

## **Marketing Culture in the Digital Age**

### **A Report on New Business Collaborations Between Libraries, Museums, Archives and Commercial Companies**

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## I. Introduction

Google's investment of tens, some say hundreds, of millions of dollars in library digitization at Harvard University, Oxford University, the New York Public Library, Stanford University, and the University of Michigan, announced to the public in late 2004, took many in the library and cultural heritage sector by surprise—"a bomb was dropped," one librarian told us. Yet these sorts of relationships—publishing, distribution, and digitization projects featuring noncommercial institutions and commercial partners—actually have a long and rich ancestry, a history of effective precedents, featuring commercial involvement and investment in the distribution of scholarship and cultural heritage content in North America.

These noncommercial-commercial collaborations have varied widely in their scopes and approaches, and they have involved collections, companies, and institutions large and small. The American Antiquarian Society, for example, the leading repository of pre-1800 printed Americana, has enjoyed a business partnership with ReadEx/NewsBank for over 50 years, also involving the investment, by a commercial company, of millions of dollars in production, distribution, and marketing. The Library of Congress has been working with a variety of technology companies and commercial publishing companies like ProQuest (formerly UMI and Bell & Howell) since World War II. Thomson-Gale, part of the Canadian media conglomerate Thomson, has been an active funder-partner of initiatives like the important Text Creation Partnership, in which ReadEx and ProQuest also have invested, and companies like ProQuest are collaborating with research libraries on the financing of new institutional repositories. Chadwyck-Healey, prior to its acquisition by ProQuest, partnered with a number of libraries to build a product called the Periodicals Contents Index (PCI) that offered the table of contents of thousands of academic journals. At campus-based technology and media laboratories such as the Entertainment Technology Center at Carnegie Mellon, the School of Literature, Communication, and Culture at Georgia Tech, the Massachusetts Institute of Technology Media Lab, the Entertainment Technology Center at the University of Southern California, and the Institute for Advanced Technology in the Humanities at the University of Virginia, corporate supporters and partners have played an important, often foundational role. Public history institutions like the Smithsonian Institution have engaged commercial partners in production and distribution as well. Smithsonian Folkways signed a music deal with Microsoft in January 2005, for example, and then in February 2005 announced a major publishing partnership with NewsCorp's book division HarperCollins. These public-private relationships are and have been very much a part of making cultural and educational content at noncommercial institutions more accessible.

With the advent of the new Internet economy, where text, image, sound, and video products can be reproduced and distributed at little cost, the commercial sector is now devoting increasing attention and resources to cultural heritage resources and educational material. There is a growing recognition that libraries and museums and archives are the equivalent of unexplored gas and oil fields when it comes to content that might be discovered, converted, repurposed, and marketed. Furthermore, and quite apart from the content therein, commercial firms in publishing, music, film, television, gaming,

software, and hardware are increasingly understanding that much of the most exciting media work in the world today is being sponsored under the aegis, or facilitated by the creative wisdom, of information or library science. Indeed, the recognition is rising that library and information scientists occupy a vital place not only in the record-keeping of our society, which most people understand as historical in nature, but in the development of media, which is forward-looking. Joining Google and Microsoft, companies such as Apple, Electronic Arts, IBM, Pixar, Sony, Sun, Universal, and Yahoo—the list is long—have begun to invest in the human resources and know-how of the library and museum world. Today, any company, any enterprise, and any venture fund with a screen to fill, an engine to search, a pipe to send bytes down, or a chip to sell is a current or potential stakeholder in the digitization and publication, broadly defined, of scholarship and culture and educational materials.

This rich history and these new media opportunities notwithstanding, much more needs to be done to understand and, depending on one's perspective, secure the investment and the potential for investment from commercial companies across the sector. Libraries, museums, historical societies, archives, and universities have not, as a rule, been particularly adept at marketing themselves—neither for their content, nor for their skills and expertise. While it is true that the current corpus of collaborative relationships, taken together, has generated significant revenue for the sector to date, the legal and business structures and practices underlying many of these relationships have not always effectively facilitated the good work of cultural and educational institutions. In many cases, the distribution of rewards from these arrangements, including revenue and publicity, has not been equitable. Many leaders of nonprofit institutions, for a variety of reasons, seldom have developed backgrounds or experiences in the ways of business—in determining the market value of their assets, for example, or negotiating business arrangements, or conceptualizing and implementing business plans. Commercial representatives have told us that this makes it a fundamentally different experience for them to engage in a business arrangement with a library than it is with a coequal commercial enterprise. While there have been some efforts launched to familiarize cultural leaders with business tools and techniques, most of the business planning guides intended to improve planning in the cultural and educational sector have been prepared and distributed by authors based in the noncommercial sector, with little or no professional input from the business world.<sup>1</sup>

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<sup>1</sup> See, for example, Laura Price and Abby Smith, *Managing Cultural Assets from a Business Perspective* (Washington, DC: Council on Library and Information Resources, 2000); Diane Zorich, *A Survey of Digital Cultural Heritage Initiatives and Their Sustainability Concerns* (Washington, DC: Council on Library and Information Resources, 2003); Liz Bishoff and Nancy Allen, *Business Planning for Cultural Heritage Institutions* (Washington, DC: Council on Library and Information Resources, 2004); and some thoughts about these documents in Peter B. Kaufman, “Digitization, Economics, and the Humanities,” *Information Outlook*, July 2004.

