

Avoiding the Golden Fleece: Licensing Agreements for Archives

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Abstract

The need to negotiate licenses protecting the rights to intellectual property in archives is an emerging and complex area. This article provides archivists with a better understanding of the legal and economic issues arising from commercial requests for archival materials, examining five key areas relating to licensing: the technology, the players, the economics, the rights, and the consequences. The article presents guidelines, strategies, and a sample licensing agreement to help archivists make informed decisions about whether and on what terms to license materials from their collections for commercial use.

During relentless promotional spots for the History Channel, the announcer intones, "As we enter the next millennium, the demand for history *grows!*" For those of us in the archival profession, this new thirst for the past has rather less to do with the dawn of the new millennium, and a great deal more to do with the growing number of corporations intent on using archival materials in profit-driven and protean digital environments.

Modern technologies may drive this brave new digital world, but the fuel necessary to propel the media skyrocket is *existing content*, better known to archivists as the photographic prints, motion pictures, sound recordings, manuscripts, music, art, and architectural records that form our institutions' holdings. For nearly a century, archives have provided permission to scholars to quote from their collections, traditionally without cost, and guided by clear-cut policies. While most institutions are careful to offer their holdings freely for nonprofit projects advancing their institutions' goals, what is the role of the archivist when dealing with commercial requests?

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The favored method of conveying intellectual property rights today is a legal agreement known as a license. Stites and Harbison, a law firm specializing in licensing and intellectual property, provides the following definition: "A license is a contract by which the owner of an intellectual property right . . . conveys to another the right to make, use, and/or sell the intellectual property. In return, the owner receives financial or other consideration, typically a share of the revenues or profits."¹

Licenses are increasingly important tools to archivists dealing with requests from commercial entities, offering the ability to manage institutional assets while specifying the terms of use. While the traditional conditions for use of materials occupy a primary place in licensing agreements, there are often legal and financial considerations to be decided beyond the customary fee-based reprographic services and permissions to quote from manuscript materials.

As the popularity of the commercial new media ventures has increased, so has the number of proposals, demands, requests, and other importunate advances by publishers and producers. As different industries blend their technologies in the new media environment, critical issues have arisen for archivists, challenging customary ideas of reference services and traditional permissions for use and transforming our role as curators of the past into intellectual property defenders of the future.

Archivists who work with intellectual property licensing struggle with familiar issues of access, accountability, scholarly content, collection integrity, exclusivity, and revenue-enhancement. Public services archivists are encountering commercial producers unfamiliar with basic research and operating under "need-it-yesterday" deadlines. Having satisfied the reference demand of commercial users, archivists find there is more work to be done. The need to protect the materials to be used in a commercial project often entails negotiating complex worldwide licensing agreements for the commercial product. Additional requests may include rights to promotion and advertising; further distribution, such as airport, hospital, and other institutional viewing; release in other formats, such as home video and DVD; and spin-off merchandising. "Perhaps it was inevitable," notes one museum guide to legal issues, "that intellectual property laws would give rise to owners' hopes of getting rich quick, users' fears of commercial exploitation, and everyone's misunderstandings about the often dense and mysterious legal terms these agreements contain."²

This paper is written to help give archivists a better understanding of the legal and economic issues arising from commercial requests for archival

¹ *Licensing Your Intellectual Property Rights*, Stites & Harbison, PLLC, available at <http://bsd.iplawky.com/wcsb/licensin.htm> (accessed 19 January 2004).

² Michael S. Shapiro and Brett I. Miller, *A Museum Guide to Copyright and Trademark* (Washington, D.C.: American Association of Museums, 1999), 123.

materials, so that, as archivist Karen Underhill at Northern Arizona University says, archivists "may make informed decisions about whether and on what terms to license your holdings commercially."³ This paper examines five key areas relating to licensing: the technology, the players, the economics, the rights, and the consequences, and it offers guidelines and strategies for archival institutions that enter into licensing agreements.

The Technology

The growing demand for existing content from archival institutions can be traced directly to the convergence of technology and media during the past fifteen years. The marriage of technology with media is bringing sweeping changes to long-established industries, including publishing, broadcasting, and film. Media giants are merging and making acquisitions, large and small, in film, radio, television, cable, and publishing of all types including books, magazines, newspapers, and the World Wide Web. Although media companies have been punished recently on Wall Street for their enthusiastic embrace of new media and its much-touted synergies, not even the recent "dot-bomb" stock market meltdown can constrain the pace of media convergence. "There is a rapidly blurring line between the business segments once claimed exclusively by entertainment, publishing, computing and telephony," according to industry maven Jack Plunkett.⁴

The term "multimedia" originally was a catchphrase referring to an ever-widening array of technologies, all of which are based on the intersection of visual materials, telecommunications, and computer software. The most elemental definition of "multimedia" refers to works that combine audio, video, graphics, and text. The *Microsoft Press Computer Dictionary* defines multimedia as "The combination of sounds, graphics, animation, and video. In the world of computers, multimedia is a subset of hypermedia, which combines the elements of multimedia with hypertext, which links the information."⁵

However, the fact that multimedia may embrace one, two, or all three of these areas leads to some confusion about what multimedia is and how we should think about it. Duomedia, or the convergence of just two of the three areas, yields products virtually unknown ten years ago, but commonplace today: CD-ROM (software and video minus telecommunications), satellite and cable channels (telecommunications and video minus software), and on-line services

³ Karen Underhill, "Digital Dilemmas: Access and Ethics," Society of California Archivists workshop, May 1995.

⁴ Jack W. Plunkett, *Plunkett's Entertainment & Media Industry Almanac* (Houston: Plunkett Research Ltd., 1999), 11.

⁵ *Microsoft Press Computer Dictionary: The Comprehensive Standard for Business, School, Library, and Home* (Redmond, Wash.: Microsoft Press, 1994), 264.

(telecommunications and software minus video). Adding the third element to these existing products transforms them and paves the way for the further emergence of new products and services, such as streaming audio and video files, and broadcasting over the World Wide Web.

The term "new media" is heard more often today, consigning "multimedia" to a status as a virtual synonym for CD-ROM products. New media includes a "wide array of digital communications technologies, including Internet development and services, desktop and portable personal computers, workstations, servers, audio-video compression and editing equipment, graphics, hardware and software, high-density storage servers, and video conferencing systems."⁶

For archivists, the greatest impact lies on visual collections. Traditional research in archival collections for the purposes of completing dissertations or publishing monographs continues, yet the new and intensive demand for photographs, motion pictures, and other visual media is generated almost exclusively by the convergence of the technologies cited above.

