Hold?

Different kinds of records have varying levels of potential risk related to making them publicly available. Following is an exploration of a few examples commonly held in archives and special collections.

- **Institutional records.** The copyright risks associated with institutional records tend to be very low because your parent institution likely holds the copyright to the majority of the material that comprises these types of records, so the risks associated with copyright are generally negligible. However, institutional records may hold trade secrets; patent information; confidential records; or, depending on the type of institution, records that are covered by a statute such as HIPAA or FERPA.
- **Records of artists, writers, or other creatives.** Artists, writers, photographers, and other individuals or organizations that generate revenue by creating content are generally the donors who have the clearest interest in protecting the uses of their work. Creatives and their estates have a vested financial interest in protecting their copyrighted work; therefore, these types of collections

tend to be some of the riskier collections to make available without clear licenses and permissions from the rightsholder(s).

- **Business or organizational records.** Many repositories hold the records of third-party businesses or community or civic organizations. Unlike artists and other content creators, most of these organizations do not profit from the ongoing use and licensing of their work and are often more interested in building awareness of their work than in protecting their intellectual property. In our experience, these types of donors often are not aware that the unpublished records they generate in the course of conducting organizational business are covered by copyright protection or that they may be copyright holders. Over time, business and organizational records have a higher likelihood than other types of records to become orphan works as the organizations that produced them go out of business or cease to exist as an incorporated entity. Additionally, the *ARL Code of Best Practices in Fair Use for Academic and Research Libraries* (2012) notes that it is best practice to consider digitizing and disseminating aggregations of copyrighted archival material a fair use: “Materials in special collections typically include significant amounts of primary sources and artifacts . . . whose value as historical objects for scholarly research is significantly different from their original purpose.” This highly transformative use is particularly true of organizational records where the purpose of using the records as a way to understand history is very different from the original purpose of running a business or advancing a cause. It is worth noting, however, that although copyright risk is generally lower for these records, there may be other types of risks, such as trade secrets present in the records, to be mindful of, especially if a business or organization is still active. Generally,

however, making these records broadly available carries a lower risk than many other types of records.

- **Collections of art.** Works of art enjoy robust copyright protection; if the artwork is still in copyright, it may be riskier to make it broadly available than other types of material, especially if an original creator is still using and licensing the artwork in other ways.
- **Published works.** *Published* has a very specific meaning in copyright law: Under US copyright law, “publication is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication”(17 U.S.C. § 101, Copyright Act, 1976a). The copyright to all works published in the United States more than 95 years ago has expired, and those works have entered the public domain. However, these works are not the only published works that are free of copyright protection. Current copyright law grants copyright to all published and unpublished works automatically, but for much of the 20th century, creators needed to formally assert or register copyrights or renew them after a period of time. If they did not do so, the work would enter the public domain. For example, anything published between 1927 and 1977 that doesn’t have an explicit copyright notice was never protected by copyright and is currently in the public domain. In many other cases, if a work was published with copyright notice, but that copyright wasn’t renewed, the work has entered the public domain. These facts mean that a far greater amount of material published in the 20th century in the United States is out of copyright than commonly thought. While the landscape of copyright formalities is complex,

Cornell University Library (2022) maintains a helpful chart to help one determine the copyright status of a work.

- **Sound or video recordings.** Sound and video recordings can be tricky to assess from a copyright point of view because of the many possible layers of copyright holders in a recording. For example, in a musical recording the copyright for the musical composition is likely owned by the songwriter or the publisher of the sheet music, but the copyright in the recording is probably owned by the performer, producer, or record label. The landscape is even more complicated if the recording is unpublished. For unpublished recordings made before 1972, there are a number of possible copyright terms protecting recordings based on their date of original creation (U.S. Copyright Office, n.d.). These varying terms of protection can make it more complicated and time-consuming for a cultural heritage organization to make an accurate assessment of the risk they might be taking on by digitizing and disseminating sound and video recordings. As with any other media, if a recording is a commercial recording that someone is currently profiting from, that recording would be riskier to make available, and if a recording is noncommercial or doesn't have anyone actively managing its rights and dissemination, it would likely be less risky.
- **Government Records.** The risk level associated with digitizing government records and making them available online varies depending on the government agency that created the record. Broadly speaking, in the United States, copyright protection is not available for works created by employees of an agency of the federal government, so those works are in the public domain. There are some exceptions to this rule for works created by federal contractors or for logos or trademarks used by agencies. Additionally, many (though not all) of the records created by federal legislators and judges are considered the

personal papers of those individuals or offices rather than records of the federal government. The records of state and local governments are regulated by local laws and differ from state to state. Nations other than the United States, of course, have their own statutes and regulations covering the copyrightability of their state-produced records. When assessing risks related to government records one should also be mindful of whether records contain classified or potentially classified documents.

Some Key Questions to Ask Yourself

Is someone actively managing or making money from this content? This situation is most common in the collections of writers, artists, photographers, or other people working in creative fields. For artists, their heirs, or cultural organizations that make a living on the creative work that they produce, controlling and managing their intellectual property may be an important factor in their current livelihood and legacy planning. These individuals or organizations often have a high economic stake in protecting the rights they have in their work, which may make digitizing and publicly disseminating the work a riskier undertaking from both a copyright and a donor-relations perspective.

Does a known copyright holder exist? Works that are in copyright but don't have a clear copyright holder that can be identified or their copyright holder is impossible to contact are collectively known as *orphan works*. Examples of orphan works may include a pamphlet that was published anonymously, a work where the original copyright holder is deceased and their heirs are not locatable, or the records of an organization that has dissolved or gone out of business. These works are generally going to carry a lower risk to reproduce or

disseminate than works with active copyright managers, but the fact that they are known to be in copyright is a risk factor.

What is the age of the material? Unpublished material enjoys copyright protection for 70 years after the death of the creator. Therefore, unpublished records from individuals who died more than 70 years ago may not be as risky to digitize and disseminate as something more recent. Similarly, records created by or about deceased individuals or defunct organizations may have fewer stakeholders invested in someone's work or reputation and therefore carry less risk of harming a relationship between a donor and a cultural heritage organization. In the context of an institutional archives, recent Board of Trustees or Board of Directors meeting minutes could contain confidential material about ongoing projects, plans, or budgets, but it is highly unlikely that the same confidentiality applies to minutes from the 1920s. There are few magic numbers in this equation, but in general older records carry less risk to digitize and disseminate than more recent records.

What kind of people are represented in the collections? Does this collection contain juicy correspondence that discloses secrets about famous people? Does the collection include material by a public figure who is very protective of their public image (or whose family and estate is)? Does the collection contain documents about a third-party private citizen who does not know a compatriot donated material to the archives that may end up online? Even if a collection of this nature is out of copyright, there may be other risks associated with digitizing and disseminating it that an institution will want to consider.

Is the majority of the material published or unpublished? Copyright terms are different for published and unpublished material. Additionally, the publication status is one to consider if your institution is making an argument that digitizing material is fair use. Again, the Cornell University Library's

Copyright and the Public Domain website (2022) is a helpful tool when assessing the copyright status of both published and unpublished works.

Does the collection contain a significant number of medical, educational, psychiatric, or attorney/client records?

Some communications between professionals and their clients are considered privileged information and often contain disclosures made with the understanding that these communications are highly confidential. While in most cases it is the responsibility of the professional (e.g., the attorney, doctor, therapist, etc.) to maintain this confidentiality, making these records publicly available online would present serious ethical questions for a cultural heritage institution.

Mitigating Risk

Once you understand the level of risk tolerance at your institution, you can start thinking about ways to mitigate risk. Consider the following characteristics of a hypothetical collection at your institution:

- The donor is the copyright holder for 75% of the materials in the collection.
- The copyright holder is known to be litigious and protective of their rights.
- The copyright holder is continuing to actively license works from the collection for use in books, documentaries, and journal/magazine articles.
- The materials are clearly in copyright and will remain so for many decades.
- The items in the collection are highly creative, and some are unpublished.

Contrast the characteristics above with the following ones:

- The copyright holder is unknown for most works in the collection, so they are classified as orphan works.
- There is no licensing market for the works in the collection.
- The date of creation for the materials clearly indicates that they are no longer protected by copyright.
- The collection largely contains factual, published material.

You could consider these characteristics as opposite ends of a spectrum with many shades of gray in between. The top collection would be highly risky, and the bottom one would entail almost no risk. Your job is to determine where your collection falls on this spectrum and act accordingly.

Digitizing and Sharing Collections Online

If your institution has a goal to share its collections in an equitable fashion that allows anyone with an internet connection to access them, you can mitigate the risk of sharing in many ways. Here are some hypothetical examples: your institution could share digital images of materials from a **very low-risk collection** in high resolution and large format, users could be allowed to download and save the images, and the images could be available to anyone globally. For a collection that's very high risk, you might not make it available online at all – it would only be available in your reading room. Further details on this spectrum can be found in Table 2.1.

Table 2.1. Example: Spectrum of Risk for a Hypothetical University

Criteria	Collection is very low risk	Collection is low risk	Collection is medium risk	Collection is high risk
Resolution?	Full resolution	Full resolution	Low resolution	Very low resolution
Format?	Large format	Large format	Small format	Very small format
Availability?	Global availability	Global availability	Global availability	Very limited availability
Download?	Download allowed	No download allowed	No download allowed	Very limited download

Disclaimer: It is critical to remember that institutional risk can vary greatly from one institution to the next. This table represents one possible method for mitigating risk and should not be applied without completing your own institutional risk assessment.

Takedown Policy

Having a takedown policy that allows creators to request removal of copyrighted material from digitized archival collections is a common practice that demonstrates that institutions are acting in good faith. Furthermore, the DMCA stipulates that to qualify for the safe harbor provisions in the law, OSPs must establish a process that allows copyright

holders to register a notice with the OSP stating that they believe the OSP has infringed their copyright by sharing materials online. When the OSP receives the notice, it must remove the materials in question and determine whether the claimant has a valid complaint (see 17 U.S. Code § 512; Copyright Act, 1976i). Because of these DMCA stipulations, many cultural heritage institutions have created takedown policies that outline this process and make it clear that they are complying with the law. These actions help mitigate risk, and many examples can be found online:

- Emory Libraries' Digital Collections Copyright and Content Policy
- NYU Libraries' Notice and Takedown Policy
- HathiTrust Digital Library's Take-Down Policy
- University of Wisconsin – Madison Libraries' Take-Down Policy: Addressing Copyright Concerns
- Duke University Libraries' Deaccession and DMCA Takedown Policy

Documentation

Cultural heritage institutions can also mitigate risk by ensuring that they have policies and workflows to determine whether they can share materials online and by documenting these policies and processes. Well-articulated policies ensure that institutions are taking an intentional, considered, and consistent approach to managing risk. Documenting these policies as well as how you have reached your decisions about copyright and other risks further strengthens an institution's position in case there is ever a legal challenge. U.S. copyright law includes a section (see 17 U.S. Code § 504(c)(2); Copyright Act, 1976g) that reduces damages when you can prove that

you thought you were acting within the confines of the law, so robust documentation is an important way to show what basis we made our decisions on, what research we undertook, and otherwise demonstrate that we were acting in good faith that our use was a legally allowable one.

Exercise: Practical Strategies for Mapping Risk Factors to Your Institution's Collections

One tool that we developed at Emory to help us make high-level assessments about the potential risk of digitizing and making available a whole or part of a library collection was a Rights and Risk Matrix.

For the major types of collections that we tend to have in the Rose Library (personal papers, literary collections, organizational records, various types of Emory University records), the matrix identifies the most common series or record types that each kind of collection contains, identifies external risk factors that may impact our ability to make the records available publicly online, and then combines these factors to indicate the likely level of risk associated with making that category of material available. The matrix is intended to help archivists, librarians, and curators identify both potential red flags and easy paths towards digitization and dissemination of collection material.