The specific questions that have been raised about these business deals spotlight a general and longer-standing set of concerns about the wisdom of nonprofits entering into commercial relationships. Criticisms of Google Print for Libraries mushroomed after the 2004 announcement, in part because of Google's fame and size. The very idea of universities that are centuries-old partnering with such a new and potentially powerful commercial organization aroused some strong reactions—regarding appropriateness, respect for rights, and almost anything, really. Michael Gorman, president-elect of the American Library Association and writing in the ALA's journal, addressed, with palpable hostility, "university administrators in the grip of cupidity." "Google is supposed to have complex algorithms," Gorman opined, on this issue, "but still produces piles of rubbish for almost all searches. You can put lipstick on a pig, but it's still a pig." A May 2005 open letter from Peter Givler, executive director of the Association of American University Presses, to Google's general counsel referred to the "confusion," mounting alarm" and "concern" among university presses about the competition presented by Google's apparent "systematic infringement of copyright on a massive scale"—"fundamental, broad-sweeping violation of the Copyright Act"—and it asked Google's attorney to answer 16 pointed questions within 30 days.<sup>2</sup> It is not only scholarly publishers who have been balking at Google. The Association of American Publishers, which represents the interests of both noncommercial and commercial institutions, sent a letter in June 2005 asking Google to suspend Google Print for Libraries for six months—"to facilitate discussion"—and in the spring of 2005, media and entertainment conglomerates including Viacom, Time Warner, and NBC Universal sent several stern warnings to the company about its activities and plans concerning the digitization and distribution of text, images, audio, and video.<sup>3</sup> Google has recently decided to interrupt, temporarily, the Google Print for Libraries operations to assess and respond to these concerns.

For their part, representatives of the commercial sector—publishers, media companies, agents, investors—often are insufficiently prepared to search for opportunities effectively across noncommercial institutions. As the reaction to Google Print demonstrates, they are often ill-apprised of the challenges that can confront collaborations and partnerships with mission-driven not-for-profits. Perhaps they would benefit from an opportunity to learn more about collaborations with the sector, and to understand the powerful and diverse attachments to mission that the stewards of culture and education embody. Perhaps noncommercial institutions could benefit from the involvement of business and finance professionals in their mission-driven work.

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<sup>2</sup> See William Foster and Jeffrey Bradach, "Should Nonprofits Seek Profits?" *Harvard Business Review*, February 2005; Michael Gorman, "Google at the Gate," *American Libraries*, March 2005, pp. 40-43; and Burt Helm, "A Google Project Pains Publishers," *Business Week Online*, May 23, 2005.

<sup>3</sup> See Kevin J. Delaney and Brooks Barnes, "For Soaring Google, Next Act Won't be as Easy as the First," *Wall Street Journal*, June 30, 2005; and "Publishers Question Google Print Library Project," *American Libraries*, August 2005.

With all these things in train, it seemed that now would be an appropriate time to study, understand, and determine, in a more concerted effort, what can be done to both facilitate and improve these arrangements for the public good. To that end, Intelligent Television, with generous support from The Andrew W. Mellon Foundation and Ithaka, embarked on a research project and report about these relationships to date. This report reflects those investigations and the interviews conducted with approximately 30 university librarians, museum librarians, archive directors, foundation directors, university and nonprofit administrators, and others, all of whom are directly involved in building relationships between their own cultural and educational institutions and the commercial sector. From December 2004 through July 2005, the project set out to ask these stakeholders the following questions:

- How have you determined what assets at your institution are suitable for digitization and/or publication, and whether to consider collaboration with a commercial partner? How do you find and select partners?
- How well have you met the challenge of estimating cost and demand and otherwise building a sound business model? What measurements have you used in studying successes and failures? What are the avoidable mistakes?
- What are the key issues to think about and the biggest hurdles to overcome when negotiating agreements and structuring relationships with a commercial partner?
- Does your organization have adequate access to the legal, financial and other expertise it needs to evaluate and pursue these collaborations? What are the best sources of legal, financial or other advice for these projects?
- What other kinds of advice, services or resources would benefit the not-for-profit community's efforts to exploit the potential of technology to preserve and share our cultural heritage?

This project also sought advice and commentary on current transactions and noncommercial-commercial relationships in the field from business leaders in the private sector—from publishers and distributors directly involved in these types of relationships, to lawyers, accountants, bankers, and investors who have engaged in work with these institutions or others like them. The project asked representatives of these enterprises what business outcomes and strategies, for example, they have admired in the noncommercial world, and what visions and practical recommendations they might have for improving the results and efficiency of these relationships in the future, and what programs and services could facilitate better dialogue on both sides.

This report discusses the responses to these questions. Throughout, we have sought to understand what each side contributes to transactions of this nature; what the deal

structures are; and what the economic and other reactions have been in the market. We have also sought to understand where noncommercial organizations see their primary missions and roles today, and where they see themselves getting to in, say, five years hence (a question almost impossible to answer, we know). The report places our investigation in the broader, evolutionary context of the market for cultural and educational content in the digital age. It groups the relationships we have uncovered according to a taxonomy or sorting structure for types of deals (categories that are still under development). It relates comments from outside the field provided by commercial experts whom we have interviewed, and it shares the recommendations and requests for further study and activity that emerged from our interviews.

## II. The Evolving Market for Culture and Education in the Digital Age

Sources of funding for cultural and educational institutions include, as a rule, a mix of federal, state and local public funds; grants and gifts coming from charitable foundations; grants and gifts provided by corporate underwriters; philanthropic support from individuals; admission fees (“front gate”), in some cases; and revenue from business ventures. The proportional relationship of these sources varies widely—in the field as a whole, and among the institutions represented in our research—and it changes over time. Support for one large institution we spoke with, for example, breaks down as 30 percent public money, 30 percent private gifts, 30 percent front gate, and a tiny percentage of commercial revenue from products and services; whereas the natural economy of small film and audio archives can derive upwards of 50 percent of their annual operating costs from licensing. One television archive director told us that his host university expects the archive to support itself fully by charging for the goods and services it provides.