The Players

Fledgling media companies and familiar corporate names alike are pursuing the existing content of archival collections for their new media products. When the dot-com revolution began, much was made of stodgy, so-called bricks-and-mortar corporations and the challenges they faced from innovative new clicks-and-mortar technology companies. An illustrative example of the corporate evolution of technology and media is found in the evolution of the Discovery Channel into Discovery Communications, Inc. (DCI), the self-proclaimed "leading global real-world media and entertainment company."⁷ In 1985, founder John Hendricks envisioned an all-documentary U.S. cable TV network. However, Hendricks was not content merely to establish a cable television station. By 1996, DCI executives were charged with "guiding the global brand into new areas, [including] Discovery Channel Online, develop[ing] designs for new content services, including those for television and computer screens, and . . . developing 'global' specials and series and the related marketing campaigns."⁸

Today DCI, with 2001 sales of \$1.8 billion, has a dizzying array of enterprises, including global operations in 155 countries, with 700 million cumulative

⁶ Jack W. Plunkett, *Plunkett's E-Commerce and Internet Business Almanac 2001-2002* (Houston: Plunkett Research, 2001), x.

⁷ *Discovery Channel Network Homepage*, Discovery Communications, Inc., <http://dsc.discovery.com/> (accessed 19 January 2004).

⁸ Ann S. Dinerman, "Restructuring Discovery's Many Worlds; Discovery Communications, Inc.," *Video Age International*, February 1996, 26.

subscribers. "DCI's 33 networks of distinctive programming represent 14 entertainment brands including TLC, Animal Planet, the Travel Channel, Discovery Health Channel, Discovery Kids and a family of newer, targeted channels. DCI's other properties consist of Discovery.com and 167 Discovery Channel retail stores. DCI also distributes BBC America in the United States. The new Discovery Solutions Group, an integrated sales and marketing team, identifies and targets advertisers for large scale, cross-platform advertising partnerships."⁹ DCI is owned by four shareholders: Liberty Media Corporation, Cox Communications, Inc., Advance/Newhouse Communications, and founder John Hendricks.

Another cable success story is A&E Television Networks (AETN), a joint venture of media giants Hearst (37.5 percent), Walt Disney's ABC Cable (37.5 percent), and General Electric's NBC (25 percent),¹⁰ with sales of \$770 million in 2000. AETN offers a plethora of programming in history, current events, true crime, and the arts through its two primary cable networks: A&E (84 million subscribers) and The History Channel¹¹ (72 million subscribers). "The company's flagship program is A&E's *Biography*, which has expanded [from a weekly series] into magazines, books, videos, and interactive media," according to a 2002 Hoover's investment profile. A&E Television also operates two digital cable channels (Biography Channel, History Channel International) and their related Web sites.

Initially, cable channels produced less than 30 percent of their own programming, relying on independent producers who specialized in this new niche market. Nevertheless, the days of autonomy for these producers are ending, as larger media companies find it more cost-effective to buy these units. One example of this trend is Cinetel Productions, one of the largest independents, which was purchased by E.W. Scripps in 1994 as an adjunct to its startup Home & Garden Television network.

The Economics

In the early 1990s, the rapid development of multimedia CD-ROM titles raised hopes that archives and museums now had "the opportunity to make their

⁹ "Procter & Gamble and Discovery Communications, Inc. Announce Cross Platform Media and Marketing Deal," *Financial Times Information*, 21 June 2002.

¹⁰ "A&E Television Networks," *Hoover's Online*, <http://www.hoovers.com/co/capsule/5/0,2163,47295,00.html> (accessed 19 January 2004).

¹¹ The History Channel actually had, "one million subscribers, an extremely modest beginning," when it launched in January 1995. "We had forecast that we would get to 4.5 million subscribers by the end of 1995," said Daniel E. Davids, the general manager of the History Channel. "We wound up at eight million." "One reason postulated by Thomas S. Rogers, the president of NBC Cable, for the early success of the History Channel: "It seems there is a very high correlation of cable operators who were also history majors in college." "Bill Carter, "For History on Cable, the Time Has Arrived," *New York Times*, 20 May 1996.

collections more widely available by marketing or licensing their images for such multimedia products. In addition to serving their traditional role of making their collections available to the public, particularly by licensing their images, museums may be able to capitalize on the value of their collections and generate income through the use of the images in such products."¹² Royalty-based multimedia deals looked particularly promising to nonprofit administrators, who envisioned new sources of revenue to augment dwindling base budgets.

Because the multimedia industry was then in its infancy, most media producers were small and undercapitalized. They struggled almost immediately with time-intensive efforts to license holdings from multiple institutions. One article in their professional literature even advised would-be multimedia developers that rights holders were "obstacles" to be "danced around."¹³ Another attorney in the same article said, "My biggest piece of advice is to educate the other side . . . [to explain] that what they are licensing may not be seen by the end user, so the economic impact on properties may not justify the amount of money a licensor wants."¹⁴ Often libraries and archives are presented as low- or no-cost sources of content.¹⁵

Compounding the problem, the royalty structures promised to archives and museums were often predicated on strong sales that failed to materialize. In 1995, attorney Geoffrey Berkin, who specialized in multimedia licensing at the Los Angeles law firm of Manatt, Phelps & Phillips, warned archivists of the evanescence of profits in the vast majority of multimedia-published titles. His 1996 presentation at the Society of American Archivists annual meeting in San Diego painted a grim picture of multimedia titles that failed to turn any profit at all. *Encarta*, Microsoft's CD-ROM encyclopedia, was an exception to the rule of profitability. Yet, the budget for licensing images, while not officially revealed, was believed in the industry to be less than 10 percent of the total cost of production, making it unlikely that nonprofit institutions that participated were rewarded financially by this title's success.¹⁶

Archivists should understand both the economic underpinnings of licensing requests and the backing of the company proposing it. Archivists who work

¹² "An Analysis of Economic Models for Administering Museum Intellectual Property," Canadian Heritage Information Network (CHIN), 27 April 2002 http://www.chin.gc.ca/English/Intellectual_Property/Economic_Models/introduction.html (accessed 19 January 2004).

¹³ Kristi Ellis, "Developing CD-ROMs from Scratch," *Los Angeles Business Journal*, 13 February 1995, 23.

¹⁴ Ellis, "Developing CD-ROMs from Scratch," 23. Ronald Laurie, head of the computer law group in the Menlo Park, California, office of Weil, Gotshal & Manges noted, "You can't possibly pay a little bit to thousands of people, no matter how little, and make a profit." Susan Orenstein, "Digital Multimedia Madness," *Legal Times*, 13 September 1993, S29.