In this exercise you will create your own risk assessment matrix for your institution based on the types of collections that you hold and your institution's risk tolerance, or you will assign risk categories to the blank matrix we designed at Emory (see Appendix B) based on the level of risk your institution is likely willing to take on.

1. List the major types of collections your repository holds (personal papers, institutional records, etc.).
2. Then think about what major types of records you often encounter in those types of collections (personal papers may include correspondence, subject files, diaries, or journals, etc.)
3. Identify any risk modifiers that would make any given risk category either more or less risky than it might otherwise be. For example, a nonliving creator may indicate less risk, and a living, highly-litigious or very private creator may be an indicator of higher risk. Similarly, the relative age of the records may be a useful risk modifier for your institution and its collections. For organizational records the risk modifiers might be things like whether the organization still exists, or whether the organization did work that might make it higher risk (examples may be an arts organization that may be more protective of copyright, or an activist organization whose members may have engaged in protest actions that could be prosecuted or retaliated against).
4. Identify your risk categories. These are likely some combination of copyright status and additional risk considerations. Some examples may be the following:
 1. likely out of copyright, low/no risk
 2. likely out of copyright, higher risk
 3. in copyright/likely in copyright, strong fair use argument
 4. likely in copyright, low risk
 5. likely in copyright, medium risk
 6. likely in copyright, high risk
 7. Our institution owns copyright, restricted or high risk
 8. Our institution owns copyright, low risk
 9. More research required to make a responsible decision
5. Assign a color to each of your risk categories.
6. Create a matrix (a simple spreadsheet is a good tool for

this) with record types (grouped by collection type) on your y-axis and risk modifiers on your x-axis.

7. Assign each cell a risk category/color (for the combination of record type and risk modifier) based on how your institution would rank the risk levels of that category.

3. Evaluating Licensing and Permissions for Archival Materials

A large part of the rights-review process for archival materials involves reading, evaluating, and/or obtaining deeds, transfer agreements, licenses, and permissions documents to ensure you can build your digital collection as intended. To ensure smooth and efficient processes, you want to have a strong understanding of what these documents are and what language your institution currently uses for them. You may even need to draft some templates or revise outdated language to better facilitate building digital collections.



Photo by Cytonn Photography is available on Unsplash.

Definitions

Before we share how we approached this topic, let's define some terms.

License. A *license* is permission granted by an authority to do something that would otherwise be prohibited (Legal Information Institute, 2020). Often, librarians think of licenses in the context of providing access to databases and e-resources. For archival digital collections, rightsholders can grant licenses

to the institution, giving the institution the ability to make a work publicly available online. Licenses can also be offered by the institution to third-party users. For example, if an institution holds copyright in a given work, it can grant others the permission to use it in a scholarly publication or documentary series.

Permissions. In the context of rights and digital collections, *permissions* generally means “authorization to do something” (Society of American Archivists, 2022f). To get permission usually involves obtaining a license. Often, we need permissions from a copyright holder to invoke their exclusive rights. Sometimes, we might need permission from an individual featured in an object to ensure we are not violating their right to privacy. Permissions documents can take many forms from something as simple as a short letter to a multipage, complex license form.

Deed. A *deed* is a legal agreement to transfer ownership of property (Society of American Archivists, 2022c). Deeds are often referred to as either a *deed of gift* or *deed of sale* depending on whether or not the agreement involved monetary compensation (Society of American Archivists, 2022d). For the purposes of building digital collections in cultural heritage institutions, a deed transfers ownership of one or several items of an entire collection of tangible and/or digital materials from a donor or a seller to a cultural heritage institution. Deeds also serve as legal contracts for any additional terms and conditions related to the transfer such as copyright and license agreements and privacy restrictions, for example.

Deeds of Gift or Sale

A deed of gift or sale¹ is a legal contract that must be carefully composed so that no party to the contract has any questions about its meaning. The Emory deed template (see Appendix C) is extensive and complex. It was developed by our special collections staff in collaboration with an attorney in our Office of General Counsel, so it is longer and more formal than some deeds from other institutions.

Other examples of deeds can be found online:

Georgia Tech University, Library Archives and Special Collections Deed of Gift (PDF)

Rice University, Fondren Library Special Collections and Archives, Woodson Research Center Deed of Gift (online webform)

Guggenheim Museum Deed of Gift (PDF)

The Society of American Archivists has developed a practical and useful Guide to Deeds of Gift (2013) that outlines all the elements these deeds should include and explains details about each element.

Transfer of Copyright

It is important to note that even though deeds transfer the ownership of the physical or digital objects to your institution, this ownership transfer does not always include a transfer of copyright. If your institution wishes to control the copyright

1. For simplicity, we will refer to these documents as *deeds of gift* from this point forward, but you should interpret this phrase to include both types of deeds.

to the materials it will own, the transfer of copyright must be negotiated with the donor or seller (if they are the copyright holders) and explicitly spelled out in the deed, as can be seen in the examples above. It's also important to remember that donors or sellers rarely hold copyright in every item in a given collection, and they can transfer or license only the rights they hold. For example, Emory owns a large collection of Southern Christian Leadership Conference (SCLC) records. As you can imagine, many of the documents in this collection, such as letters and other correspondence, were created by SCLC employees in a work-for-hire situation, so the SCLC owns the copyright to those documents and could transfer that copyright to Emory (which is actually not the case). However, the collection also contains correspondence written by people outside of SCLC and sent to SCLC staff, so the organization would not own copyright in those specific records and therefore could not legally transfer that copyright to Emory. Because of the complex legal nature of the deed, it is always best when possible to have your general counsel review it to ensure it aligns with the policies of your organization.

Amendments and Addenda

Many cultural heritage institutions have existed for a number of decades or even centuries, so the collecting focus of the institution may have changed several times over the years, and best practices concerning deeds of gift have likely also changed. For example, it has long been the norm for donors and sellers of cultural heritage collections not to transfer copyright in the materials to the receiving institution, but this norm is changing and often dependent on whether the copyright holder is monetizing the materials (or plans to do so in the future). In addition, the rise of the digital age over the

past few decades means that cultural heritage institutions can now share their collections online as opposed to the in-person, physical exhibits that were the sole option before the early 2000s. Therefore, if you want to digitize and share collections that your institution received or bought in predigital times, you may need to renegotiate with the donor or seller because permissions for digitization and online sharing would not have been included in the original deed of gift.

It is important to take some time to assess whether you and/or your staff have the capacity to work with the collection's copyright holders to obtain permission for digitization and online sharing of them, or possibly for the transfer of copyright. The time and labor necessary to research the numerous copyright holders in any given collection and then contact them individually for permissions may be beyond what your current staff can accommodate. If you determine that you can't accommodate this work, it's best to focus on public domain material or crafting fair use justifications (see also Chapter 2: Identifying Your Institutional Risk Tolerance: Practical Considerations). If you determine that you do have the capacity for this in-depth research and outreach, it is best to approach this conversation with a goal in mind. For example, if the donor/seller wants to retain their copyright, are they willing to grant a broad license to your institution for digitizing the materials and sharing them online? Or might they be willing to add a Creative Commons license to the materials to make it easier for your institution and the public to work with them? Would they be willing to dedicate the materials to the public domain or to transfer copyright in them to your institution so that you could openly license them?

Following are examples of language concerning rights that can be used in a deed of gift amendment (if you are changing the original deed) or addendum (if you are simply adding new terms and conditions to the original deed), and each example illustrates one possible outcome.

1. **Seller/Donor retains IP rights and grants [institution name] a license for the [specific part of or items in the collection, e.g., photographs, diaries, correspondence, etc.] in the [name of the collection]:** Seller/Donor grants to [institution name] a nonexclusive, royalty-free (i.e., no cost to [institution name]), worldwide, and perpetual license to copy, distribute (via downloadable copies and otherwise), modify for display, and display such Materials in print, digital, and online formats, now known or later developed, to the extent necessary to preserve and steward the Materials, to publicize and promote use of the Materials, and to make the Materials available for study, research, and exhibition. The foregoing license shall include the right to digitize Materials originally received in nondigital formats, as reasonably necessary for [institution name] to exercise the other rights granted in this Agreement.
2. **Seller/Donor retains Seller's/Donor's IP rights and irrevocably licenses the [specific part of or items in the collection, e.g., photographs, diaries, correspondence, etc.] in the [name of the collection] with one of the following:**
 1. A Creative Commons Attribution 4.0 International (CC BY 4.0) License. This license allows any user to reproduce, distribute, adapt (e.g., remix or transform), or make derivative versions of the original material as long as the user cites the creator of the material. This license allows for all of these uses to be commercially exploited.
 2. A Creative Commons Attribution-Noncommercial 4.0 International (CC BY-NC 4.0) License. This license allows any user to reproduce, distribute, adapt (e.g., remix or transform), or make derivative versions of the original material as long as the user cites the creator of the material. However, users cannot use the material

for commercial purposes (e.g., the use cannot be “primarily intended for or directed toward commercial advantage or monetary compensation”; more information here).²

3. **Seller/Donor indicates an express wish to irrevocably transfer, convey, and assign to the public domain all Seller's/Donor's IP rights. The transfer of rights will be**

2. A special note: Creative Commons is a nonprofit organization founded in 2001 to create user-friendly, free, legal licenses that proactively allow copyright holders to grant specific permissions to downstream users. For example, a Creative Commons Attribution license allows anyone to reuse the licensed material in any way, even commercially, as long as they provide credit to the original creator. A Creative Commons Attribution-Noncommercial license has the same credit requirement but does not allow downstream users to make a profit on their use (for more information on noncommercial uses, see Creative Commons, 2021). Creative Commons provides four other licenses with varying degrees of permissiveness. Cultural heritage institutions frequently have missions that focus on sharing and expanding knowledge, increasing public access to information and cultural artifacts, and educating users, and Creative Commons licenses help fulfill and advance these missions. Cultural heritage institutions are increasingly using Creative Commons licenses, but some of these institutions' staff members may not be familiar or comfortable with them, so if you choose to start using them in your workplace, be sure that you understand the licenses and their meaning and can effectively explain them to donors and colleagues. Creative Commons offers a certificate program that can familiarize you or your colleagues with detailed information about the licenses and how they work.

marked by a Creative Commons CC0 license.

4. **Seller/Donor irrevocably transfers, conveys, and assigns all the Seller's/Donor's IP rights in the Materials to [institution name].**

Challenges

Complex legalese. As noted above, deeds can often be complex and confusing for those without legal training, so it is critical that curators and archivists have broad training and a deep level of comfort with legal terms and conditions since they are most likely the ones that donors will query when they do not understand parts of a deed. Curators and archivists should be able to explain the meaning of any and all portions of their institution's deeds, but they should take care to inform donors that they are not able to provide legal advice to them. Instead, curators and archivists should advise donors to retain legal counsel.

Finding current legal entities. When a cultural heritage institution determines that an amendment or addendum to a deed is necessary (often because they want to digitize and share materials that were donated decades ago), staff must find out who is the current legal representative of the original donor, who may no longer be alive. This person may be the heir(s) of the donor, or in the case of a corporate donor, it may be that the corporation was merged with or sold to another corporation that is the current legal entity. This investigation may be time consuming and difficult, and sometimes, finding an answer may be impossible. Staff at cultural heritage institutions should remember that these problems may arise and make contingency plans for them. For example, you could decide that it may be best to simply not digitize the collection

or to consider the fairness of the use rather than to accept the risks that come with orphaned work status.