Understanding the current and potential place of the cultural heritage institution in the economy of culture and education in the digital age is critical for the future health of these institutions. Defining, more specifically—and in terms that the community itself can appreciate and build upon—the economy for products and services in the library, museum, and archive community that can provide for revenue and ancillary business planning benefits to these institutions is a task that could prove enormously helpful. Without a fuller sense of that market, it is difficult for individual institutions to determine the value (market value) of their goods and services, calculate the true costs of doing business (reaching that market), and make informed decisions about the most appropriate and beneficial types of business partnerships and collaborations. Providing that economic background would be useful in general, even if some of the collaborations investigated for this project were conceived of without the objective of generating revenue.<sup>4</sup>

This brief report cannot provide detailed analysis on a topic of such broad and sweeping scope. Even as we await this kind of comprehensive market analysis, however, it is evident that the amount of cultural and educational material and technological expertise available for development and distribution is massive. The books in libraries, archives, and museums in the United States, the manuscripts, audio files, films, and television and video assets—all number in the millions, as do the artifacts and specimens in American museum collections. The rate of content creation and conversion of many of these objects to digital formats is accelerating at an unprecedented rate. Cultural and educational institutions are now trying to render a healthy percentage of these accessible through publishing, distribution, and digitization programs, with a significant percentage of these being unlocked with investment and support entering the institution through commercial relationships. Museums, libraries, and archives have been seeking support

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<sup>4</sup> A trend that, given the economic potential of the Internet and personalization, and now the economics of open content, open software, and open courseware, may well continue.

from such relationships for the preservation of materials as well; and in some cases, the preservation of these materials has been important to their commercial partners.

Once converted into digital media, or even in analog form, these cultural resources enter a marketplace that is enormous and exploding. The U.S. book and journal industry, the music, film, television and video industries—all are multi-billion-dollar businesses. Up to now only a very small fraction of these sales in any given year has derived from material developed, licensed, or distributed from the noncommercial sector, but that percentage is growing.

The number of users and consumers in this marketplace is likewise unprecedented in its size, scale and growth potential. “On a typical day in 2004,” explains a recent Pew Foundation study, “some 70 million American adults logged onto the internet to use email, get news, access government information, check out health and medical information, participate in auctions, book travel reservations, research their genealogy, gamble, seek out romantic partners and engage in countless other activities.” Fourteen million people listened to music or watched video. Five million people posted or shared other people’s blogs. Four million swapped sound files. Eighty-one percent of American teenagers between 12 and 17 were online.<sup>5</sup> Indeed, as one nonprofit administrator from the library world told us in an interview, “most students have lived the digital life since they were old enough to move a mouse.” These numbers are likely only to grow. According to one authoritative forecast, “Driven by time spent with the Internet, home videos, videogames, and increased media multitasking, the average consumer’s time spent with media will expand at a compound annual rate of 2.1 percent (from 3,663 hours using media in 2003 to 5,059 hours in 2008), more than 11 hours per day or 78 hours per week.”<sup>6</sup>

Although it is Google’s print initiatives that have riveted the attention of the sector, and books, newspapers, and print assets that have been at the core of previous collaborations, the demand today is for more than textual material. With the explosive growth in the purchases of DVD players, CD and DVD burners, and personal video recording devices (estimated to reach half of all American homes by 2010), the approach of users young and old to the media they deploy and manipulate and remix and produce is fresh and bracing. Many people are now building and controlling their own listening and viewing experiences. Apple iTunes, the online store, is selling 1 million songs per day. New research suggests that more and more television programs are going to be bought on-demand, in a process, down the line, equivalent to downloading a song track or image or

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<sup>5</sup> *Trends 2005: The Mainstreaming of Online Life* (Philadelphia: Pew Research Center, January 2005); Donald F. Roberts et al., *Generation M: Media in the Lives of 8-18 Year Olds* (New York: Kaiser Family Foundation, March 2005); and Andrew Blau, *The Future of Independent Media* (Emeryville: Global Business Network, September 2004).

<sup>6</sup> *Communications Industry Forecast & Report 2004* (New York: Veronis Suhler Stevenson, 2005).

attachment over the Internet.<sup>7</sup> As it is, millions of songs and hundreds of thousands of video hours are downloaded over the Internet each day. The sheer quantity of media and data that is being created is so enormous, it is awesome. A senior enterprise-storage expert at IBM has indicated that “humanity will generate more data—from websites to digital photos and video” over the next three years “than it has generated in the past 1,000.”<sup>8</sup> *Wired Magazine*’s co-founder, Kevin Kelly, describing today’s web universe of 600 billion web pages and 50 million blogs—with a new blog being launched every two seconds—puts it this way: “A simple extrapolation suggests that in the near future, everyone alive will (on average) write a song, author a book, make a video, craft a weblog, and code a program. This idea is less outrageous than the idea 150 years ago that someday everyone would write a letter or take a photograph.”<sup>9</sup>

Within this booming demand for media and information, the public’s excitement about libraries, museums, and archives continues to grow. More people visit libraries and museums each year than attend sporting events or concerts. The American Association of Museums has estimated the number of museum visits in the United States between 1987 and 1998 at 865 million, for example.<sup>10</sup> An estimated 3 million visitors are being expected annually at the Library of Congress, once the U.S. Capitol Visitors Center is completed in 2007—the first time in its distinguished history that the Library will experience anything like that retail traffic. The National Archives already has capitalized on this public interest, investing more than \$7 million into an elaborate “Public Vaults” initiative for its 1 million annual visitors and 250,000 professional users.<sup>11</sup> Count digital visits and uses, and these numbers surge. It may be a sign of the times that the interest of commercial companies in helping to exploit these assets has made sense only very

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<sup>7</sup> Lorne Manley and John Markoff, “Steal This Show,” *New York Times*, January 30, 2005. Indeed, Google Video, now being beta-tested, is a major focus of the company’s, not least because Americans spend more time with moving images than with any other sort of media. Consumers spent 1,625 hours each, on average, viewing TV, home videos, and movies in 2004, compared with 176 hours with the Internet and 108 hours reading books. See Delaney and Barnes, “For Soaring Google, Next Act Won’t Be as Easy as the First,” *Wall Street Journal*, June 30, 2005.

<sup>8</sup> Quoted in David Talbot, “The Fading Memory of the State,” *Technology Review*, July 2005.

<sup>9</sup> Kevin Kelly, “We Are the Web,” *Wired*, August 2005.