¹⁵ Rick Prelinger, "Archival Survival: The Fundamentals of Using Film Archives and Stock Footage Libraries," http://www.footage.net/info/archival_survival.html (accessed 19 January 2004).

¹⁶ Richard Raysman and Peter Brown, "Multimedia Licensing," *New York Law Journal*, 13 July 1993, 3.

with television producers are familiar with plangent requests from start-up production companies or the regular invocation, "But it's for PBS!" Some judicious sleuthing usually reveals a commercial producer with a budget for licensing, regardless of the nonprofit status of the broadcaster. Knowing how deals are structured can guide archivists not only in calculating fees, but also in determining whether to participate at all.

The Rights

The new media industry's success is, in part, dependent upon gaining rights to existing content. Media licensing is a new and flourishing specialty, with ties to intellectual property, contracts, copyright, patent, and communications and entertainment law. Much of the "existing content" in institutional settings is subject to pre-existing agreements that do not stipulate rights in new environments. Thus, the legal and practical issues surrounding the licensing of "existing content" are diffuse and often aggravated by the (current) lack of a legal definition for either electronic or digital rights.

Independent producers frequently offer their own licensing agreements to archives. One such agreement demanded rights to incorporate our archival holdings "in any manner HGTV sees fit . . . [and to] irrevocably use and authorize others to use the Property in the distribution, sale, licensing, marketing, advertising, promotion, exhibition, reproduction, and repurposing of the Property and Program in all markets and media (whether now known or hereafter developed) throughout the world, an unlimited number of times in perpetuity."¹⁷ Another producer demanded terms identical to those above, "throughout the universe."¹⁸ The response to such unnecessary and unfavorable demands for rights is a simple "no." Prudence further dictates that archivists never sign agreements provided by companies requesting archival materials. There are alternatives to producer-provided agreements however. Although the intricate issue of intellectual property law, as it relates to archives, is beyond the scope of this paper, a review of some of the legal terminology is in order.¹⁹

What is a license? As noted earlier, a license "is a contract by which the owner of an intellectual property right . . . conveys to another the right to make,

¹⁷ "High Noon Productions Acquired Footage/Still Photograph Agreement," facsimile sent 27 March 2001.

¹⁸ Untitled agreement, Casa Grande Productions, Inc., facsimile sent 21 September 2000.

¹⁹ There are a number of excellent resources for archivists relating to emerging copyright issues. See William J. Maher, "Current Issues in Copyright Law and Archival Administration," *Archival Issues*, forthcoming, 2003. Maher's SAA workshop, "Copyright: The Archivist and the Law," also provides an excellent and specific grounding in intellectual property issues relating to archives. Shapiro and Miller, *A Museum Guide to Copyright and Trademark* is also helpful.

use, and/or sell the intellectual property. In return, the owner receives financial or other consideration, typically a share of the revenues or profits."²⁰ For our purposes, this definition is broadened to include the conditions of use, which are of equal importance.

Why use a license? Attorney Mark Radcliffe, who specializes in licensing transactions, notes, "Licensing is the often touted mechanism . . . [because] it gives the intellectual property owner the ability to manage his or her assets and protect against the attrition of their value by unchecked proliferation, while at the same time delivering returns from the ordered and controlled distribution of those assets."²¹ Thus, the license becomes the mechanism the archivist uses to both manage and protect materials from collections requested for commercial use. Licensing agreements not only stipulate financial inducements, but also the conditions for use of the materials.

What is intellectual property?²² Intellectual property encompasses four distinct kinds of intangible property: copyrights, patents, trademarks, and trade secrets.²³ In most cases, federal law governs the first three, while state common law or statutes generally protect the latter. Laurence Hefter and Robert Litowitz provide a useful description of intellectual property:

Intellectual property shares many of the characteristics associated with real and personal property. For example, intellectual property is an asset, and as such, it can be bought, sold, licensed, exchanged, or gratuitously given away like any other form of property. Further, the intellectual property owner has the right to prevent the unauthorized use or sale of the property. The most noticeable difference between intellectual property and other forms of property, however, is that intellectual property is intangible, that is, it cannot be defined or identified by its own physical parameters. It must be expressed in some discernible way to be protectable.²⁴

Intellectual property protection in developed countries is embedded in national law.

²⁰ *Licensing Your Intellectual Property Rights*, <http://bsd.iplawky.com/wcsb/licensin.htm> (accessed 19 January 2004).

²¹ Mark F. Radcliffe, "Licensing Issues in the New Economy," *The Computer & Internet Lawyer*, September 2001, 1.

²² "The definition [for intellectual property] has not evolved far from an 1845 court case, the date of the first recorded usage of the term. 'Only in this way can we protect intellectual property, the labors of the mind, the productions and interests as much as a man's own . . . as the wheat he cultivates.' " Denise K. Fourie and David R. Dowell, *Libraries in the Information Age: An Introduction and Career Exploration* (Greenwood Village, Colo.: Libraries Unlimited, 2002), 206.

²³ *Black's Law Dictionary* also include "publicity rights, moral rights, and rights against unfair competition" under the rubric of intellectual property. Bryan A. Garner, ed. *Black's Law Dictionary* 7th ed. (St. Paul, Minn.: West Group, 1999), 813.

²⁴ Laurence R. Hefter and Robert D. Litowitz, "What Is Intellectual Property?" <http://usinfo.state.gov/products/pubs/intelprp/> (accessed 19 January 2004).

Copyright is perhaps the most important class of intellectual property in the archival context because it most frequently captures rights in archival holdings.²⁵ The Copyright clause of Article I of the U.S. Constitution grants to Congress, the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

The issue of copyright ownership in archival collections is important because it conveys six exclusive rights:

1. To reproduce the copyrighted work in copies or phonorecords
2. To prepare derivative works based upon the copyrighted work
3. To distribute copies or phonorecords of the copyrighted work to the public, by sale or other transfer of ownership, or by rental, lease, or lending
4. In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures, and other audiovisual works, to perform the copyrighted work publicly
5. In the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly
6. In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission²⁶

The status of copyright to collections held by archival institutions may not be readily apparent, unless such rights were held by the donor(s) and conveyed to the institution at the time of the gift. Prudent archival collection development policy addresses copyright issues before collections are deeded to the institution. The issues of what rights the donor has to convey and which are being included in the deed of gift are significant ones. Rights conveyances for new acquisitions are further clouded by the advent of commercial companies, such as Corbis or Getty Images, securing "digital rights" to collections but leaving the physical care and administration of collections in the hands of the acquiring archives.²⁷

²⁵ Of the many Web resources on U.S. copyright law, the University of Texas site is notably useful: <http://www.utsystem.edu/ogc/intellectualproperty/cprtindx.htm> (accessed 19 January 2004). For Canadian copyright issues, the Canadian Heritage Information Network (CHIN)'s intellectual property site, produced in cooperation with the Virtual Museum of Canada, is a model of clarity: http://www.chin.gc.ca/English/Intellectual_Property/Economic_Models/introduction.html (accessed 19 January 2004).