Signatory authority. Knowing who has the authority to sign a legal document on behalf of your cultural heritage institution may seem straightforward, but it can be surprisingly complex. At your institution, is it the director of the museum? The dean of the library? The director of the archives? The institution's chief financial officer? The general counsel's office? Be sure to have a solid understanding of who can sign the deed at your institution, and it also behooves you to know who may be able to sign a deed in the absence of the chief signatory authority.

Obtaining Permissions

Finding the Copyright Owner

Once you've determined that you need permission in order to add materials to your digital collection, the permissions process begins with finding the copyright owner. This involves two steps: (1) identifying the copyright owner and (2) locating the copyright owner in order to contact them. Unfortunately, neither step is universally simple or straightforward.

Identifying and Locating the Copyright Owner

The biggest hurdle in obtaining permissions is often identifying who owns the copyright in a work, locating that owner, and determining the best method for seeking their permission. A copyright owner could be an individual but could also be a commercial entity such as a publishing house, literary

agency, or foundation.³ If you are new to this work, we recommend reviewing Chapters 3 and 8 from the openly accessible book *Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums* (Hirtle, Hudson, & Kenyon, 2009).

When it comes to developing your copyright workflow, make sure that you factor in the time, cost, and effort involved in permissions processes.

Crafting a Permissions Letter

Once you've identified your copyright owner, you'll need to get permission. You may be able to obtain permission through a collective rights management organization, like the Copyright Clearance Center (CCC) or the Visual Artists Rights Society (see Hirtle, Hudson, & Kenyon, 2009, Chapter 8, Section 3 for more details). However, many materials in archives aren't managed by a third party.

If you need to contact a copyright owner directly, you will want to craft a permissions letter to use in obtaining permissions. These letters can take a variety of forms and structures, but you want to be sure to answer the following questions:

- Who are you?
 - Include your name and title as well as information about the organization you are writing on behalf of.

3. The University of Reading and the Harry Ransom Center at the University of Texas maintain WATCH (2022), a useful database for identifying copyright holders of works by writers and other literary figures.

- What are you using?
 - Be as specific as possible in describing the copyrighted work you want to use.
- How do you want to use it – both current and potential future uses?
 - You want to ensure that you have the rights you need now for creating your digital collection, but you also want your language to be flexible enough to allow for other uses if possible.
- What rights do you need to conduct that use?
 - Exclusive vs. nonexclusive
 - Do you want or need to be the only entity doing what you're doing? If so, then you want exclusive rights. If it doesn't matter to you whether others have the same permissions you do, then you can ask for nonexclusive permissions.
 - Perpetual
 - To avoid having to continuously re-ask for permission, make your request in perpetuity.
 - World-wide
 - Copyright law is a national law. Given that digital collections are online, you want to ensure that the rights you obtain apply in all possible jurisdictions.
 - Royalty-free
 - You want to make clear that your permission request does not have a financial incentive for the copyright owner.

In crafting your letter, there are a few additional items to take into consideration. First, are you certain that the person you are contacting is the copyright holder? Or do you suspect it? If you only suspect it, you may want to include language that gives the recipient the opportunity to state that they are not

the rightsholder and to direct you to the appropriate entity if possible. Second, you want to consider your form. If the rightsholder is a professional creator, a more formal license structure with legalese may be appropriate. However, if the rightsholder is a community activist, a personal letter structure with more human-readable language might be preferable. Finally, be prepared for an alternative. Sometimes, rightsholders have their own permissions form or template prepared and require all inquiries to be made using that document. Make note in your workflow how you might prepare for this type of permissions interaction, especially if the rights granted are more restrictive than what you need.

At this stage you are ready to move forward with contacting rightsholders to get permission. One item to clarify in your workflow before you do: What level of permissions assent is enough? Ideally, you want the rights owner to send you back a copy of your letter with a physical signature. However, given technology or time constraints or the cost of postage, that might not be feasible for every rights owner. Before you begin, confirm what level of assent is sufficient for your institution. Is it acceptable to just get an email response? If so, are there any conditions to confirm? Can you accept PDFs with Adobe e-signatures? Can you use DocuSign or another e-signature software to get assent? These questions all point to a risk determination. For more information on assessing risk, see Chapter 2: Identifying Your Institutional Risk Tolerance.

Negotiation

Requesting permission may not always be successful at first because rightsholders are sometimes not comfortable with how you plan to use their copyrighted material(s) or would like to be compensated for their use. If or when a rightsholder denies permission, it's important to remember that

negotiation is possible. Let's explore this idea with an example. Your cultural heritage institution holds a collection of works by a famous art photographer, and you want to digitize and make available online several of her most famous photos as part of an exhibit of art photographs your institution holds in its collections. You have crafted an excellent permissions request letter by following all the guidelines above. In the letter, you ask to digitize the photos and share them in this exhibit and other similar exhibits in perpetuity. You explain that the exhibit will feature the photos in a high-resolution, large format that can be downloaded, and you state that your institution is experiencing a tight budget, so you are unable to pay a licensing fee. You send the letter off with high hopes and begin to plan your online exhibit. However, the response to your letter is an unqualified denial of permission because the rightsholder is still monetizing these images through a licensing market. At this point, you have several options – you can offer to do one or more of the following:

- Display the images in a smaller, lower resolution format;
- Disallow downloading of the images;
- Ask for time-limited permissions rather than perpetual ones;
- Select different images for the exhibit.

You can also negotiate on the monetary side by offering to pay for the license, perhaps asking for a slight or even substantial discount because of the collegial relationship you have with the rightsholder. The important point here is to persist (in a professional manner, of course) with various offers and counteroffers to discover whether you and the rightsholder can come to a mutually satisfactory agreement.

Record Keeping

The permissions process for creating digital collections can be somewhat cumbersome. It is important to create an organizational system to help you track each step of the process from when and how you identified the rightsholder to when you received a response from them. A simple spreadsheet can tackle this work. For a good example, see Susan Bielstein's *Permissions, a Survival Guide: Blunt Talk about Art as Intellectual Property* (2006).

When permissions letters and forms are received, you may also want to use a checklist to ensure that the rights you asked for are the rights you obtained. Rightsholders can strike clauses from letters and in the event they insist you use their standard permissions form language, you need to confirm that the permission granted will allow for your use. Including a brief letter review into your workflow will save significant headaches down the road.

Planning with Permissions in Mind

For the purposes of developing a copyright workflow, it is important to take into consideration a few of the following factors:

- Time
 - The permissions process can be a long one. The law does not require responses from copyright owners you asked for permission. Treat a nonresponse as “no.” In creating a copyright workflow for your institution, consider how you can build in enough time to negotiate and obtain permissions without rendering a project permanently on hold. Identify the timeline

that you feel gives the copyright owner a reasonable period to respond and develop a backup plan (see the third bullet below) for when a rightsholder doesn't respond or denies your request.

- You can save time for both you and the rightsholder by consolidating your permissions requests. Rather than getting permissions piecemeal, item-by-item or collection-by-collection, try to anticipate and obtain permissions across your archives. Do you have several collections that are interrelated, but only one is scoped for ingest into your digital collection? If a copyright owner's work crosses over multiple collections, try to get permission for all those materials at one time.
- Relationships
 - The permissions process is a collaboration between you and the copyright owner. It is often an opportunity to initiate broader discussions. You may ask for permission to digitize one letter and end up acquiring a whole new collection. In developing your workflow, consider how you will handle serendipitous offers from copyright owners.
- Backup plans
 - Assume that you will not be successful in obtaining permissions at least some of the time. Incorporate into your workflow what you will do when this happens. Will you consider fair use (and your institution's policy regarding fair use for digital collections)? Will you exclude certain materials from a digital collection, or will you exclude a whole collection from digitization?

Exercise: Reviewing Your Legal Documents or Writing a Permissions Template

Instructions: Review the deed of gift or sale for a collection you want to digitize. Determine if the deed covers the permissions you might need to create your collection. If not, write a permissions letter to get permission from the copyright owners identified in that collection.

4. Processing with Rights in Mind

What Is Archival Processing?

Archival processing is the combination of tasks and decisions required to organize an archival collection and make it available for research use, and it refers to both arrangement and description of collections.



Archival boxes by Nana Smirnova is available on Unsplash.

Though technically separate functions, arrangement and description are often done in concert with one another, one informing the other and happening more or less concurrently.

Arrangement is “the process of organizing materials with respect to their provenance and original order, to protect their context and to achieve physical or intellectual control over the materials” (Society of American Archivists, 2022b). The principles of provenance and original order guide archivists during arrangement. Provenance tells us that materials from different sources should not be intermingled. Original order dictates that when the creator’s original organization is present and discernible, it is better to retain it than to create a new artificial arrangement. Both principles are about protecting context and relationships between files and documents. Context in archival collections is vitally important to fully understand the content of collections. To obscure context is

to risk obscuring the meaning of the documents that are included in a collection.

Description is “the process of creating a set of data representing an archival resource or component thereof” (Society of American Archivists, 2022e). The function of description is to create access to archival collections. It can take many forms but is most often represented in finding aids. Finding aids are guides to collections that include narrative summaries of the contents as well as inventories of the physical location of materials. Narrative notes summarize the types of documents present in the collection, notable individuals documented by the collection, activities of the creator that are documented in the collection, and date ranges of the material in the collection.

Description of archival collections is often in the aggregate. Individual items are rarely described, but groupings of similar types of material often are. For example, rather than describing each individual letter in a collection, all of the correspondence would be described as a whole, focusing on the overall nature of the letters, common themes, and recurring names.

The first step of processing is conducting a collection analysis. This is a high-level review of the collection’s contents that results in a processing plan. At this point, the archivist ascertains whether original order is present. If it is, the archivist focuses their analysis on learning the creator’s organizational system and identifying anomalies. If the original order is not present, the archivist focuses their analysis on identifying intellectual units within the collection to create a logical and useful arrangement. One approach is to identify documents that share a format, for example, correspondence or photographs. Another approach is to identify documents that serve the same function, for example, business records or teaching files. Very often, archivists employ a combination of approaches, organizing some materials according to their format and some according to their function. The Hanley’s Bell

Street Funeral Home records at Emory University is a good example of the combined approach, with a series for the funeral home's business records and a series of the Hanley family's personal papers, as well as series for photographs, printed material, and memorabilia.

Following the collection analysis, processing archivists will physically sort the collection to bring together all components of the categories they identified during the collection analysis (see Figure 4.1). Sorting happens multiple times over the course of the processing project. During a first-level sort, the archivist will bring together all of the correspondence, all of the creator's writings, and all of the photographs, for example. A second-level sort may then be necessary to organize the writings between poetry and prose works. During a third-level sort, the archivist would bring together all of the drafts of each publication. This enables the archivist to ensure they're arranging and describing all of the related material at the same time. The archivist is better able to describe documents consistently and can make decisions about arrangement and description with all relevant materials in front of them. Each grouping is likely to require different levels of sorting. While writings often require the significant effort described above, correspondence may not. Once all of the correspondence is physically together, it may be enough to put it in chronological order without any further divisions by type.

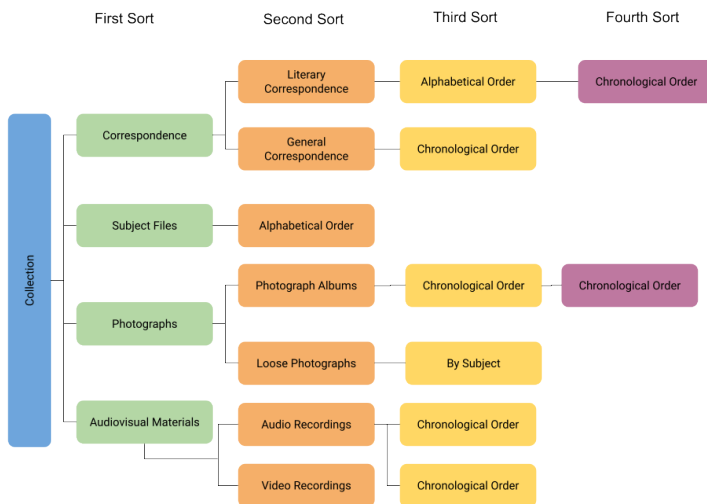


Figure 4.1. Chronological sorting activities for various parts of a collection. Courtesy of Stuart A. Rose Manuscript, Archives, and Rare Book Library at Emory University Libraries.