<sup>10</sup> See <http://www.cpanda.org/>; *Investing in Knowledge: A Five-Year Vision for England’s Museums, Libraries, and Archives* (London: Museums, Libraries and Archives Council, 2005); and <http://www.nea.gov/news/news03/PublicParticipation.html>. See also Randolph Starn, “A Historian’s Brief Guide to New Museum Studies,” *American Historical Review* 110, Number 1 (February 2005), p. 69.

<sup>11</sup> Jacqueline Trescott, “Archives’ Magical History Tour,” *Washington Post*, November 12, 2004.

recently. As one of the librarians working with Google put it to us, when Google executives had first shown up on the university's doorstep, over two years ago, offering to digitize the university's entire book collection, "We thought, what were they smoking?"

Academic publishing is itself a substantial, multibillion-dollar market. The academic journal publishing market alone has been evaluated as worth \$5 billion—one, for example, where the University of California schools spend over \$30 million per year, and where one company, Elsevier, does \$1.6 billion in annual turnover (\$7.7 million from the University of California system alone).<sup>12</sup> And not just commercial institutions sell to it. Even for the noncommercial organizations serving this community, such as JSTOR, Project Muse, HighWire Press, and ARTstor, to name a few examples, tens of millions of dollars in revenues are being generated. Perhaps even more important than the revenue flows generated by these commercial and not-for-profit organizations is the degree to which scholars, researchers, and students are using these new resources. For example, JSTOR, with its 18 million journal pages online, accounted for 65 million pages viewed, and 14 million articles printed, in the first half of 2005 alone.<sup>13</sup>

In his masterful study of American media, *The Creation of the Media: Political Origins of Modern Communications*, Paul Starr, Professor of Sociology at Princeton (a Pulitzer- and Bancroft-Prize winner for a previous social history of medicine), describes how societies face radical changes in the framework of communication, whether these changes are precipitated by technology, politics, cultural shifts, or other causes. A society, Starr tells us, makes what he calls "constitutive choices"—social choices about how things are built and how they work, their design and rules of operation. There are slow and evolutionary ways that these choices actually get made, and there are more sudden turning points, tipping points, or "triggering events."<sup>14</sup>

By any of Starr's own measures, we are squarely at another one of these turning points now, in the middle of a great epochal transformation in media, technology, and communication. One of our interview subjects spoke to us about the "disruption" in the economics and business of music caused by Napster. "One of the reasons the Google

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<sup>12</sup> Bernard Wysocki Jr., "Scholarly Journals' Premier Status is Diluted by Web," *Wall Street Journal*, May 23, 2005. While the field is rich, many actors, chief among them university presses, "struggle to break even in the best of times." See this and other statements from Peter Givler, executive director of the university press association, quoted in Burt Helm, "A Google Project Pains Publishers," *Business Week Online*, May 23, 2005.

<sup>13</sup> See: [www.jstor.org](http://www.jstor.org). This is up from 16 million pages viewed and 6 million articles printed over approximately the same period in 2002. Roger C. Schonfeld, *JSTOR: A History* (Princeton: Princeton University Press, 2003).

<sup>14</sup> Paul Starr, *The Creation of the Media: Political Origins of Modern Communications* (New York: Basic Books, 2004).

deal is so appealing,” he said, “is that it has the potential to accelerate the same sort of disruption in print.” In the entertainment industry, he told us, companies were left with no choice but to put their media up online in digital form. With such disruptions—“media disruptors” is becoming a term of art now—we find ourselves subject to wrenching change almost every few months, trapped in a technological and economic environment where events move at light-speed and serious forward planning is almost impossible. What Google represents for the future of media and access, therefore, is exciting. At the same time, as the Supreme Court reaffirmed in 2005, society as a whole is not certain how fast or how far to honor the digital revolution. When, in *MGM v. Grokster*, 28 large entertainment and information companies were pitted against peer-to-peer networks, who took who’s side, from the academy, cultural and educational institutions, and technology companies, during the court case and immediately afterwards, was often surprising.<sup>15</sup>

At what stage, then, in mid-2005, do we find ourselves—in the evolution of media generally, and in the development of cultural and educational institutions to work with the promise of digitization and networking in particular? Although many in the sector remember or even witnessed the rebuffed efforts of Corbis 15 years ago to acquire perpetual and exclusive distribution rights from museums, or Fathom to build demand for university-based content—events which have colored the views of (or, in the words of one archivist, “had a longstanding residual effect” on) many of our interview participants regarding commercial companies and the search for revenue—the fact remains that we are still, as one business leader described it, at the second pitch of the top of the first inning of a long, nine-inning ballgame. Describing his new relationship with a new media company, one university librarian told us: We have been around “for centuries.” They, on the other hand, are “six years old.” Their free-style approach to experimentation; their flat, non-hierarchical management style; their whole ethos of a new and successful digital media company—all that is fresh, new, and “fascinating.”

It is at this moment—still early in the game—that we have attempted to capture impressions about the evolving business relationships between noncommercial institutions and commercial enterprises. As a rule, in our investigations we have found that institutions welcome and encourage collaborations—for pilot projects, for longer-term relationships, even for strategic relationships—where these relationships can be built equitably and on terms that are clear as well as fair. As one nonprofit administrator told us, these partnerships are “legitimate”; “building the digital world of the future,” he said, “is not going to happen without them.” Another indicated that the collaborations are “inevitable”—and that it would be “misguided, foolish, and wasteful” not to nourish them. “Our future is inextricably tied to the commercial sector,” one senior librarian said; with budgets constrained, “we will have to be more adventurous.” Still, a lot of people in the community are “scared to experiment,” one museum librarian told us; “a lot of us don’t know what the sustainable models should be.” There is “a whole lot of

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<sup>15</sup> On *MGM v. Grokster*, the best resource base is the Electronic Frontier Foundation’s at: [http://www.eff.org/IP/P2P/MGM\\_v\\_Grokster/](http://www.eff.org/IP/P2P/MGM_v_Grokster/). See also David E. Thigpen, “Mortal Enemies No More,” *Time*, July 3, 2005, posted at: <http://www.mashboxx.com/>.

suspicion and fear—fear that we will be giving stuff away and not doing the right kind of deals.” “We’re not geared to do this,” another librarian told us. “There’s a lot of misinformation about how hard it all is” and “complete ignorance about what the commercial side really does.” “Business planning,” said another, “is not part of our culture.” One film librarian told us that our study thus is “of huge importance to the field right now” and “really timely.” Another librarian told us, “This effort is responding to a problem that I have felt. There are a lot of emerging models, and a lot of uncertainty, and it’s a project worth tackling.”