²⁶ 17 USC § 106. Cited on the Library of Congress Web site: "Copyright Law—Chapter 1," Copyright Office, Library of Congress, <http://www.copyright.gov/title17/92chap1.html#120> (accessed 19 January 2004).

²⁷ For related museum acquisitions issues, see Marie C. Malaro, *A Legal Primer on Managing Museum Collections* (Washington, D.C.: Smithsonian Institution Press, 1985), 113–21.

Yet for those unique materials in archival collections, whose rights may be unclear and were not conveyed in written assignment, access to the materials could be provided (and fair use provisions upheld) while the institution still retains the right to provide reproduction on a fee basis to commercial users. As Rick Prelinger notes, "Many public domain materials may be physically controlled by libraries or collectors who charge access fees. There is no license to be granted, so when you [producers] pay someone for access to a copy of a PD work, you are simply entering into a contract with the owner of the physical materials. Public domain status does not relieve you from the obligation to fulfill the terms of the contract."²⁸

In addition, an increasing number of archival institutions are charging commercial use fees based on physical ownership of items in their collections on the basis that the materials belong to the institution, which has the right to manage its property. Archivists are advised, however, to consult with legal counsel for their institution before proceeding, and to make clear to requesters their obligations to secure applicable permissions.

Archives that are licensing material commercially should also be familiar with legislation related to the right to privacy, which exists separately from intellectual property rights. The right of privacy protects against public exposure and resulting harm, defined as "(1) intrusion upon seclusion; (2) public disclosure of private facts; (3) publicly placing another in a false light; (4) appropriation of name and likeness. . . . Because privacy rights protect an individual's dignity, the rights usually last only for the individual's lifetime."²⁹

The right of privacy varies from state to state. For example, the supreme court of Texas has recognized that living persons enjoy a common-law right to privacy that "prevents the public disclosure of information that (1) contains highly intimate or embarrassing facts about a person's private affairs, such that its release would be highly objectionable to a reasonable person and (2) is of no legitimate concern to the public. Documents containing information falling into these categories may be restricted by such law from publication. A request to publish the names or other identifying information about individuals from documents created within the last 75 years which would violate the common-law right to privacy defined above will be denied."³⁰

²⁸ Rick Prelinger, "Archival Survival: The Fundamentals of Using Film Archives and Stock Footage Libraries," http://www.footage.net/info/archival_survival.html (accessed 19 January 2004). For a more choleric view of institutional control over reproduction of items in the public domain, see Kathleen Connolly Butler, "Keeping the World Safe from Naked-Chicks-in-Art Refrigerator Magnets: The Plot to Control Art Images in the Public," *Hastings Communications and Entertainment Law Journal* 21 (Fall 1998): 55.

²⁹ Shapiro and Miller, *A Museum Guide to Copyright and Trademark*, 185.

³⁰ "Permission to Use Reproductions of Materials," (San Antonio: University of Texas at San Antonio, undated).

Institutions with collections relating to Native American populations are particularly concerned with Title 45 *Code of Federal Regulations* § 46 (Protection of Human Subjects), which provides protection to living human subjects of federal research. Northern Arizona University's policy even "extends the rights of privacy to include ceremonial objects and rites of Native Americans and requires the permission of the tribe's cultural office before releasing reproductions."³¹

Where privacy issues may apply, archivists may require researchers to secure releases from individuals whose privacy would be compromised.³²

Art museums face additional legal issues negotiating permission to reproduce photographs of works of art. Copyright to photographs of works of art may be held by the museum in question, if the photograph was made by an employee under the "work for hire" provision of copyright law. Nevertheless, publication of the photograph of the work of art may infringe upon the copyright of the artist who created the original work that was photographed. This issue underscores again the importance of clear conveyance of rights when archives and museums acquire collections.³³

The Consequences

Two kinds of institutional risk management apply to the licensing of archival materials for commercial use. The first is determining the "scope of rights" that your institution has to grant, and that your organization is not

³¹ "Application for Permission to Publish and/or Reproduce," Cline Library Special Collections and Archives Department, Northern Arizona University, Flagstaff, Arizona, at <http://www.nau.edu/~cline/speccoll/exhibits/sca/using/forms/publish.html> (accessed 19 January 2004).

³² Privacy rights are not a new concept. In 1902, Abigail M. Roberson sued a company for using a lithograph of her face on 25,000 advertisements for flour without her permission. A recent (perhaps light-hearted) example of a privacy suit: "When a 1970s photo of [Skip] Johnson cropped up in ads for a San Francisco dot-com, with his head filling a two-page spread that poked fun at [his] bushy mane, it sent him on a trip—straight to San Francisco Superior Court. . . . [Johnson's attorney] said his client had [once] been married . . . to Jefferson Airplane singer Grace Slick . . . who first noticed the photograph. . . . Johnson's lawsuit . . . includes claims for alleged libel, misappropriation of likeness and infliction of emotional distress. Johnson wants unspecified damages, along with a court order that would force the company to stop using the photo in advertisements." Peter Hartlaub, "S.F. Dot-Com Is Sued Over Big Hair Ad; Firm Used 'Do Without Permission, Suit Says,'" *San Francisco Chronicle*, 29 May 2001, B14.

³³ Malero, *A Legal Primer on Managing Museum Collections*, 121. Malero also addresses additional rights artists have pertaining to their work that are too complex for treatment in this paper, but worth noting here in brief: *droit de suite* (a property right an artist enjoys from the resale of his/her work) and *droit moral*, which "assumes that every work of art carries with it the distinctive imprint of its creator, and hence, the fate of the work and the reputation of the artist are inextricably bound." Moral rights thus provide the artist with the right to prevent the misuse of his/her work. Both *droit de suite* and *droit moral* are recognized in several foreign countries, but are not widely accepted in this country, with the exception of California and New York State (moral rights only).

infringing on rights held by others when agreeing to reproduction.³⁴ The second is defending your institution's rights when its holdings are infringed upon, misrepresented, altered, or illegally transferred by others.

While the first issue is the subject of greater attention and concern on the part of archivists, there is one comforting axiom and several direct strategies to be employed in response. Nonprofit institutions are infrequently attractive targets for copyright infringement suits because they normally lack the "deep pockets" to satisfy judgments. However, the low probability that your institution will become embroiled in litigation does not remove the ethical responsibility to ensure that your agency complies with copyright law to the best of its ability.