After the collection is sorted, archivists rehouse material and provide basic conservation interventions. Original file folders are replaced with acid-free folders, original boxes are replaced with acid-free boxes, documents are flattened, fasteners may be removed, and torn documents are placed in plastic sleeves to prevent further damage. Archivists also label file folders at this stage, transcribing original titles from the creator's folders or applying devised titles based on information derived from the documents themselves.

Throughout this process, the archivist will keep notes about the creator's life and activities, the kinds of records that are present in the collection, and other individuals who are documented. These notes will form the basis of the finding aid,

the creation of which is the final step of processing.¹ Because the archivist is already gathering this kind of information during processing, they are uniquely suited to conducting copyright analysis.

Why Integrate Rights Analysis into Processing?

Collection analysis/processing and copyright/risk analysis begin with the same questions:

- Who created this item?
- For what purpose did they create this item?
- When did they create this item?

Integrating rights analysis with existing processing workflows leverages the archivist's existing collection expertise and eliminates duplication of labor because they are already gathering information necessary for robust rights analysis as part of their regular processing work.

Detailed processing requires granular interaction with collection material. Although every item is neither described individually nor read word for word, most documents are at least skimmed in order to classify them. To accurately arrange and describe materials, archivists may scrutinize significant portions of collections more closely. For example, memos in a collection of business records may need to be read to determine which project they're associated with. In another

1. For more information concerning processing of archival collections at Emory's Rose Library, see our Collections Services Manual.

example, an author's manuscript drafts may require close review to determine order or identify duplication.

Because archivists gain such intimate knowledge of the contents of archival collections during processing, they are uniquely positioned to evaluate the intellectual property landscape of a collection. During and immediately after processing, this knowledge is at its height and easiest to leverage. Integrating rights analysis into processing takes advantage of the knowledge of the processing archivist and helps streamline workflows. It eliminates the need for someone (often not the processing archivist) to return to the collection at a later date (often many years or decades later) to conduct a basic rights analysis, frequently without the benefit of the processing archivist's knowledge.

Because archivists are accustomed to arranging and describing archival collections in aggregations, they are well-suited to identifying and analyzing groups of materials with similar copyright considerations. It is important to note that aggregations that are useful for access to collection material are not necessarily the same aggregations that should be analyzed for copyright analysis. Archivists should be aware of the need to analyze the entire collection during copyright assessment, not just within categories. We discuss this more in the following section, "What to Look for During Processing."

We do not recommend integrating rights review into minimal processing workflows. Although minimal processing is a powerful tool to provide timely access to collections, it is not granular enough to support thorough copyright review for building digital collections. During minimal processing, archivists do not typically interact closely enough with collection materials to identify information necessary for rights analysis, such as rightsholders beyond the creator of the collection or publication dates for published material in the collection. Detailed processing (defined here as file- or item-level arrangement and description), as opposed to minimal

processing, also gives archivists an important opportunity to identify and mark red flags, or higher risk items, in the collection. It is vital to an adequate rights analysis to know what materials may require special attention or be off the table for digitization entirely.

What to Look for During Processing

Who Was the Collection Creator?

- Is the collection an individual's papers?
- Is the collection a business's records?

Understanding the provenance of the materials is critical to copyright analysis, especially for archival materials, which are often unpublished. For example, the duration of copyright for unpublished works of corporate authorship is 120 years from the date of creation, whereas copyright for unpublished works by an individual expires 70 years after the author's death (see 17 U.S. Code § 302; Copyright Act, 1976f).

If the Creator Was an Individual

- Were they a literary figure or prominent politician?
- Were they a community member without national notoriety whose papers were acquired to document local history?
- Were they a person of industry whose papers were acquired because of their profession?

Depending on the identity of the creator, the nature of the

records present in the collection may vary. The personal papers of an author will likely include a more significant volume of published works that generate revenue than those of a local community member. The community member's papers may include far more unpublished material than the literary figure's papers. In addition to their own personal papers, a professional's papers may include records created in their capacity as an employee at a business, which may mean that the copyright owner is actually the business.

- What is their death date?

The term of copyright for unpublished works is the life of the creator plus 70 years. Unpublished works created by authors who have been deceased for 70 years or more are in the public domain and can be widely shared in any way your institution may wish (e.g., in digital or physical exhibits). Very young creators will hold copyright in their unpublished materials for many decades to come, which may make those documents a higher risk for digitization and sharing online.

Are Other Copyright Holders Represented in the Collection?

- Who were they in relation to the collection's creator?
- What is the creator's relationship to records whose copyright is held by another?

For example, as mentioned above, if a collection includes records created by an employee of a business (i.e., works for hire), the business is the copyright holder, not the individual.

Understanding and documenting the major copyright holders represented in the collection at the time of processing will help assess risk later. Major copyright holders may be

individuals and organizations who hold the rights to a significant volume of material in the collection. They also may be significant because of their notoriety/fame, because of the risk associated with particular items to which they hold copyright, or because they are known to be litigious.

There may be institutional reasons to identify someone as a significant copyright holder as well, and it is worth considering your institution's relationships with donors and community stakeholders to ensure you are capturing all necessary information. For example, different donors will be more or less enthusiastic about digitizing and disseminating their papers. Even if you have a strong fair use justification for digitization or a license to reuse the materials from the deed of gift (see Chapter 3: Evaluating Licensing and Permissions for Archival Materials), proceeding with public display of digitized material without the donor's approval may cause a rift in your institution's relationship with that donor. Likewise, your institution may serve communities, particularly historically excluded communities, who have customs and laws prohibiting dissemination of certain kinds of information. This is true of many indigenous tribes whose cultural patrimony exists in predominantly white, colonizer institutions. Though your institution may legally be allowed to digitize and disseminate certain documents (e.g., perhaps their age puts them into the public domain), ethically it may not be in your institution's best interests to do so without the cooperation and partnership of the community that is being documented.

The list of names you create will likely look very similar to the list of names being gathered for scope and content notes and will probably include the following:

- significant correspondents,
- business and/or romantic partners of the creator,
- family members,
- and/or individuals whose creative works are present in the

collection.

However, your list of major copyright holders may be more inclusive than names provided in finding aids. For example, a highly litigious person who is known to be very protective of their intellectual property may have written a single letter to the creator of the collection being processed. This is unlikely to warrant description in the finding aid but is still important to note for copyright analysis purposes to protect your institution from legal harm following digitization or reuse.

Dates

- Is the creator of an item deceased?
- If so, when did they die?
- When were items in the collection published?

Dates are as important for copyright assessment as they are for access. Knowing the death dates of the creators of the material will help you determine whether items are in the public domain or still under copyright. It's unlikely that you will know or be able to ascertain the life dates for every major copyright holder represented in a collection. You may be able to estimate an approximate death date or associate them with a particular period in time via the dates of the material in the collection. This will help you assess risk, though it may not enable you to determine an exact copyright status.

Knowing the publication dates of published materials will also help you determine copyright status. Dates are another way to intellectually aggregate similar materials for copyright assessment that may differ from the aggregations used for processing. Copyright status for published materials is

complicated and depends significantly on the publication date and the law governing copyright at the time of publication.²

Be on the lookout as well for materials that bear other kinds of risk. There may be other intellectual property issues in a collection, such as trademarks, that can impact a risk assessment. There may also be right to privacy or rights of publicity considerations that bear mentioning.³ While privacy is a separate issue from copyright and not necessarily pertinent to an analysis of copyright, it is pertinent to an overall risk assessment when considering a collection for digitization. For more information on conducting a risk assessment, see Chapter 2: Identifying Your Institutional Risk Tolerance.

Aggregations for Access vs. Aggregations for Copyright

Aggregations of material that are useful for access may not be the most useful aggregations for copyright analysis, so it will also be important to track record types that share a similar copyright status across the collection. For example, terms of copyright are different for unpublished works than for published works, as noted above, while fair use is more favorable for published works than for unpublished works. Yet, published and unpublished works by the collection creator as well as other authors may be present in every series of a

2. Cornell University Library (2022) maintains a helpful chart summarizing copyright terms according to publication status and date.
3. See Legal Information Institute (n.d.a) for more information on the right of publicity and the right to privacy (Legal Information Institute, n.d.b).

collection. For example, an article published by the collection creator may exist in draft form in a writings series and in the final published form in a printed material series. Likewise, the writings series may include drafts of works that the creator never published. Although the creator may be the copyright holder for the published article and the unpublished works and although these works are physically organized in the same series, the term of copyright is different, and your risk analysis must treat them differently.

Another example of this issue is correspondence, which is a common and logical grouping in archival collections. Arranging all of the letters in a collection together facilitates access to information about the creator's work and relationships and is one way to provide researchers with both a broad and a detailed overview of the creator's life. However, it's a very complicated grouping from an intellectual property perspective. Correspondence series can include letters written by hundreds of authors from all backgrounds. Depending on the collection, a correspondence series could include letters from unknown individuals as well as the most famous artists and politicians. It requires very careful risk analysis and will not be as straightforward as an analysis of more homogenous groupings of material.

We can see these issues illustrated in this finding aid for the Richard Blanco papers at Emory University's Rose Library (see Figure 4.2). Let's use Blanco's poem "One Today" to look at how copyright applies to similar material across a collection.

Blanco was the fifth presidential inaugural poet and composed the poem "One Today" for Barack Obama's second inauguration in 2013. Subsequently, Blanco repurposed the title for a memoir, *For All of Us, One Today: An Inaugural Poet's Journey*. He also published a version of the poem as a children's book, illustrated by Dav Pilky, and artist Susio Baudat created a commemorative print of the poem. This poem is one of Blanco's most important works, and the collection includes

multiple iterations and derivatives of the original poem across multiple series, each with a slightly different copyright status, as well as correspondence about the poem and books, children's art inspired by the poem, photographs of Blanco reading at the inauguration, and records documenting publication of the works.