### III. Current Business Relationships

The types of products and services that are developed, created, trained, produced, and distributed in the collaborations we have investigated here range widely. Publishers and distributors of print, images, audio, and video license or otherwise invest in a range of products within museums, libraries, and archives. The American Antiquarian Society and Readex/NewsBank have collaborated, as we noted above, for half a century to offer for sale and subscription microfilm and now online access to millions of pages of books and newspapers published in pre-Civil War America. Smithsonian Folkways offers approximately 3,500 albums for sale through approximately 20 music distributors. The Field Museum and its licensors offer plush-toy versions of “Sue,” its giant Tyrannosaurus Rex and reprints of its Audubon wildlife paintings. Both the UCLA Film & Television Archive and the National Film Preservation Foundation license certain DVD rights to films they control or that are in the public domain. Among services, the Library of Congress offers commercially supported film preservation applications to Hollywood studios, who pay for them; the University of Michigan’s Digital Library Production Services digitizes millions of book pages for institutions looking to put their collections online. Carnegie-Mellon University’s Center for Entertainment Technology and the University of Southern California’s Entertainment Technology Center invite the commercial sector to invest in student and faculty research. The costs and prices of these packages and the number of customers that each reaches vary widely.

#### ***Transaction models***

Contemporary models or types of arrangements for these business relationships facilitate two kinds of public-private collaborations—those that are meant to develop products and services sold and licensed to the public, and those that involve products and services sold and licensed to educational and cultural institutions. In our conversations we identified seven different types of transaction categories for these nonprofit/commercial collaborations. They include the following (the illustrative examples come from our study):

**Gifts, grants, sponsorships, and collaborative agreements with restrictive conditions**, where a commercial company will gift or grant money to an institution in exchange for that institution providing something of commercial value in return. Electronic Arts, for example, at times will fund a research initiative at a university with donated funds in exchange for that initiative being developed at EA if it shows promise. Disney Studios or Warner Brothers will grant money to a library for the library’s preservation staff to improve the condition of Disney or Warner films. Sun Microsystems will donate professional services to a museum in exchange for public recognition that Sun hopes will enhance its reputation and standing in the marketplace.

**Barter arrangements**, where a commercial company will more formally require an institution to provide goods or services in exchange for the company’s material or services. Microsoft, for example, will provide PCs and Pocket PCs to a university in exchange for receiving digital content for its electronic book reader.

**Licensing deals, where no royalties are paid**, where a commercial company will invest in the production, distribution, sales, and marketing of, for example, archival content, satisfying the host institution's mission-oriented mandate to provide broad access to its holdings. Some of the early publishing relationships in the field started this way; and some still endure. For example, Chadwyck-Healey originally developed its Periodicals Contents Index through a multiyear collaboration with several large research libraries.

**Licensing deals, where royalties are paid**, where a commercial company will invest in the production, distribution, sales, and marketing of cultural or educational content and services and provide a portion of the sales or rental proceeds to the host institution. Institutions large and small collaborate through this mechanism. The Oppenheimer Galleries, for example, will at times scan and reproduce historic John J. Audubon prints for sale to the public. ReadEx/NewsBank will collaborate with a major library to digitize and sell subscriptions to early American newspapers. Kino Films will release a restored print of a classic film in a library archive. Royalty structures, rates, and payment schedules vary widely, depending on what each side to a deal contributes and what each side can negotiate.

**Distribution deals, with sales commissions being extracted**, where a commercial company will assume the costs and responsibility of selling and marketing books, prints, films, and recorded sound materials (for example), and deduct sales commissions and additional charges from the net revenue distributed to the host institution. This model usually involves the host institution assuming the full cost burden of producing the content in a form suitable to bring to market. Image Entertainment will distribute DVDs of classic films for the National Film Preservation Foundation. Twenty commercial distributors might work with Smithsonian Folkways at any given moment.

**Agenting/representation deals, with agency commissions being extracted**, where an agent will arrange deals involving the license of rights or services and deduct an agency commission for doing so. Getty Images, for example, will at times license the use rights to the moving pictures on behalf of a large archive. The Hamlyn Group will work with the Field Museum to develop deals for merchandise ranging from calendars to toys. *Variety Magazine* still calls agencies "tenpercenteries," but the agency commission as a percentage of net revenue can range higher and lower.

**Direct sales of products and services**, where a cultural or educational institution will itself engage in business resulting in direct sales of goods or services to the educational or retail community. Museum stores are an example of this service. The University of Michigan's DLPS is another, as are publishing initiatives like Stanford University's HighWire Press and Johns Hopkins University's Project MUSE.

**Investment and joint ventures**, where a commercial and noncommercial entity agree to co-invest resources and split the resulting revenue according to an agreed-upon formula. MIT's Media Lab exemplifies this approach.

### **Transaction elements and structures**

While these types of deals all vary between and within categories, they are, with rare exception, enshrined in written contracts, letters of agreement, memoranda of understanding or other written legal instruments between the nonprofit institution and commercial enterprise. They often begin with a written memorandum of understanding, term sheet, or “deal points” that outline what two or more parties have agreed upon, and then they often progress to detailed agreements. Whatever the instrument, it is of vital importance to the working relationship. One of the commercial accountants whom we interviewed put it this way: “Everything that goes into that deal ‘bible’ is what you’ll have to live by.”