The following steps are recommended:

- Include the following familiar boilerplate both in researcher registration forms and permissions, on photocopies made for researcher use, and on placards on public copy machines:

WARNING CONCERNING COPYRIGHT RESTRICTIONS:

The copyright law of the United States (Title 17, USC) governs the making of photocopies or other reproductions of copyrighted material. Under certain conditions specified in the law, archives and libraries are authorized to furnish a photocopy or reproduction. One of these specified conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement. This institution reserves the right to refuse a copying order if in its judgment, fulfillment of the order would involve violation of copyright law.³⁵

- Include a clause in reproduction agreements stating:

³⁴ Archivists may be even more concerned about permissions using digital technology. Attorney Mark Radcliffe writes, "Copyright law and the courts have faced the issue of how to apply existing agreements to new technologies several times before in this century: the introduction of 'talking' motion pictures, the advent of television and the development of the home video market. The leading treatise, *Nimmer on Copyright*, summarizes the two possible approaches as follows: The preferred, broad-construction approach is that the licensee may properly pursue any uses which reasonably may be said to fall within the medium as described in the license. The less preferred, strict-construction approach is that 'a license of rights in a given medium, such as motion picture rights, includes such uses that fall within the unambiguous core meaning of the term, e.g., exhibition of motion film in motion picture theaters, and excludes any uses that lie within the ambiguous penumbra, e.g. exhibition of a motion picture film on television. Thus, any rights not expressly—in this case meaning unambiguously—granted are reserved.'" Mark F. Radcliffe, "Old Content in New Bottles: Interpreting Pre-Existing Agreements in the Online World," *Entertainment Law Reporter* 17 (January 1996).

³⁵ For more information on implementing Section 108 notices, see "Copyright Notices for Supervised Library Copying: Updated Information for Library Services," Copyright Management Center, Indiana University and Purdue University, http://www.copyright.iupui.edu/super_copying.htm (accessed 19 January 2004).

In all instances, the [researcher/licensee] agrees to indemnify and hold harmless the [name of your repository] and its agents against all claims, demands, costs, and expenses, including without limitation, attorneys' fees, incurred as a result of alleged or actual copyright infringement or any other legal or regulatory cause of action arising from the use of the Repository's materials.

- Seek legal counsel to review deeds of gift, policies and procedures, applications for reproduction, licensing agreements, and other forms that may have copyright implications. If your institution does not have legal counsel on staff, look for assistance on a *pro bono* basis from appropriate counsel. Boards of directors and supporters of your organization may have helpful leads in this regard.
- Stay abreast of relevant cases and changes in intellectual property law as part of your continuing education.

The second set of risks—misuse of your institution's holdings—may present a greater set of challenges. Using a well-vetted licensing agreement is essential, as is determining the extent to which your institution is prepared to defend its collections, in and out of court.

Does the ease of copying works stored in digital form place them at much greater risk of unauthorized use than works in analog form? "Old issues are going to come up in exaggerated form," says Paul Goldstein, a professor of copyright law at Stanford Law School and of counsel to San Francisco's Morrison & Foerster. "It's always been possible for someone to take bits and pieces of a work manually. Those are issues that we've been facing for over 100 years, but once again, digitization has facilitated this to a degree we haven't contemplated before."³⁶

What are the legal remedies when your agency's holdings are infringed upon? For archivists, the answers are often unsatisfying. Intellectual property owners are able to protect their rights by pursuing civil remedies that range from correcting credit lines in future editions, to destruction of products containing the infringed material, to monetary damages. Does the possibility of civil sanctions deter misuse? "Some intellectual property thieves view civil damage actions as just another cost of doing business. It has been estimated that the theft of intellectual property rights in the United States cost over three hundred billion dollars in 1997, with high technology corporations most frequently targeted."³⁷

However, the damages awarded in such cases are often predicated upon the infringement having a negative effect on the economic value of the original. "A court will consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and wide spread

³⁶ Susan Orenstein, "Digital Multimedia Madness," *Legal Times*, 13 September 1993, S29.

³⁷ Carol Noonan and Jeffery Raskin, "Intellectual Property Crimes," *American Criminal Law Review* 48 (Summer 2001): 971.

conduct of the sort engaged in by the copier would result in a substantially adverse impact on the potential market for the original."³⁸

An excellent example is the vigor with which Paramount Pictures Corporation pursues fans using Star Trek photographs and sound samples on their Web sites. As the holder of the Star Trek franchise, Paramount instructs their attorneys to issue stern cease-and-desist orders regularly to protect their financial interests.³⁹ Another example is the recent licensing of Dr. Seuss characters. Theodor Geisel (Dr. Seuss) turned down lucrative merchandising offers repeatedly, saying, "I'd rather go into the Guinness Book of Records as the writer who refused the most money per word."⁴⁰ After his death in 1991, his widow, Audrey Geisel, said, "We attempted for some time to line up the wagons in a circle to fight and defend the Dr. Seuss trademarked characters [without resorting to merchandising]." Ultimately, Geisel was "urged by copyright lawyers to seek licensing so she could maintain proprietary use of the figures without them slipping into the public domain and becoming available for use by anybody."⁴¹

Here are some other instructive examples of infringement cases:

- A CD-ROM product with images of Georgia O'Keeffe and Edward Hopper paintings was marketed in an Adobe Photoshop catalog as follows: "This month Image Club is eager to introduce you to our newest provider of stock photography, the world of Planet Art. With their images you can incorporate the work of Renaissance masters to the 20th-century art of Georgia O'Keeffe [*sic*]." Planet Art had apparently scanned the images from catalogs, then falsely represented that 3,000 stock-image files were royalty free and compiled through exclusive licensing agreements with museums. Included in the company's clip-art sampler was Edward Hopper's *Lighthouse*, owned by the Dallas Museum of Art and bearing its copyright notice. Neither the O'Keeffe Foundation nor the Dallas Museum was able to locate Planet Art to lodge complaints. Adobe destroyed the unsold CD-ROMs in response to a cease-and-desist letter from the museum's lawyer.⁴²
- The estate of Martin Luther King, Jr. sued CBS for copyright infringement when a broadcaster used part of King's renowned "I Have a Dream"

³⁸ Needham J. Boddie II, Thomas C. McThenia, Jr., Fred B. Amos II, and Douglas W. Kim, "A Review of Copyright and the Internet," *Campbell Law Review* 20 (Spring 1998): 193.

³⁹ Steve Silberman, "Paramount Locks Phasers on Trek Fan Sites," *Wired News*, 18 December 1996 at <http://www.wired.com/news/culture/0,1284,1076,00.html> (accessed 19 January 2004).