Richard Blanco papers, circa 1980-2017

Manuscript Collection No. 1431

Subseries 1.2

Occasional and commissioned poetry, 2012-2016

4	16	<i>For All of US, One Today</i> , bookmark, undated	Page 10
4	17	<i>For All of US, One Today</i> , contract, Beacon Press, 2013	
4	18	<i>For All of US, One Today</i> , correspondence, 2013	
4	19	<i>For All of US, One Today</i> , draft, edited by Mark Neveu, 2013 August 26 [1 of 2]	Page 11
4	20	<i>For All of US, One Today</i> , draft, edited by Mark Neveu, 2013 August 26 [2 of 2]	
4	21	<i>For All of US, One Today</i> , draft, 2013 August 26 [1 of 2]	
4	22	<i>For All of US, One Today</i> , draft, 2013 August 26 [2 of 2]	
...			
5	11	<i>For All of US, One Today</i> , editor comments, undated	
5	12	<i>For All of US, One Today</i> , memorandum of agreement, W.W. Norton & Company, 2013	
5	13	<i>For All of US, One Today</i> , notes, undated	
5	14	<i>For All of US, One Today</i> , publicity plan, Beacon Press, 2013	
5	15	<i>For All of US, One Today</i> , theatrical adaptation, Annie Lareau, undated	
5	16	<i>For All of US, One Today</i> , uncorrected manuscript, 2013 August 6 [1 of 2]	
5	17	<i>For All of US, One Today</i> , uncorrected manuscript, 2013 August 6 [2 of 2]	
5	20	"Knowing Country," The 57th Presidential Inauguration, drafts and notes, 2012-2013 [1 of 2]	
5	21	"Knowing Country," The 57th Presidential Inauguration, drafts and notes, 2012-2013 [2 of 2]	
6	6	"Mother Country," The 57th Presidential Inauguration, drafts, 2013	Page 12
6	8	"One Today," 4th grade students' artwork, 2015	
6	9	"One Today," 4th grade students' poems, undated	
6	10	"One Today," 6th grade students' artwork, undated [1]	
6	11	"One Today," 6th grade students' artwork, undated [2]	
AV1	-	"One Today," The 57th Presidential Inauguration, 2013 January 21 [original: DVD]	
6	12	"One Today," The 57th Presidential Inauguration, articles, 2013 January	
6	13	"One Today," The 57th Presidential Inauguration, brochure, 2013	
7	1	"One Today," The 57th Presidential Inauguration, drafts, 2013	
7	2	"One Today," The 57th Presidential Inauguration, envelope, 2013	
7	3	"One Today," The 57th Presidential Inauguration, invitation, 2013 January 7	
...			Page 13
8	2	"One Today," trademark, 2013	
8	3	<i>One Today</i> , correspondence, 2013-2014	
8	4	<i>One Today</i> , drafts, undated	
8	5	<i>One Today</i> , postcard, undated	
8	6	<i>One Today</i> , uncorrected proofs, 2015	

Series 3

Professional papers, 1991-2013

AV1	-	Speaking events, 57th inauguration, "One Today" with music, 2013 [original: CD]	Page 25
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Series 5

Printed material, 1996-2017

OP1	-	Prints, "One Today" by Susio Baudat, circa 2013 [signed by Barack Obama]	Page 29
...			
OP4	-	Prints, Ultra Press United Edition of <i>One Today</i> by Lawrence Green [illustrated by Dav Pilkey], circa 2013	

Figure 4.2. Excerpts from the Richard Blanco papers finding aid at the Rose Library show the various iterations and derivatives of the poem "One Today" in multiple locations across the collection.

Though Blanco holds copyright in most of the items in the above image, some are published and some are unpublished. The children's book has multiple copyright holders, as do the prints and the recording, and the business records have corporate copyright holders. Risk will need to be assessed differently depending on who the copyright holder is, how many people hold the copyright to a single item, and whether the item is considered published or unpublished. It's important to remember that sometimes even categories that seem straightforward on the surface can be complex upon further examination. Your analysis should take these complexities into account, and your documentation should also account for the myriad locations where items with similar copyright status are present within a collection.

Special Considerations

Certain formats may require a slightly different approach. As mentioned in Chapter 2: Identifying Your Institutional Risk Tolerance, copyright for audiovisual material is especially complicated (see “What Types of Collections Do You Hold?” in Chapter 2). There are likely multiple copyright holders for any given recording. For example, in an oral history, the interviewer may hold copyright in the questions asked, while the interviewee holds copyright in their answers to questions, and if the interview is being recorded by a third party, they may hold additional copyright in the recording itself. These intertwined layers of rights increase risk and make it harder to seek permissions, either due to the number of copyright holders represented and capacity to conduct the necessary research or due to lack of information about the total number of copyright holders for a particular item. For these reasons, you may wish to create separate digitization workflows and justifications for a/v digitization.

Visual art and photography require their own special considerations. Works of visual art, including paintings, drawings, and still photographic images, among other formats, are governed by the Visual Artists Rights Act of 1990 (VARA, see 17 U.S. Code § 106A, Copyright Act, 1976c). VARA affords visual artists certain rights in their works regardless of who holds copyright or physical ownership of the work, including rights of attribution and integrity. Familiarity with VARA and the rights it protects will be critical to an assessment of visual arts collections in your institution. Furthermore, art photography typically generates revenue for creators and will likely be higher risk in terms of digitization and sharing. Copyright analysis should focus on the type of photographs present in a collection and whether they were created by professionals or are snapshots taken by the creator and/or their friends and family. If professional photographs are present, particularly in large numbers, it is worth documenting the photographers and studios who took the photos.

Items such as memorabilia, artifacts, and scrapbooks present another category of special considerations. While useful articles such as clothing or crockery are not copyrightable, design elements that are part of the useful articles may be copyrightable. However, it can be difficult to ascertain who holds copyright in these design elements. Memorabilia and artifacts may also include trademarks, which is another kind of intellectual property risk that must be considered. For example, a collection in your holdings may include a commemorative mug from an event. The mug is not copyrightable as a useful article, but if the mug bears a trademarked logo or copyrighted special design, those elements may be more risky when considering digitization. Scrapbooks can be complicated because they often contain items created by many authors, from photographs to letters to newspaper clippings, and therefore represent multiple copyright holders.

For all of these items, transformative fair use is an important

consideration when assessing risk for digitization. For ephemeral items and memorabilia, their original purpose was functional or commemorative, not educational. Creating a digital surrogate for research and educational use could be considered transformative according to the *Association for Research Libraries' Code of Best Practices in Fair Use for Academic and Research Libraries* (2012). Scrapbooks themselves are a transformative use of the items that they contain. The meaning of the scrapbook as a record is the sum of its individual parts, most of which were created for a different purpose than commemorating the life of the book's creator. Digitizing scrapbooks is a further transformation of the item into an educational resource. Though the rights landscape for these items can be complex, they can be some of the best candidates for digitization based on fair use.

Capturing Information

Much of the information necessary to conduct rights analysis is already captured by archivists during processing. The kinds of information necessary for a robust and impactful finding aid correspond to the kinds of information needed to assess risk in a collection, so archivists should not fear that adding a rights framework to their workflows will add significant extra burden to their work.

Capture information in whatever way works best for you and serves the needs of your institution. Processing work plans and notes documents are two potentially helpful locations. Archives management tools such as ArchivesSpace may also include space to record rights information. Ultimately, the reason you are capturing this information should inform where you permanently record it. If the information will be used by coworkers outside of the processing unit, particularly

colleagues responsible specifically for rights-review work, consider creating a report that can be shared more broadly.

A post-processing rights and risk assessment report is a powerful tool that can both record and effectively disseminate an archivist's knowledge about a collection. It records the information at the time when the archivist knows the most about a collection and can help the archivist translate their knowledge into useful information for nonarchivist colleagues.

The template we created at Emory (see Appendix D) mirrors many of our other templates and is therefore easier for our archivists to use because it's familiar. Processing archivists are responsible for completing the report at the end of each processing project, though they may work on it throughout the duration of the project as they identify important information. The goal of the report is to capture everything the processing archivist has learned at the point when their knowledge is at its height. The template includes sections for the archivist to describe the intellectual property landscape of each series or, if the collection does not have series, each type of material in the collection. There are also sections to record other kinds of risk present in the collection, list the names of major copyright holders, and enumerate any licensing/permissions work or digitization that has already been done.

The report is kept permanently in the administrative file for the collection and can be shared with colleagues in other divisions when needed. Because the audience for the report is broader than Rose Library, the template also includes sections to record licensing information in the deed of gift and collection- and series-level descriptive information (taken from the finding aid). The template effectively collocates information from several different documents into a single report and enables colleagues outside of the Rose Library to locate all that information in one place.

It is important to note that completion of the post-processing rights and risk assessment report does not include

final licensing or fair use analysis work. Other staff will use the report if and when the collection is discussed as a priority for digitization. The information in the report will allow decision makers to ascertain whether the risk associated with a collection is too high to pursue a digitization project. It will also tell them how much additional copyright clearance work will need to be done if they pursue digitization. Processing archivists at Rose Library are not responsible for verifying copyright status of individual items, sending permission letters to copyright holders, or writing fair use justifications. If necessary, that work will be done by others later in the digitization workflow.

Exercise: Designing an Effective Report Template

Create a post-processing report template to capture the copyright information you need to adequately assess the risk associated with digitizing a collection.

Questions to consider when creating your report:

1. Who is the audience for the report? Is it internal to your unit or will it be used by colleagues in other parts of your organization?
2. What functions will it facilitate? Will it help with digitization? Other kinds of reuse? Both?
3. What other information is important to that function? Is it appropriate to include that information in the report as well?
4. How can the template's design help with training processing archivists to use it?
5. Where does the report fit into various workflows?

Test the template using a sample collection at your institution, preferably one that you've processed and know well, if possible.

Share the draft with others on your team.

- Does it capture the information they expect it to?
- Did they find it easy to understand?
- Where did they see gaps in the document?

Incorporate their feedback into any revisions you make to the template. It's important to continue revising the template as more archivists use it to create reports and as others use it as a resource in rights work.

Alternate Exercise: Use Emory's template (see Appendix D) and test with a collection at your institution. Revise the template to make it your own, based on your institution's needs.

5. Mapping a Workflow That Works

As noted in Chapter 1: Teamwork Makes the Dream Work: Building the Right Team, when creating new processes for work that crosses institutional boundaries, such as copyright review for archival collections, it is critical to make it a collaborative



Mapping a workflow by Christina Morillo is available on Pexels.

process. When possible, include members who have archival processing or scholarly communications expertise or both. Each perspective will be necessary to adequately identify the pain points in the current workflow and establish a new workflow that will incorporate rights review and satisfy the needs of both teams. Establish an official leader of the working group (or task force or committee) to keep the group on track, but set up guardrails that ensure equal participation and investment from everyone, including rotating note-taking during meetings and assigning tasks equitably to each member.

Conduct a gap analysis to properly evaluate and revise your workflows. A gap analysis is a process by which an organization can compare current performance to aspirational performance and set a strategy for removing barriers and improving processes/procedures to achieve stated goals (Leonard & Bottorff, 2022). Though more often used in the business sector, it's a useful tool that can be deployed in most instances where an improvement needs to be made. It will help crystalize the

current state from an ideal future state and identify what changes need to be made to get there.

Step 1. Identify the current state and define the problem you want to solve. Look at the processing workflows and the copyright analysis workflows. Think of them together as dependent and complementary processes. Map them both if that's helpful (see below for visualization tools). Locate in the workflows where pain points occur, for example, bottlenecks from lack of staffing or loss of knowledge due to incomplete handoffs.

Step 2. Define the ideal state or the goal you wish to achieve. Identify the needs that are not currently being met and the functional requirements that a new workflow would support.

Step 3. Analyze the gaps. What about your current workflows prevents you from achieving the goals outlined in step 2? What needs to be added? What needs to be reassigned to better leverage existing expertise? What might be removed to increase efficiency? Where are redundancies causing work to be duplicated?

Step 4. Make a new plan and revise the workflows. Identify the best home for responsibilities, potentially using a RACI chart (Miranda & Watts, 2022). RACI stands for “responsible, accountable, consulted, and informed” and will help you clarify the involvement of both stakeholders and team members at different points in the process. Identify new tasks that need to be added to achieve the goals set in step 2. Remap using visualization tools (Leonard & Bottorff, 2022).

Once the new workflows are designed, solicit feedback from stakeholders. We asked for review from the leaders who had charged us with our work in the beginning. We asked if the workflows made sense to them and satisfied what they had been looking for in initiating this project. We also needed them to sign off on proposed approval workflows for digitization projects based on fair use, which we anticipated would be more complicated than approval workflows for digitization

projects where rights or licenses had been secured from rightsholders or where the materials were all in the public domain. We also asked for feedback from the Digital Strategy Team in the Rose Library, the group primarily responsible for setting digitization priorities and internally vetting project proposals. Once we received their questions and feedback, we revised the workflows again, refining some elements and simplifying others.