The collaborative agreements that we reviewed all have a set of key issues that must be resolved for business arrangements to be clearly and comprehensively defined. Specific provisions are commonly negotiated, usually with the advice of counsel, in the following areas—some 20 topics in all:

- the parties to the agreement;
- the specific products that will be created, distributed, and sold;
- the specific license granted, further defining the products and markets—geographic, institutional, media—that the arrangement intends to target;
- the ownership of copyrights and intellectual property created during the relationship;
- the exclusivity of the arrangement, if any;
- the credits and attribution to be provided to authors, producers, and others;
- the term, including any option to renew or extend the arrangement;
- the financing, including determining which party will pay which types of costs and describing the size and schedule of any payments meant to fund the arrangement;
- the personnel and other resources that are being committed;
- the revenue-sharing structure, including the timing and size of royalties, commissions, or other revenue-sharing arrangements;
- the production and delivery schedule;
- approval and consultation rights;
- promotion, publicity, and marketing commitments;
- termination rights, and what happens upon termination;
- representations and warranties and/or indemnities;
- accounting statements;
- record-keeping responsibilities and audit rights;
- the right to assign or transfer the agreement to a third party;
- the choice of law to be applied, and in what jurisdiction; and
- dispute-resolution mechanisms.

People whom we interviewed at cultural and educational institutions sometimes shared with us facts about these agreements, sometimes told us of certain details, sometimes

read us excerpts, verbatim; sometimes provided them to us in their entirety; and sometimes, as a result of preexisting initiatives like the popular Liblicense listserv and website (see: <http://www.library.yale.edu/~llicense/index.shtml>), pointed us to these agreements where they had been posted online as part of an information-sharing community.<sup>16</sup> An interesting point about many of these contracts is how durable they have been in enshrining agreement over time. Agreements between a commercial vendor to film library assets and sell them as microform products needed only to be amended to include a new provision for digitizing the same assets and selling them as digital files. That durability serves as both a good sign (that original agreements were comfortably negotiated) and a warning (that the agreement you sign today may still bind you tomorrow).

Commercial attorneys with whom we discussed the general issues raised by agreements governing not-for-profit/commercial collaborations raised five issue areas for the nonprofit community to be sensitive to. The first concerns protection of the nonprofit's own name and "goodwill." Because one of the primary assets that a cultural institution has is its name and reputation, a nonprofit should exercise considerable care in ensuring that it has appropriate rights to approve branded products and uses of its name. Second, the definition of the type of income and how it is received has to be worked out under the eye of an attorney or tax accountant, because bad planning in this area can jeopardize a nonprofit's federal tax-exempt status.<sup>17</sup> Third, there is significant room for creativity around how a university library, say, can be compensated for the work it does to locate and prepare certain assets in its collections for publication or distribution. Fourth, be careful about the structure of any royalty arrangements: ask your partner for a royalty based on revenue rather than profits, because accounting shenanigans can sometimes affect how "profits" are defined. And fifth, again, take extra care in defining exactly what the end-product will be. One attorney warned the nonprofit community not to squander time securing approvals once production is under way. "Nothing is more frustrating," he said, than to be kept from being in the marketplace by a cumbersome approvals process that is costing time and money.

### **Questions and responses from the community**

We solicited a great number of reflections from the field about how these collaborations have gone to date. The interview methodology for this preliminary report involved scheduling conversations structured around sets of questions with cultural and educational institutions, then interviewing commercial-sector stakeholders and commentators, and also reviewing sample non-confidential agreements, revenue statements, and other information provided to us. This system allowed us to record and

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<sup>16</sup> See also: <http://www.lib.umich.edu/mdp/um-google-cooperative-agreement.pdf>.

<sup>17</sup> Needless to say, this report is not intended to serve as anything like advice for nonprofits about how to deal with issues of tax, revenue, and what the IRS calls "unrelated business income." For one up-to-date and masterful review of the main issues, see Marion R. Fremont-Smith. *Governing Non-Profit Organizations: Federal and State Law and Regulation* (Cambridge: Harvard University, 2004).

then process into this report many key impressions from current and potential stakeholders about today's business relationships in the field. Impressions from the noncommercial sector are grouped below. Impressions that we recorded and processed from commercial sector representatives follow. Conversations with both groups as often as not included recommendations for improving current dialogue and business practices. We have highlighted these general recommendations and then selected several to emphasize at the end of the report.

**Question set: How have you determined what assets at your institution are suitable for digitization and/or publication, and whether to consider collaboration with a commercial partner? How do you find and select commercial partners?**

Many of the answers to the first question centered on how to define "demand" for these materials within and outside of the institution where they are held. One library administrator long active in the field of scholarly text digitization told us that he determined asset suitability using the criteria of "faculty demand," "student demand," and the institution's own "sense of value." A foundation director said that she "polled scholars" about what materials they would like to see available for commercial distribution. Another librarian stressed that "demand" is not a static thing, and that stewards needed to anticipate market changes. His university's film and video collection received many urgent inquiries at the time of President Reagan's funeral about film clips of the assassination attempt on Reagan in 1981; many of the same organizations returned looking for clips of the assassination attempt against the Pope for their news coverage needs a few months later.

For one university, the key criterion for whether and how to select partners to work with on publishing or otherwise distributing these assets was to be able to come to terms that were consistent on the issues of "rights," "economics," and "standards." Partners who have demonstrated an appreciation of educational, scholarly, and archival virtues of materials—and what one university provost called "the potential for potential"—naturally stand out. Does that commercial entity "think about things the same way as we do," the provost asked. Do they recognize the importance of rights to use the material developed "in an open and academic environment," and do they acknowledge that "the university's skills at curation and archiving have value in the broader commercial world"? Several interviewees stressed doing due diligence on potential commercial partners and calling on colleagues in the field to get full references and histories.