⁴⁰ Theodor Seuss Geisel quoted in David Handelman, "Curiouser and Curiouser," *The New York Times on the Web*, 16 May 1999 at <http://www.nytimes.com/books/99/05/16/bookend/bookend.html> (accessed 19 January 2004).

⁴¹ Kirstin Downey Grimsley, "The Cat in the Hat Strikes Back; Seuss's Widow Licenses Characters in an Effort to Protect His Legacy," *Washington Post*, 3 March 1994.

⁴² Barbara Hoffman, "Caught in the Legal Web," *Art News*, March 1996, 100.

speech in a documentary. King's estate recently sold the rights to market the speech to Time Warner, which is producing books, CD-ROMs, and audiobooks on King. CBS News President Andrew Heyward said "the company is not required to seek permission before distributing news material. King's estate does not dispute CBS's right to use its own footage of the event on news programs, but it does object to its use in a for-profit enterprise," according to the AP wire report.⁴³ The suit was settled by a cross-license, "a fairly typical way for parties to resolve disputes involving intellectual property," according to Tony Askew, a partner in the intellectual property firm of Jones & Askew. "CBS News will retain the right to use footage from the march, including the famous speech. CBS also will have the right to license its footage to others but must provide contact information regarding the King estate's claimed intellectual property rights. That would seem to leave open the possibility of the King estate bringing copyright infringement litigation against others who use the speech without their permission."⁴⁴

- SuperStock, an international stock photo agency based in Jacksonville, Florida, won one of the first test cases related to the World Wide Web. The "milestone case in Atlanta, Georgia, put the issue of intellectual property rights on the Internet to the test. In a rare trial by jury, SuperStock . . . was awarded \$10,500 for its complaint against Atlantis New Media, Inc. SuperStock, which licenses the reproduction rights for hundreds of photographers, artists, archives, and museums, claimed that the web site design company was guilty of copyright infringement. It successfully proved to . . . [the] jury that Atlantis New Media illegally scanned three images from one of SuperStock's stock photography catalogs for use on its corporate web site."⁴⁵

Guidelines for Licensing Agreements

The licensing agreement developed for the Robert E. Kennedy Library at California Polytechnic State University follows this article. When granting permission for commercial reproduction for your institution's holdings, a well-crafted licensing agreement (reviewed by an attorney familiar with your state's statutes) is essential. Here are some elements to consider:

⁴³ David Boudier, "Martin Luther King's Estate Sues CBS News," AP wire story via Lexis-Nexis, 20 November 1996, and "King Estate Sues CBS Over Copyright," *Los Angeles Times*, 20 November 1996.

⁴⁴ Linda Daniels, "IP Lawyer: King, CBS Agreed to Cross-Licensing," *Fulton County Daily Report*, 14 July 2000.

⁴⁵ "Intellectual Property Rights in Cyberspace: In a Landmark Trial by Jury, SuperStock Successfully Defeats Opponent in Copyright Infringement Law Suit," *Intellectual Property Today*, May 1998, 36.

- Insist on licensing on your terms only; refuse to sign producers' agreements.
- License materials for use in one product only.⁴⁶ Some examples of reuse that would require additional fees and separate agreements include
 - home video/DVD rights;
 - foreign language editions;
 - nontheatrical use (i.e., brokers buy rights from cable TV producers for airport, hospital, and other institutional viewing);
 - CD-ROM publication;
 - publication and/or broadcast rights for foreign countries;
 - merchandising spin-off rights.
- Stipulate that use is nonexclusive; your institution retains all rights, title and interest in licensed materials.
- Reserve the right to refuse reproduction of materials and/or impose conditions in the best interests of your institution at the discretion of management.
- Reserve the rights to relicense for future uses of the product in any formats or technologies hereinafter developed or created.⁴⁷
- Specify whether rights are for North America or the world and for which language.
- Specify whether or not the licensee is permitted to use your images in packaging and advertising its product, and if additional fees are required.
- Include a monetary figure (preferably a multiple of the original licensing fee) that will be assessed as liquidated damages for unauthorized reproduction, while retaining all legal rights and remedies for willful infringement.
- Reserve the right to limit the number of images reproduced from a collection.⁴⁸

⁴⁶ Attorney Mark Radcliffe advised his business clients to "try to obtain broad rights to exploit a work. The parties must also determine how to share responsibility, costs, and damages for infringement, particularly for 'parts' of the work. For example, who pays for and controls litigation if an infringer only takes a photograph out of an interactive program? How will the monetary damages, if any, be shared?" Mark Radcliffe, "Legal Issues in New Media Technologies," *Computer Lawyer*, December 1995, 1.

⁴⁷ "Right holders are generally unwilling to agree to broad transfers of future rights to the works in unknown technologies. Such requests are often viewed with some degree of distrust and skepticism. Museums, libraries and other sophisticated entities that control or own many of the notable works in the public domain are especially reluctant to entertain such a request." Richard Raysman and Peter Brown, "Multimedia Licensing," *New York Law Journal*, 13 July 1993, 3.

⁴⁸ Archivists with sound and motion picture materials may want to retain the right to limit the length of audio or video segments used in one product because "an extended audio or video segment in the product could effectively supplant the demand for future exploitations of the work such as recordings, movies or videocassettes." Raysman and Brown, "Multimedia Licensing," 3.

- Address privacy rights and reserve the right to withhold publication or use accordingly.
- Retain the right to review proofs for quality control purposes before publication.
- Include an indemnity clause that absolves your staff and institution of responsibility for improper or illegal use on the part of the licensee.
- Limit/prohibit the use of licensed materials as a logo or other symbol or to endorse products.
- Specify the credit line to be used and where it must be placed in the product (i.e., use of watermarks on digitized materials, credits at the end of a production, credit lines on the same page as each published image, etc.).
- Stipulate all costs to be paid by licensee, including providing your institution with a copy of its final product.
- Require all costs be prepaid before licensed materials are released.
- Limit/prohibit use of licensed architectural plans for the construction of new buildings.
- Refuse requests to license materials in perpetuity.

Alternatives to Self-Licensing

One alternative to self-licensing for nonprofit institutions is licensing your holdings through for-profit companies such as Corbis Corporation or Getty Images, Inc.⁴⁹ Corbis,⁵⁰ founded by Bill Gates in 1989, came to prominence in 1995 with the purchase of the Bettmann Archive, the world-famous collection of sixteen million photographs. More than two million Bettmann images have now been digitized and made available for purchase. "The owners of the archives stated that one of the major reasons for the sale was that although they could not afford to digitize their inventory, they believed that digitization is essential to the archives' continued success."⁵¹ Corbis recently acquired 750,000 images from Sygma, the renowned Paris- and New York-based photojournalism agency. Corbis postulates that the "digital representations of the photographs it has

⁴⁹ Named for co-founder Mark Getty.