One important feature of this work is treating the workflows as a living document. You won't be able to anticipate all of the places where questions or problems might arise before you deploy the workflow. Remain flexible and be willing to incorporate feedback as the workflow is used in real time. You may wish to do a pilot project using the new workflows before you implement them fully. This is a good way to identify bugs and may give you the opportunity to identify situations where the workflow fails. However, it's not necessary to conduct a pilot before implementation as long as you remember that this work is iterative and may need adjustments as staff use the workflows with different collections.

Visually representing your workflows can be helpful for documentation, training, and communication purposes. A visual representation of the workflow will help decision makers who need to approve processes but are not necessarily involved in doing the work governed by the policies. There are numerous tools available for workflow design. We used Lucidchart, which offers a free trial. Microsoft Office includes Visio, which may be easily accessible if your institution provides access to Office 365 products.

Once the new workflow is deployed, the work of your team may be concluded. It will be important to have a postimplementation check-in to discuss potential revisions. Once the new workflows are in place and running smoothly, consider how often any future check-ins need to occur or

whether you can consider your project successfully completed. Congratulations on a job well-done!

Exercise: Prototype and Test Your Rights-Review Workflow

1. Sketch out the specific tasks.
2. What is step 1? Step 2? etc.
3. What are the hand-offs?
 1. Are the hand-offs critical hand-offs?
 2. Are there any decision points? – Refer back to Chapter 1: Teamwork Makes the Dream Work to identify decision makers.
 3. What tasks can/will happen concurrently?
4. Where does the documentation you've created come into play?
5. Use a mapping tool of your choice to create a prototype workflow
6. Test the workflow.
 1. Select pilot collections.
 2. Conduct a feedback session with relevant stakeholders.
 3. Test a faux collection.
 4. Assess and revise your workflow.
 1. Debrief on the workflow – discuss with your project team and stakeholders what went right, what went wrong, what could be improved.
 2. Revise workflow based on that feedback.
 3. Note that testing should be done by someone else who did not develop the workflow but is likely to be involved in the work, for example, a processing archivist who will need to use this workflow if/

when it is operationalized.

6. Case Study: Emory University Libraries

In the fall of 2019, Jennifer Gunter King (the director of the Stuart A. Rose Manuscript, Archives, and Rare Book Library at Emory University Libraries) and Lisa Macklin (the Emory Libraries associate vice provost and university librarian) chartered a small task force of two scholarly communications librarians and two archivists (the authors of this text) to examine and revise workflows associated with copyright review for digitization of Rose Library collections. Historically, although our divisions worked closely together to prepare collections for digitization, our workflows were separate and did not account for dependencies as well as they should have. They were also not scalable, causing us to digitize far less than our stakeholders requested. We were charged with the following tasks:

- Examining existing workflows,
- Revising them to incorporate a more scalable, risk-based approach,
- Creating additional templates, forms, and guidelines for doing the work, and
- Incorporating additional librarians and archivists into the workflows where possible to provide additional support.

Historical Workflows

Archival Processing

Historically, Rose Library archivists have not been a significant part of copyright work at Emory Libraries. Because we know the collections well, we may have answered occasional questions from the copyright and scholarly communications librarian or other stakeholders to help with copyright analysis but were otherwise not expected to participate in rights analysis, rights clearance, or fair use justification. Our purview had been primarily focused on processing and creating access for collections and consulting occasionally on proposals for digitizing collections. The new workflows make introductory copyright analysis part of the arrangement and description process.

Processing in the Rose Library is iterative. All collections are minimally processed during accessioning.¹ They receive basic physical stabilization, are reboxed if necessary, and an inventory of each box's contents is provided as part of a short finding aid with basic biographical/historical and scope and contents notes. We provide minimal processing in an effort to make collections available for research as soon as possible following acquisition. If a collection is small or especially straightforward, the archivist may choose to provide more granular arrangement and description, including file- or item-level processing. However, for detailed processing to occur on

1. Accessioning is the process whereby an institution takes “intellectual and physical custody of materials, often under legal or policy authority” (Society of American Archivists, 2022a).

most collections, Rose Library leadership must identify the collection as a priority for granular access.

After priority collections are identified, they are assigned to processing teams. Processing teams consist of one professional archivist and two graduate student processing assistants. The archivist determines the overall processing plan and assigns portions of the collection to each student for arrangement and description. The archivist is responsible for writing the processing plan and keeping it updated as plans change and decisions are made. The archivist uses the processing plan and other communication tools to ensure consistency during the project. Each team member is responsible for the arrangement and description of their assigned portion of the collection, and the archivist provides final editing and description of any elements that apply to the entire collection. When a draft of the finding aid is completed, it is reviewed by other archivists in the unit as well as the curator who acquired the collection. After any changes have been made or questions answered, the finding aid is published online and the collection is reopened for research use.

Copyright Analysis

In 2019, Emory University Libraries began scaling up its digital library program in preparation for the launch of a new digital repository. Initially developed for hosting digitized archives and special collections materials, Emory Digital Collections was slated for beta launch in spring 2020. Until this time, all rights-review work for digital collections was being performed at the item level by our copyright and scholarly communications librarian (who is one of the authors of this text, Melanie T. Kowalski, and who occupied this position from 2013–2022). This librarian's position description allocated approximately 20% of her time to rights review. Limiting this work to one individual at

8 hours per week created bottlenecks in our workflows. Some of the inherent challenges included the following:

- Item-level rights review was simply not sustainable. Since the launch of Emory Digital Collections, we have ingested just over 34,000 digital images. The sheer scale of content to review could not be managed by 20% of a single person's work week. To address this workflow imbalance, we experimented with hiring student workers. However, we found that training student employees for rights review was a time-consuming and lengthy process. Given the high turnover rate of student employees, we found the return on investment did not yield an increase in review productivity.
- While the pace of rights review remained slow, the pace of digitization did not. In order to keep pace with digitization requests, the digitization team produced substantial volumes of material that required review. As their pace exceeded that of the copyright and scholarly communications librarian, a backlog of uningested digitized content developed. This upside-down workflow was detrimental because not infrequently the copyright and scholarly communications librarian would determine that certain pieces were too risky to share online from a copyright standpoint, so they never should have been digitized (unless it was needed for preservation).
- In these rights reviews, the copyright and scholarly communications librarian was duplicating much of the work that archivists had already done when they processed the collections (e.g., researching creation dates and names of creators to determine whether materials were still protected by copyright). Since that work had not been documented with the intent of using it to perform rights-review assessments, the materials needed to be assessed by staff again. This duplication of effort was

inefficient and contributed to the bottleneck at the point of rights review.

Digitization

In general, Rose Library special collections material may be selected for digitization in three different ways:

1. To fulfill a patron order for a high-quality scan of material.
2. To support internal library projects like exhibition work or a library-sponsored digital humanities project.
3. To support a formal digitization project when the Libraries' leadership identifies a collection or a portion of a collection that we would like to have digitized and included in Emory Digital Collections, our public-facing digital library.

While each of these is an important part of the digitization landscape, this case study will focus on the third scenario and how, historically, the digitization process for inclusion in our digital library happened.

In the past, anyone in the Libraries could submit a request for a digitization project via an online form. Most commonly archivists or curators working in the Rose Library would be the ones to suggest digitizing Rose collections, but other colleagues in other units of the Libraries or our affiliated digital scholarship center would also occasionally initiate a project to digitize special collections material. The proposal form, which included a brief overview of the project, a note about any known deadlines or preservation concerns, and the overall project scope was submitted to the head of digitization services. This individual then shared the proposal with our Digital Collections Steering Committee composed of collection managers from across the Emory Libraries, representatives

from the metadata team, and the copyright and scholarly communications librarian. If the committee approved moving forward with a digitization project, the head of digitization services would slot the project into the digitization queue. As the actual digitization was about to get underway, the head of digitization services would set up a preservation and metadata review with representatives from the owning library, the preservation team, and metadata services. In this meeting, the metadata services representative would gather the information about a collection to pass along to the copyright and scholarly communications librarian to inform the rights-review work.

Formation of the Copyright Workflow Task Force

Once our group was convened, our first task was education and cross-training of its members. The archivists and one scholarly communications librarian took the semester-long Copyright X course offered by Harvard. We met weekly, along with the copyright and scholarly communications librarian who had taken the course previously, to discuss the week's readings and lectures. This allowed us to ask each other questions, report on conversations we had each had in our respective sections of the course, and ensure we were moving forward with similar understandings of what we had learned. The archivists also provided an introduction to archival arrangement and description for the scholarly communications librarians. This cross-training provided a baseline of shared knowledge for everyone and was also a trust-building experience as we learned together and began to identify where we had misunderstood each other's historical workflows.

We then moved on to evaluating our workflows together. To begin, we reviewed the existing workflows in each of our units. We ensured that we all understood the workflows as they were currently in use and took time to discuss dependencies, constraints, and capacity issues that might affect any changes we decided to make later. Paying particular attention to bottlenecks and gaps, we discussed areas where changes could be made to increase efficiency and introduce scalability. We also identified areas where tasks could be distributed so all the responsibility didn't fall on a single individual. Finally, we identified where additional forms and templates could help, including new deed addenda and permissions letter templates.

The Revised Workflow

Archival Processing

Overall, a few tasks were added to the processing workflow (see Figure 6.1). Archivists now complete a post-processing rights and risk assessment report following file- or item-level processing of collections. It captures the contextual and intellectual property information discussed in Chapter 4: Processing with Rights in Mind. The report repurposes much of the information from the collection finding aid. After we designed the initial template, we tested it using an already-processed collection to ensure it captured the information we needed and to ascertain how much time an archivist might expect to need to complete the report. It took about 2 hours, which was a significant improvement over the 8-10 hours it might have taken the copyright librarian to gather the same information using the old workflow.

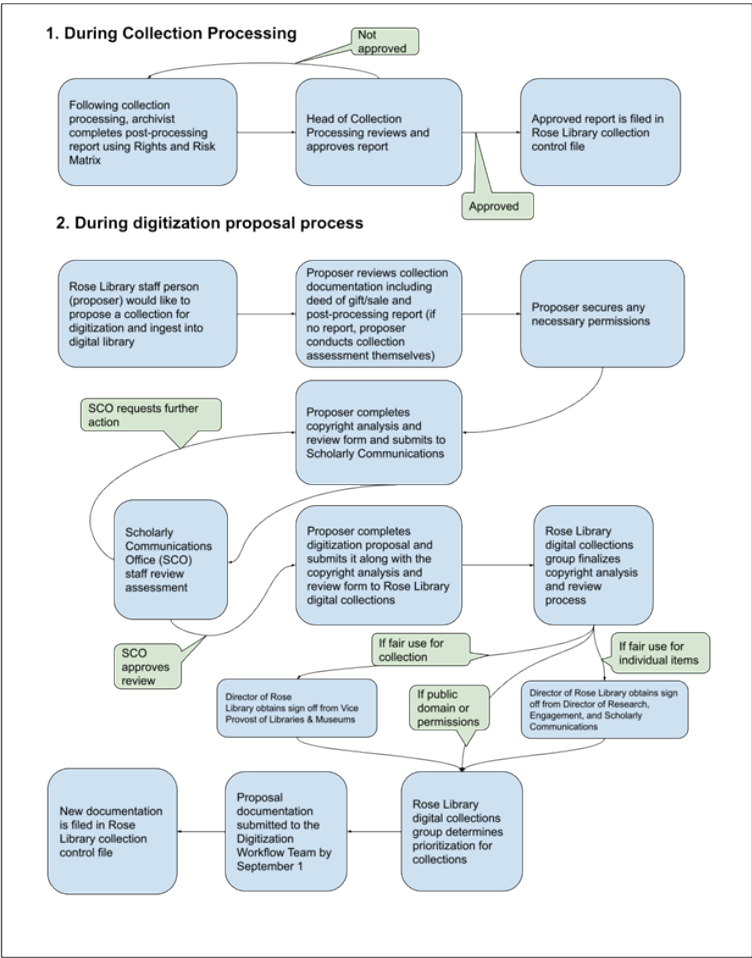


Figure 6.1. Illustration of the Rose Library copyright workflows implemented as a result of the task force members' work. Courtesy of Stuart A. Rose Manuscript, Archives, and Rare Book Library at Emory University Libraries.