It tends to be easier to find partners for large projects, one librarian told us. Finding commercial partners is "not difficult at all," he said, "especially if you are a customer" of these same companies. Look to see which commercial entities are selling materials like those in your collections; indeed, "they are usually selling stuff to you." We found that businesspeople serving as members of boards—boards of trustees, or boards of advisors—or otherwise acting as friends of the institutions were invaluable in "paving the way" and introducing business partners. More than one told us that board members helped to introduce and secure business arrangements. One set of university administrators told us that there is nobody at the university whose job it is to "scan" the

humanities space for commercial partners, although these administrators were “informally scanning” it all the time. A faculty member told us that, in some cases, commercial partners will find you; a television production company seeking a certain digital asset for a documentary film “probably just Googled us.”

That said, a number of people we spoke with encouraged the field to find new ways of more systematically attracting and engaging appropriate commercial partners. The director of a research institute proposed holding a “trade show” for libraries, museums, and archives with publishable or licensable repositories. Another interviewee discussed collaborating on web-based portals or online guidebooks promoting the holdings and services of different institutions—with an emphasis on the smaller institutions that may find it difficult to attract attention otherwise. A faculty member encouraged institutions in the field to be well-prepared to enter into agreements so that projects could move quickly once commercial partners were attracted. Having basic business procedures worked out within the host institution ahead of time was emphasized, as was having collection of existing agreements at the ready to serve as templates for future arrangements, and “rate cards” available for the price of services and sales and licensable content. Despite the progress made at several leading institutions, it is rare, another faculty member told us, for a cultural organization to have an organizational structure where it clear which person has the right authority to answer a commercial proposal. “No one knows,” in such circumstances, “where to forward the pitch.”

**Question set: How well have you met the challenge of estimating cost and demand and otherwise building a sound business model? What measurements have you used in studying successes and failures? What are the avoidable mistakes?**

Many of the interview participants told us how much they had been learning in recent years about building the right sorts of commercial relationships, strategic plans, and business models. Much of this knowledge is being institutionalized, especially at the largest institutions. The Smithsonian Institution, for example, has established Smithsonian Business Ventures to oversee its significant number of transactions concerning physical museum stores, print and online catalog businesses, and product development and licensing arrangements for items ranging from books to wallpaper to holiday ornaments. The Field Museum has its Business Enterprises Area for high-end reproductions, licensing arrangements, and billable special events; the Getty Museum and Research Institute has an Enterprise Retail Group; and the Library of Congress is organizing a Business Enterprises Initiative. Some of these institutions have even compared their own new management structures against other institutions in the sector and, farther afield, against revenue-generating nonprofits like National Geographic and the Wolf Trap Foundation for the Performing Arts.

Scoping the market for one’s products and services is an ongoing process. A considerable amount of research is required to develop an understanding of the market and the proper place of an organization’s products or services in that market. Many of our interviewees told us that this marketing work involves both art and science. One archivist in the recorded sound arena told us that “you get a feel for it,” especially after

working with commercial distributors who have sales and marketing staffs. That part actually is “not difficult”; “after a while,” one is able almost to intuit how many copies of an instrumental bluegrass album will sell, versus a collection of songs from the Burmese highlands, versus Mexican mariachi. Vendors and distributors will help “suss out” demand. When you ask your or your commercial partner’s marketing department what their forecast numbers are, one curator told us, ask them “mission questions” too. “What price do we have to pay,” for example, “to successfully get the message out about the existence of this unique or important recording?” Another library administrator told us that estimating production costs in particular can be challenging, even though it is here that the community has made great strides in maximizing efficiencies and improving its own learning base. While successes in the marketplace are easy to appreciate, the reasons why products do not succeed can be difficult to understand. Does a product put out to market fail because it is not a good product, or because nobody wants it in the form it is offered in, or because the right market and sales plan has not been developed for it? The ways in which prices on products and product lines are set—by both commercial organizations and noncommercial entities like JSTOR and ARTstor—frequently came up as a question in our interviews. One university provost told us that an educational institution needs to “balance” what to charge for goods and services in order to make its assets available. “It sticks in my craw,” he said, “that we have to charge at all.” Shouldn’t smaller and less wealthy institutions be given a better price on educational materials than the richer institutions with large endowments? A museum librarian told us that there is always an inherent tension about trying to generate revenue versus pursuing a fully open access model, which is what the Internet now allows for and what many believe scholarly publishing should support.

To many in the community, an economic failure does not always mean that a project was unsuccessful. Some of the institutions we spoke with allowed that their publishing and licensing programs, units, and divisions do not always operate on a profit, when internal and external audits are done toting up the full direct and indirect, hard and soft costs. Some carry a five- and six-figure annual deficit, and a few others even more than that. In our conversations, success in publishing and licensing was sometimes defined as just getting something from a collection published and pushed out into circulation—part of the institutional mandate of promoting access—or getting a mention or other credit for the supplying institution on a book jacket, CD jewel case, or on-air. One foundation director told us that providing sufficient and clearly visible credit to participating institutions is “key.” A music archivist told us that, for a CD about the music of Afghanistan, it’s not only the inherent market value of the music that he is developing; it’s getting the full story out about that music on the liner notes, in catalogs, in reviews, and in playlists. A DVD publisher said that part of her mission is in fact to correct “market failures”—situations where, for example, there are no movies in commercial distribution that can facilitate teaching the history of silent films or film history generally. A music publisher told us that the founder of his division once licensed a recording that was so commercially successful, that the investments required to respond to the success almost drove him out of his core mission-oriented business, such was the demand for this soundtrack, the other music from this performer, the new label, and the recorded sound archives of the institution. After that experience, when the demand for other artists

crested toward the same “zone,” he advised them to go find another label. “We are looking to do things that are not supported by the private sector,” he said. “If you are doing it right,” another curator told us, “the two measures of success will coincide. You will be getting more products and news about your collections disseminated, and you will be receiving more revenue.”

In measuring success and failure, one has to fully factor in all the costs of what one’s publishing partner is doing, from their production and digitization costs to their costs of marketing and sales. Understanding these costs helps to put the product or service you are trying to sell in its proper context. When your partner has a booth at the American Library Association annual meeting to market your collection, that is a part of the cost structure that must be recognized and recovered, one librarian explained. A university librarian told us that understanding distribution costs in their entirety is critical. You must develop a comprehensive understanding of your costs if you are truly going to be able to manage for operational efficiencies, cover costs, or generate surpluses.