⁵⁰ Corbis is frequently mistaken as a subsidiary of Microsoft Corporation, but actually is privately owned by Bill Gates. "The privately-owned company is headquartered in Seattle, with offices around the globe in Asia, Europe and the United States," *Corbis Overview*, <http://www.corbis.com/corporate/> (accessed 19 January 2004).

⁵¹ "Huge Photo Archive Bought by the Chairman of Microsoft," *New York Times*, 11 October 1995.

purchased are original acts of authorship in their own right that qualify for copyright protection."⁵²

Corbis now counts sixty-five million images in its collection through contracts with "more than 3,000 creative sources," including photographers, museums, and archives. Gates initially attempted to purchase exclusive digital rights from nonprofits, but most administrators responded to those proposals with a distinct lack of enthusiasm. Corbis now offers nonexclusive license agreements providing nonprofits with approval and control over the use of images licensed to third parties. CD-ROM licensing agreements to a museum collection may often run from thirty to sixty pages.⁵³

Corbis users are offered "rights managed" images "for their specific predefined usages, meaning that the client identifies how, where, and to what extent they would like to use an image(s) and the agency provides permission to reprint the image. The usage fees are based on the usage as requested. You are typically granted one-time usage rights (although we do offer time buys and unlimited usages), and you must follow Corbis' Terms and Conditions for usage. You are not allowed to edit or alter the images unless authorized. By using rights managed, you are ensured that there is limited usage of the image; you can even request exclusive rights to an image to eliminate its simultaneous usage by other agencies and competitors."⁵⁴ Corbis also offers royalty-free images, motion picture footage, custom-framed prints and posters, and an electronic greeting card service. Corbis has also launched a production division devoted to documentaries, according to a 2002 Hoover's investment profile.

Getty Images, Inc., also headquartered in Seattle, claims an inventory of sixty million images and 27,000 hours of film, and targets four customer niches: creative professionals, analog and digital publishers, business users, and consumers. The company has approximately two thousand employees worldwide, and had revenues of \$79.9 million in the fourth quarter of 1999, according to a 2002 Hoover's investment profile. Getty Images, Inc., is publicly traded on the NASDAQ [GETY].

For nonprofit institutions with qualms about assigning rights to their holdings to companies such as Corbis, collectives may be an attractive alternative. A

⁵² "Many are worrying that Corbis actually plans a copyright end run, taking works from the public domain, transforming them into digital images, claiming a copyright, and thus removing a public domain work from the public. In fact, Corbis is quite open about its intentions in that respect." "The Next Copyright Debate: Does He Or Doesn't He?," *Intellectual Property Today*, January 1996, 20. In 1999, a closely related case, *The Bridgeman Art Library, Ltd. v. Corel Corporation*, was brought in federal court in New York. Bridgeman, which licenses reproduction rights for works of art held by museums, alleged that a Corel CD-ROM product infringed on its rights to 120 transparencies and digital image files. The judge ruled that "Bridgeman's images lack sufficient originality to be copyrightable" under either British or American law. Shapiro and Miller, *A Museum Guide to Copyright and Trademark*, 17.

⁵³ Barbara Hoffman, "The Legal Web and the Virtual Gallery," *New York Law Journal*, 22 March 1996.

⁵⁴ Corbis—Stock Photography and Pictures at <http://pro.corbis.com/> (accessed 19 January 2004).

collective is generally structured as a nonprofit corporation, controlled by its members, with authority to license works from the member organizations. The Canadian Heritage Information Network (CHIN) has developed a collective for its members and provides a thorough understanding of the process at the Virtual Museum of Canada's Web site. According to the organization's structure, "A member of the collective is an owner of copyright who has authorized the collective to license one, more than one, or all of the members' copyright works. It is common for members to authorize a collective to license their copyright works by an agreement referred to as an affiliation agreement."⁵⁵ CHIN specifically addressed "the imbalance in negotiating power between commercial multimedia producers and not-for-profit museums. . . . It is likely that the multimedia producer has developed considerably greater expertise than museums in securing and protecting intellectual property rights, particularly in countries outside Canada, and the museums may tend to rely on the producer's expertise to their detriment."⁵⁶ Differences in U.S. and Canadian copyright law present some obstacles to the establishment of a collective based on CHIN's model, but the model presented remains compelling. The legal framework of the collective is outlined, as well as specifics on performing rights, retransmission rights, electronic rights, and relationships with both authors and users.⁵⁷

One example of a collective in the United States was the Museum Educational Site Licensing Project (MESL). A pilot program coordinated by the Getty Art History Information Program and MUSE Educational Media, the MESL project was designed "to explore and promote the educational benefits of digital access to museum collections through campus networks maintained by academic institutions in order to help promote the development of computer-based learning tools for the study of art and culture." Six art museums and six universities participated.⁵⁸ Because the MESL project was limited to nonprofit institutions and educational use of holdings, no solutions were proposed for licensing by commercial users.

⁵⁵ "An Analysis of Economic Models for Administering Museum Intellectual Property," Canadian Heritage Information Network (CHIN), 27 April 2002, at http://www.chin.gc.ca/English/Intellectual_Property/Economic_Models/introduction.html (accessed 19 January 2004).

⁵⁶ "An Analysis of Economic Models."

⁵⁷ "Illustrating Options: Collective Administration of Intellectual Property for Canadian Cultural Heritage Institutions," Canadian Heritage Information Network (CHIN), 27 April 2002, at http://www.chin.gc.ca/English/Intellectual_Property/Illustrating_Options/index.html (accessed 19 January 2004).

⁵⁸ MESL Press Release, 23 December 1994. Contributing institutions: Fowler Museum of Cultural History at the University of California, Los Angeles; International Museum of Photography at George Eastman House, Rochester; Harvard University Art Museums, Cambridge; Library of Congress; Museum of Fine Arts, Houston; National Gallery of Art, Washington, D.C.; and National Museum of American Art, Washington, D.C. Universities: American University, Washington, D.C.; Columbia University, New York; Cornell University, Ithaca; University of Illinois at Urbana-Champaign; University of Maryland at College Park; University of Michigan at Ann Arbor, Dearborn, and Flint; and University of Virginia, Charlottesville.