Archivists at Rose Library do not complete this form after minimal processing because the archivist's knowledge of the collection is not granular enough at that point. Minimally

processed collections are also not candidates for digitization at Emory.

Revising the workflow for archival processing also required us to think differently about the kinds of analysis archivists performed during arrangement and description. Archivists in the Rose Library already had some knowledge of copyright law since many had taken basic copyright workshops as part of their own professional development over the years. However, in this new workflow, we were asking archivists to serve as an authority in the rights-review process. While we did not need them to become copyright experts, they did need to have more than a passing familiarity with concepts like fair use. Therefore one additional deliverable for our task force was a training plan for archivists and other Rose staff who would interact with the new workflows.

We wanted to leverage the knowledge of the processing archivists in a new risk-assessment framework, but we needed them to see themselves as integral to the process. Like many cultural heritage organizations, Rose Library operates with a very lean staff, so adding responsibilities can feel stressful, and the team members were skeptical that they had the expertise and the time to write the reports. Implementing the new report template required a lot of socialization and reassurance that the processing archivists would be able to provide the necessary information without spending an exorbitant amount of extra time completing the work. We did this by emphasizing that the work required a perspective shift more than it required extensive new training. As mentioned before, most of the information the report captures is repackaged from the existing finding aid or other notes archivists keep during processing. We also identified “copyright experts” in the Rose Library, staff who had received in-depth copyright training and education, who could act as consultants when processing archivists needed help.

Copyright Analysis

As a result of this change in workflows, copyright analysis work now begins much earlier in the collection lifecycle, and that work is disbursed more broadly across the organization. As demonstrated above, new collections are processed with risk and copyright assessment for digitization in mind. For collections that have already been processed, the initial review is completed by the Rose Library staff member proposing digitization of the materials. The proposer reviews collection documentation, including deeds of gift or sale. If they determine that permissions are needed, they secure those permissions using a new suite of templates for permission letters and deed addenda that our task force created. Then, the proposer completes the copyright analysis and review form and submits it to the Scholarly Communications Office for review. As a reviewer rather than author, the copyright and scholarly communications librarian serves their intended role as a consultant on copyright issues and questions. Once this form is reviewed and approved, the proposer uses the information from the form to complete a digitization proposal that they submit to the Rose Library Digital Strategy Team.

By distributing the copyright analysis labor across archival staff, this new rights-review process allows for quicker assessment and analysis of the copyright implications of a given collection. Multiple archival staff can work on multiple collections concurrently. Serving in a consultant role, the copyright librarian's 20% time allocation can be better utilized in consulting on challenging or complex questions rather than reviewing works at the item level for a single collection.

Digitization

As mentioned above, the Rose Library has a Digital Strategy Team that plans, proposes, and prioritizes all digital projects and digitization proposals. The chair of this team is responsible for managing the digitization proposal process, including ensuring that the copyright analysis and review form is completed for each collection the Library proposes for digitization and that all necessary permissions have been requested, public domain status asserted, or a fair use justification thoughtfully articulated. This form is also where the owning library makes recommendations about visibility levels and sharing options such as whether an image should be in high or low resolution, downloadable, or available only behind an institutional login. This form is then shared with the Scholarly Communications Office for approval or additional feedback and becomes part of the final digitization proposal that the Rose Library director submits for approval.

In the Emory Libraries, the approver for digitization and online dissemination of collections changes based on several factors, including the legal justification the Libraries uses for sharing collection material and the potential risk that the Libraries may incur. In our case, the head of the Scholarly Communications Office can approve moving forward with sharing collection material online if either of the following is true: (1) it is in the public domain or (2) we have received permission from the copyright holder to digitize and share it online. However, digitizing and disseminating an entire copyrighted collection because we are asserting that these actions are a fair use requires the approval of the associate vice provost and university librarian.

Once approval is secured, the Rose Library Digital Strategy Team selects which proposals to prioritize for a given year and submits this list to the Collections Steering Committee for review and approval. This committee is composed of

individuals with either content stewardship or digital collection management responsibilities from across the Emory Libraries. Previously, these proposals were submitted on a rolling basis throughout the year, but the committee now receives, evaluates, and prioritizes proposals at the beginning of each fiscal year and then reevaluates halfway through the year to see if new priorities have emerged or if collections slated for digitization need to be reranked or removed from the list.

Throughout the year, as digitization on various collections progresses, the Rose Library's head of digital archives coordinates with the Digitization Workflow Group (a group of functional leads including the copyright and scholarly communications librarian, the head of digitization services, the head of metadata services, and the digital preservation program manager) to ensure the delivery of collection material to the digitization lab and to coordinate information sharing about metadata, and to facilitate any necessary reviews of physical collections to ensure material is stable and able to be digitized safely.

7. Conclusion

Archives and special collections libraries are committed to collecting, preserving, and sharing records that provide evidence of how our society and culture have come to be and help individuals and communities understand the world. Digitizing these materials and making them available online are critical to fulfilling this mission, and our team at the Emory University Libraries was committed to building copyright workflows that support rather than impede our institutional ability to do this work. Our commitments at the beginning of this project were twofold. We wanted to develop practical, scalable workflows and tools that could help us work more effectively and efficiently than our previous, item-driven rights clearance approach allowed. We also sought to reorient institutional thinking and decision-making toward an approach that prioritized thoughtfully assessing and responsibly mitigating (rather than eliminating) risk in order to support mission-critical work. We sincerely hope that some of these tools and strategies will be adapted by colleagues at other institutions and will help others to be more effective in advancing digitization programs in support of their own institutional missions and goals.

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Appendix A: Rose Library Copyright Workflow Task Force Charter

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Rose Library Copyright Workflow Task Force

Objective

To revise the workflow around copyright review and risk assessment in the Rose Library including developing guidelines for assessing potential risk, recommendations for how to proceed based on various risk factors, developing new workflows to incorporate risk review into archival processing workflows, and drafting of templates and boilerplate language to document and standardize this work. We aim to move away from performing copyright analysis at the individual object level and are looking to identify and implement a risk analysis framework and workflows to perform rights analysis at scale. This group hopes to draft high level guidelines that will be useful and applicable for all Emory Libraries, but we are

focused on developing workflow recommendations for Rose Library.

Sponsors

Jennifer Gunter King and Lisa Macklin

Scope and Activities

In Scope	Out of Scope
Develop forms and documents used to secure permissions or licenses from rights holders	Take down notice
Develop list of common categories of archival materials	Developing specific workflows for non-Rose libraries
Provide guidance on assessing rights and risk factors for these categories	Making library-wide policy decisions
Develop workflows for performing rights assessments and risk analysis in the Rose Library	Providing legal advice
Drafting forms, templates, guidelines, and documentation to support this work	
Training plans and recommendations for Rose staff	

Deliverables

- Templates for documents used to secure permissions from rights holders, including deeds, deed amendments, and permissions agreements
- Process and workflow for conducting rights assessments of archival and manuscript collections
- Fair use guidelines based on rights assessment and risk analysis
- Guidelines and templates for documenting rights work
- Recommendations for staff training

Meeting Schedule

Group members meet as needed to develop the deliverables listed above.

January- April the group's focus will be on developing a more in-depth knowledge of US copyright law.

May- December we will work on developing the deliverables listed above.

Membership and Roles

Representation

The group is comprised of Jody Bailey, Carrie Hintz, Melanie Kowalski, and Sarah Quigley.

The co-chairs of the group are Carrie Hintz & Melanie Kowalski.

Group Member Responsibilities

Group members attend meetings and contribute to deliverables.

Group Structure

Reports Into

Jennifer Gunter King and Lisa Macklin. Final sign-off on new processes and workflows will be with Yolanda Cooper.

Appendix B: Rights and Risk Matrix for Manuscript Collections

This matrix is stored apart from this publishing platform since it is a spreadsheet and cannot be readily incorporated into the book. Please navigate to our shared Google Drive folder for a downloadable, editable version of this document.

Appendix C: Emory University Libraries Deed of Sale Template

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STUART A. ROSE MANUSCRIPT, ARCHIVES, & RARE BOOK LIBRARY

DEED OF SALE

In accordance with and subject to the terms and conditions hereinafter set forth, **[Seller Name, Address]** (“Seller”) does hereby sell, transfer, and deliver to Emory University (“Emory”) all right, title, and interest in and to certain personal papers, records, and other materials (“Materials”) as described in Exhibit A so that Emory may preserve and make the Materials available for study, research, and use.

Terms of Transfer

1. Emory hereby agrees to purchase the Materials for a confidential price of **_[\$0]**_____ to be paid in the following installments:

[\$0] within eight weeks of execution of the Deed and related paperwork and receipt of the material,

[\$0] by **[Date]**

Emory shall not be responsible for any taxes related to this Deed of Sale.

2. Seller agrees not to sell, donate, or deposit at any other institution the Materials hereby transferred to Emory, including digital files and copies.
3. Emory reserves the right to inspect the Materials for physical condition and completeness upon their receipt and prior to fulfillment of the payment terms of this Deed of Sale. Seller will disclose any damage or deterioration of the Materials that affects the value of the Materials. All expenses related to packing, shipping, insurance, and other expenses related to the transportation of the Materials to Emory shall be the sole responsibility of Emory. The risk of damage or loss to the Materials will pass to Emory upon the shipping of the Materials.

NOTE: Clause 4 is customizable. Curator or archives staff should select Option 1 (likeliest option for most cases), 2, or 3 based on their review of the material and their discussions with the seller and update the template accordingly.

4. **Option 1: Seller retains copyright and grants Emory a license:** Seller retains any copyrights, rights of publicity or

privacy, or other intellectual property rights that Seller may own or otherwise hold or control in the Materials ("Seller's IP Rights"). With respect to Materials to which Seller's IP Rights apply, Seller grants to Emory a non-exclusive, royalty-free (no cost to Emory), world-wide and perpetual license to copy, distribute, modify for display and display such Materials in print, digital, and online formats, now known or later developed, to the extent necessary to preserve and steward the Materials, to publicize and promote use of the Materials, and to make the Materials available for study, research, and exhibition. The foregoing license shall include the right to digitize Materials originally received in non-digital formats, as reasonably necessary for Emory to exercise the other rights granted in this Agreement. Seller or Seller's representatives shall respond to Emory's reasonable requests for information and shall otherwise assist Emory in identifying the Materials to which Seller's IP Rights apply. Emory may receive compensation in the exercise of the foregoing rights in connection with exhibits and other scholarly and research use consisting of primarily Emory materials. Any fees charged will inure solely to the benefit of Emory. This license will not limit any future uses of the Materials by Seller or others authorized by Seller. The rights in this Paragraph are in addition to and not in lieu of any rights or privileges under the Copyright Act, including fair use as currently codified at 17 U.S.C. sec. 107 and reproduction by libraries and archives as currently codified at 17 U.S.C. sec. 108.

Option 2: Eventual transfer of all copyrights owned by seller: Seller shall retain all copyright, privacy, publicity, or other intellectual property rights that Seller may own or control in the Materials ("Seller's IP Rights")

until **[Specified date or occurrence of event]**. Effective as of [DATE] [or upon the occurrence of EVENT], Seller hereby assigns, transfers, and otherwise conveys all of Seller's IP Rights to Emory. Such assignment shall occur automatically and without the need for execution by Seller of any further agreements or other documents, provided, however, that (i) Seller or Seller's representatives shall execute such further documents as are reasonably requested by Emory for the purpose of effectuating, verifying, or documenting the foregoing transfer and assignment; and (ii) Emory may but is not obligate to send a confirmatory notice to Seller's last known address [when DATE is reached] [or upon the occurrence of EVENT]. Seller shall not enter into any agreement that would prevent Seller from conveying Seller's IP Rights as required by this paragraph. Before [DATE or EVENT] Seller shall ensure that any agreement that conveys any license or other permission to exercise Seller's Rights may be transferred and assigned to Emory, and Seller shall inform the licensee or other grantee of any such rights of Seller's obligations to assign Seller's IP Rights [when DATE is reached] [or upon the occurrence of EVENT]. Seller or Seller's representatives shall respond to Emory's reasonable requests for information and shall otherwise assist Emory in identifying the Materials to which Seller's Rights apply. With respect to Materials to which Seller's Rights apply, Seller grants Emory a non-exclusive, royalty-free (no cost to Emory), world-wide and perpetual license to copy, distribute, modify for display and display the Materials in print and digital formats, now known or later developed, to the extent necessary to preserve and steward the Materials, to publicize and promote use of the Materials, and to make the Materials available for study, research, and exhibition. The

foregoing license shall include the right to digitize Materials originally received in non-digital formats, as reasonably necessary for Emory to exercise the other rights granted in this Agreement. Emory may receive compensation in the exercise of the foregoing rights in connection with exhibits and other scholarly and research use consisting of primarily Emory materials. Any fees charged will inure solely to the benefit of Emory. This license will not limit any future uses of the Materials by Seller or others authorized by Seller. The rights in this Paragraph are in addition to and not in lieu of any rights or privileges under the Copyright Act, including fair use as currently codified at 17 U.S.C. sec. 107 and reproduction by libraries and archives as currently codified at 17 U.S.C. sec. 108.

Option 3: Immediate transfer of all copyrights owned by seller: Seller hereby assigns, transfers, and otherwise conveys all copyright, privacy, publicity, or other intellectual property rights that Seller may own or control in the Materials to Emory. Seller or Seller's representatives shall execute such further documents as are reasonably requested by Emory for the purpose of effectuating, verifying, or documenting the foregoing transfer and assignment. Seller or Seller's representatives shall respond to Emory's reasonable requests for information and shall otherwise assist Emory in identifying the Materials in which Seller owns or controls copyright, privacy, publicity, or other intellectual property rights.

Terms of Access and Use

5. Upon receipt, Emory will make the Materials available for public use without restriction in accordance with Library

policies and procedures as amended from time to time. Seller may place specific, reasonable, equitable, and time-bound restrictions on the Materials; details about restrictions from Seller, including materials to be restricted and termination date for restrictions, must be specified in Exhibit B below.

- 6. Emory will provide the Seller or their designee with reasonable access to the Materials in accordance with Library policies and procedures as amended from time to time.

Rights and Responsibilities

- 7. Emory will provide a suitable depository for the Materials in print and digital formats and will house and maintain the same in good order according to Library policies and procedures as amended from time to time to ensure both preservation and accessibility to researchers. Emory, however, shall have no liability for damage to or destruction of the Materials by fire, water, or other casualty after Emory has assumed the risk of damage or loss to the Materials as defined below.

NOTE: The highlighted text in clause 8 is a possible option but not required.

- 8. Emory reserves the right to de-accession or otherwise dispose of any Materials which are determined to have no

permanent value or historical interest, to be surplus to the needs of the Emory University Libraries, which are duplicated elsewhere in the collection or the Libraries, or which the Libraries cannot adequately house. The Seller may request that these materials be returned to them in Exhibit C below. If no provision is made, Emory will use its discretion in the final disposition of unwanted materials.

9. Emory reserves the right to store acquired digital content and digitized copies of Materials in their entirety for preservation purposes. Emory reserves the right to recover deleted files from digital media included in the Materials for preservation and scholarly purposes, with the understanding that any restrictions on access requested by the Seller will apply to recovered information.
10. Emory will refer all requests for permission to publish items in the Materials for which Seller holds or controls copyright to the Seller or their designee identified below; provided, however, that Emory shall only be obligated to refer explicit requests for permission and shall have no obligation to determine whether any third party's activities require permission.

CONTACT INFORMATION FOR COPYRIGHT OWNER OR DESIGNATED REPRESENTATIVE:

[Name, address, phone, email]

11. The Seller or their designee shall use all reasonable efforts to respond to requests from researchers and other persons for permission to publish items in the Materials for

which Seller holds or controls copyright

NOTE: Clause 12 is an optional element for living authors/creators.

12. If Seller considers selling any additional or future Materials, the Seller agrees that Emory will have the exclusive right to negotiate with Seller concerning such acquisition for six months, subject to the following terms and conditions: (a) the six-month period will begin to run when Seller notifies Emory, in writing, of interest in selling additional Materials and provides a preliminary summary description of the items Seller is interested in selling; (b) if Seller has received offers or valuations for any such additional Materials, such offers or valuations will be shared with Emory in confidence; and (c) if Emory and Seller do not arrive at mutually agreeable terms within 6 months, Seller will be free to negotiate with other parties. The exclusive negotiation period shall be automatically extended for any period during which Emory, Seller, or the parties jointly are seeking a valuation of any Materials being considered for acquisition.

Representations and Warranties

NOTE: The highlighted text in clause 13 should be amended as needed based on the option selected in clause 4 above.

13. Seller has full power and authority to enter into this Agreement, to transfer to Emory good title to the Materials, and to grant the rights it grants.

Physical Property: Seller represents and warrants that Seller is the sole and absolute owner of the tangible property comprising the Materials and that, **but for the copyright not to be transferred hereby**, Seller's title to the Materials is free and clear of all liens and claims and is unencumbered.

Intellectual Property: Seller represents and warrants that: (a) Seller has full right and authority to authorize any uses of the Materials for which Seller holds or controls copyright and that said uses are not inconsistent with any license or other contractual commitment; (b) to the best of Seller's knowledge, the contents and authorized uses of the Materials for which Seller holds or controls copyright do not infringe or otherwise violate the rights of any third parties, including copyright, defamation, and invasion of privacy; and (c) to the best of Seller's knowledge, the contents and authorized uses of the Materials for which the Seller does not hold or own copyright do not infringe the copyright of any third party.

NOTE: Clause 14 is optional and should be included only after an assessment of risk by the curator in consultation with the director.

14. Seller agrees to indemnify Emory and its employees and agents from and against any claims, allegations of wrongdoing, damages, or expenses, including reasonable

attorneys' fees not to exceed amount paid for Materials, arising out of any breach of Seller's representations and warranties.

15. The Agreement is the sole agreement between the parties concerning the subject matter hereof and shall not be altered or amended except in writing duly executed by both parties. The Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, personal representatives, successors and permitted assignees.

NOTE: The highlighted text below is optional and should be included only when the seller is not the creator of the materials.

A. DESCRIPTION OF MATERIALS:

IF APPLICABLE, RELATIONSHIP OF SELLER TO CREATOR OF MATERIALS:

B. RESTRICTIONS OR OTHER CONDITIONS OF SALE:

C. DISPOSITION OF SURPLUS MATERIALS (optional for deed of sale)

In WITNESS WHEREOF, Seller has signed this Deed on this _____ day of _____, 20__.

SELLER

[NAME]

[ADDRESS]

[PHONE, EMAIL]

Accepted and received this _____ day of _____, 20 .

EMORY UNIVERSITY

By: _____

[NAME]

[ADDRESS]

[PHONE, EMAIL]

Appendix D: Rose Library Post-Processing Rights and Risk Assessment Report Template

Please navigate to our shared Google Drive folder for a downloadable, editable version of this document.

Rose Library Post-Processing Rights and Risk Assessment Report Template

Your Name:

Your Email:

Your Phone Number:

Date:

INSTRUCTIONS

Following the processing of a collection, complete this report describing the intellectual property issues in the collection. This report is neither a digitization proposal nor the full fair use/risk assessment that will be necessary for digitization. This report should document the potential copyright risks that will require

further investigation prior to a digitization proposal submission. It will be used to determine whether a digitization proposal should move forward, and if so, what additional rights clearance and risk assessment work needs to be completed.

COLLECTION OVERVIEW

- Collection Title:
 - Dates:
 - Extent:
 - Scope Note:
 - Access and Use Restrictions:
-

RIGHTS AND LICENSING AGREEMENTS

- Deed Language:
Please attach a copy of the deed of gift/sale with the language that discusses intellectual property highlighted, if present.
 - Copyright Holders:
Provide a list of all major copyright holders represented in the collection, including life dates, if known. “Major copyright holders” is defined as both individuals who hold copyright to a significant volume of the collection and well-known/famous copyright holders.
Have permissions been secured from any of the individuals listed above?
☐ Yes ☐ No
If yes, please list them here and attach copies of permission letters/correspondence documenting the clearance. Add any individuals from whom we need to secure permissions to the “Pre-Proposal Risk Assessment Checklist” at the end of this report.
-

ADDITIONAL IP OR RISK ASSESSMENT FACTORS

What additional factors need to be considered before digitizing this collection? For example, litigious or overly involved donors/family; contentious relationships with donors; donors would be enthusiastic about digitization and willing to work with us; privacy issues, etc. Please describe them here.

Series 1 Assessment [Repeat for each series/if no series in the collection, complete once for each set of homogenous material in the collection]:

Name, Date, and Extent of Series:

Series Level Scope Note:

Does the series contain:

- ☐ Unpublished works by collection creator
- ☐ Published works by collection creator
- ☐ Unpublished works by others
- ☐ Published works by others
- ☐ Works for hire
- ☐ Scrapbooks
- ☐ Photographs by collection creator
- ☐ Photographs by others
- ☐ Audiovisual recordings
- ☐ Other (please list):

Based on the contents of the series, what is the overall risk associated with digitization of this material, according to the Rose Library's Copyright Risk Matrix? Explain the factors that you considered to arrive at your conclusion.

Would securing permissions from rights holders in this series be cost- and time-prohibitive based on available resources?

- ☐ Yes ☐ No

Why or why not?

Any additional high-risk materials or red flags?

What other factors should be considered if this collection is

proposed for digitization (privacy issues, research value of the material, etc.)?

High Level Rights and Risk Assessment/Recommendation for Series:

FINAL ASSESSMENT

Provide brief comments about whether this collection or portions of this collection would be appropriate candidates for digitization or what steps could be taken to secure rights

Pre-Proposal Risk Assessment Checklist

Please check all steps below that have been completed at the time of writing this report. Any steps that remain unchecked will be completed by the digitization proposer prior to submitting a proposal.

- Verified whether or not deed of gift or sale gives us permission to digitize and make material available online (please list categories of material covered by deed and include overall percentage of the collection if you can estimate it)
- Fair use assessments (if you are able, please list material that will require an assessment)
- Copyright holders have been contacted to secure permission to digitize any material that is not determined to be a fair use (please provide the name of each copyright holder from the list at the beginning of this report who has already been contacted)
- Series have been sampled to determine risk levels
- Audiovisual material in this collection has already been digitized (please describe which a/v was digitized and include the justification for digitization)
- Other material in this collection has already been digitized

(please describe what material was digitized and provide the justification for digitization)