Conclusion

The management of intellectual property rights by nonprofit institutions is an issue that will grow in complexity and importance as the convergence of technology and commercial media flourishes. Licensing strategies can be viewed as a kind of intellectual property protection and will be of primary importance as archives respond to the burgeoning demands of corporate users. However, in the words of one attorney, "It will be some time . . . before obtaining rights to many pre-existing works can be described as anything but arduous."⁵⁹

⁵⁹ Fran Smallson, "Soliciting from a Spectrum of Sources," *Recorder*, 6 March 1995, 28.

APPENDIX: Sample Licensing Agreement**Application for Permission to Publish, Produce or Exhibit**

Organization ("Licensee"): _____

Contact Name: _____

Telephone: _____ Fax: _____

Address: _____

City: _____ State: _____ ZIP Code: _____

FedEx account number: _____

Material to Be Licensed:

Collection Name & Number	Photograph	Architectural Plan	Other

WARNING CONCERNING COPYRIGHT RESTRICTIONS:

The copyright law of the United States (Title 17, USC) governs the making of photocopies or other reproductions of copyrighted material. Under certain conditions specified in the law, archives and libraries are authorized to furnish a photocopy or reproduction. One of these specified conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement. This institution reserves the right to refuse a copying order if in its judgment, fulfillment of the order would involve violation of copyright law.

USE

Title and description(s) of use ("Product"):

Projected date of publication/production: _____

FORMAT: [check all that may apply]

- ☐ Monograph/Textbook ☐ CD-ROM ☐ Dissertation ☐ Exhibit Catalog
☐ Journal/Periodical ☐ Film/Video Program
☐ Multimedia (specify): _____ ☐ School Project/Paper ☐ Campus
Publication ☐ Other (specify): _____

DISTRIBUTION RIGHTS DESIRED:

(one-time publication/production, one edition, one language):

- ☐ North American Rights ☐ World Rights

Language: _____

PROMOTIONAL RIGHTS DESIRED:

- ☐ Cover ☐ Brochure ☐ Book Jacket
☐ Product Catalog
☐ Other _____

Conditions of Use

1. In this Agreement the following definitions apply:
 - 1.1. Agreeing parties defined as Special Collections Department of the Robert E. Kennedy Library, California Polytechnic State University, hereinafter called "Repository" and the following person, department, organization, or other entity, hereinafter called "Licensee."
 - 1.2. "Licensed Material" means any still image, film or video footage, audio product, visual representation generated optically, electronically, digitally, or by any other means, including any negatives, transparencies, film imprints, prints, original digital files or any reproductions thereof, or any other product protected by copyright, trademark, patent, or other intellectual property rights, which is licensed to Licensee by Repository under the terms of this Agreement and listed under "Material to be Used."
 - 1.3. "Product" means the project in this Agreement under "Title and description of use."
 - 1.4. "Promotional Use" means the marketing and distribution of the Product, including packaging of the Product, advertisement, product catalogs, or publicity or promotional materials.
2. All requests to reproduce the Repository's holdings, which may include photographic prints, architectural plans and renderings, film, video, manuscripts, maps, and other documents, must be submitted on this Agreement.
 - 2.1. Permission for reproduction is granted only when this Agreement is countersigned by an authorized representative of the Repository. Permission for reproduction is limited to the Licensee and is non-transferable.
 - 2.2. Permission for reproduction is granted only for the express purpose described in this Agreement. This permission is non-exclusive; the Repository reserves the right to reproduce the Licensed Material and allow others to reproduce the Licensed Material.
 - 2.3. Permission is granted only for one publication/product, one edition, and in one language. Any other use of the reproduced item(s) is a violation of this Agreement. Any change in use from that stated on the Agreement requires permission and will require additional fees.
 - 2.4. In the event that the Licensee engages in unauthorized reproduction of Licensed Material, the Licensee agrees to pay the Repository a sum equal to three times the normal commercial fee, not as a penalty but as liquidated damages agreed upon due to the

difficulty in assessing actual damages incurred; the Repository may, in the event of unauthorized reproduction, require surrender of all materials containing such unauthorized reproductions, and the Licensee agrees that such materials shall be immediately surrendered upon receipt of request from the Repository. This amount is separate and in addition to any amount provided by provision 4.2.

- 2.5. The Repository reserves the right to refuse reproduction of its holdings if it feels fulfillment of that order would be violating copyright law or other law. The Repository reserves the right to refuse reproduction of its holdings and to impose such conditions as it may deem advisable in its sole and absolute discretion.
3. Beyond the permission of the Repository, additional permissions may be required. Those permissions may include, but are not limited to:
 - 3.1. Copyright: In cases of living artists and/or subject to the 1976 Copyright Law or the 1991 Visual Artists Rights Act, written permission must be secured by the Licensee from the artist, his/her agent, or the copyright owner and provided to the Repository before a photograph of an artwork will be released.
 - 3.2. Living persons enjoy a common-law right to privacy. This right prevents the public disclosure of information that (1) contains highly intimate or embarrassing facts about a person's private affairs, such that its release would be highly objectionable to a reasonable person and (2) is of no legitimate concern to the public. Documents containing information that would be used to embarrass, damage, injure, or harass living persons will be withheld from publication/production at the discretion of the Repository.
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 - 3.5. In all instances, the Licensee agrees to indemnify, defend, protect, and hold harmless the Repository, California Polytechnic State University, the Trustees of the California State University, the State of California and its agents against all claims, demands, costs, and expenses, including without limitation, attorneys' fees, incurred as a result of alleged or actual copyright infringement or any other legal or regulatory cause of action arising from the use of the Repository's materials.

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12. The Repository reserves the right to limit the number of images from the Repository in any single publication or product, if it appears that their number is disproportionate in relation to those from other sources.
13. This agreement shall be governed by and constructed under the laws of the State of California. By executing this Agreement, the Licensee consents to exclusive jurisdiction of the courts of the State of California. The venue for any such disputes shall be in San Luis Obispo County.

14. The terms of this agreement are severable such that if any term or provision is declared by a court of component jurisdiction to be illegal, void, or unenforceable, the remainder of the provisions shall continue to be valid and enforceable.
15. **CREDIT LINE MUST READ:**
☐ _____ Collection, Special Collections, California Polytechnic State University.
 -or-
☐ University Archives, California Polytechnic State University.
16. Additional conditions or exceptions to the above requirements:

ENDORSEMENTS:

Licensee

By signing this Agreement, I accept personally and on behalf of any organization I represent the conditions set forth above:

Signed: _____ **Date:** _____

Please print or type:

Name, title and organization: _____

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Signed: _____ **Date:** _____

Please print or type name and title: _____

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University

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Date of Request: _____

Reproduction Fee: \$ _____

Use Fee applied: \$ _____

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