**Question set: What are the key issues to think about and the biggest hurdles to overcome when negotiating agreements and structuring relationships with a commercial partner?**

A number of interview participants expressed interest in a freer exchange of information about these collaborations and suggested the development of a collective knowledge base of the experiences that institutions have had with commercial companies. One university chief information officer complained that without such a source of shared experience, each commercial transaction in the field becomes what he called a “one-off,” a perpetual “Groundhog Day” where the lessons learned are never passed along to the community as a whole. One interviewee suggested that there be someone focused on collecting and making available the information that is freely available or that has been published by various entities. There are some case studies that have been published, and there are many websites with a great deal of information, but it is not organized in a way that is accessible to the people who could most benefit from it.

In digitization agreements, one university librarian told us that her primary concerns were about the handling of library materials by third parties. Her preservation staff had significant input into where book scanning would take place (on campus? near campus? offshore?), and on what kind of reliable production and return schedule. Another issue concerned what the library would receive in the process, in addition to its original book. Would a copy of the digital image be made available? Under what conditions could the library use it? Post it? Publish it? Certain companies, she told us, prefer to restrict the library’s use of the digital files created from the library’s materials, certain that any public postings of such material would compete with or possibly even cannibalize the publisher’s own customer market.

As regards editorial issues, “never be passive,” one foundation director told us. “Several commercial partners had come to us offering to take care of everything, like design,” she said, “but we knew we had to maintain control over the look and design, otherwise we

would lose our connection to the scholars and the contributing archives.” “Control the packaging,” another told us.

The exclusivity that many commercial publishers and partners sought presented many challenges. Many participants told us, in the words of one nonprofit administrator, that “we need to be better at retaining rights,” recognizing that each contract is or should be “limited—temporally, sectorally, geographically.” “We should retain all rights except for that specific set which we license,” he told us, “and then explore print-on-demand, giveaways, textbooks” et cetera. Another faculty member told us that he is specific with a capital ‘s’ when he licenses use rights to digital images his virtual reality lab creates—the license for an ancient site recreation, for example, would be specifically for that site in a particular year, in a particular month, on a particular day, at a particular hour! “We need to be more sophisticated,” another librarian told us, “in recognizing that the product we contract over is just one product among many” that can be developed from the core material.

A faculty member and administrator told us to advise others in the field to carefully “think through” the internal intellectual property ownership policies when negotiating with commercial partners. For example, do faculty retain ownership of their course materials, limiting ability to distribute those materials (whether for a fee or for free) in a university context? Fathom was created without working out ahead of time how the IP assets would be managed, one administrator told us.<sup>18</sup> Research financed by commercial firms at one university was structured such that commercial revenue resulting from it would be split 50 percent to the commercial company, 25 percent to the university, and 25 percent to the students who had performed the research. Another librarian reminded us that royalty rates should differ based on what stage the materials were in the process before the commercial partner entered the picture. “If you have digital images already,” he told us, “you should receive a higher royalty,” because you are saving the commercial partner capital at the outset. One person thought it might be beneficial to involve in such discussions representatives of offices of technology transfer—nearly all major universities have them—who are dedicated to patenting and commercializing university research that has market potential. These offices tend to be focused on research, inventions, and discoveries in the sciences, but the expertise in intellectual property matters and licensing that has been developed in these technology transfer units could well be valuable for exploiting the potential of digital media in other fields. The knowledge base at these offices is considerable, and in many cases it is available on the web.<sup>19</sup>

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<sup>18</sup> See Bernard F. Reilly, Jr.’s profound contemporary analyses, “Merging of Diverging? New International Business Models from the Web,” *Museum News* (January/February 2001) and “What the Cultural Sector Can Learn from Enron,” *First Monday* 7, no 2 (February 2002). See also Chris Beam, “Fathom.com Shuts Down As Columbia Withdraws,” *Columbia Spectator*, January 27, 2003.

<sup>19</sup> See the work and reports of the Association of University Technology Managers at: <http://www.autm.net/index.cfm>. UC Berkeley’s is called the Industry Alliances Office.

Reporting over revenue and cash flow also presented issues. One administrator recommended that, because of the complex politics and infrastructure within many nonprofits, it is important to insure that revenue from a given collaboration be earmarked to support that effort, and not to be diverted to other purposes or to cover the institution's general administrative costs. Some of our interview participants told us that royalty reports sometimes appeared less frequently and with less detail than they expected or wanted, and these could lead to misunderstandings. One librarian told us that she had budgeted cash flow from her major commercial partner according to her interpretation of the agreement, only to be unpleasantly surprised that the payment would be made only after revenue was recognized by the commercial partner for accounting purposes, rather than when the cash from sales was received.

Many project participants encouraged others embarking on such relationships to “push” for “mission-oriented deal points,” especially pricing structures that honor the overall mandate of the sector. Insure, for example, that small, independent institutions will be charged lower prices than large ones. Tier digital access pricing according to the resources of the customer—in a kind of means testing for consumers worldwide. Several participants reminded us that insisting on such mission-oriented points needed to be done not only in commercial deals, but in not-for-profit publishing initiatives as well. Some not-for-profit publishing and distribution projects, for example, do not give their member-contributors free or sufficient access. One university librarian told us that she sought to negotiate a discount off the end-published product—ideally in perpetuity. This, she said, is a goal that is “sometimes elusive,” especially when the contributions of her institution would make up only a small part of the overall collection. Pay careful attention, another administrator told us, to anything that will affect the “persistence and preservation of intellectual heritage.”

Several experienced university librarians agreed that it can be helpful to stage a commercial partnership with a defined “pilot” stage at the beginning. This phase “lets you learn about all of the angles: on what effect the collaboration will have on the physical collection, on user behavior, on what publishers and authors and other content creators and vendors will think, and on our reputation as a whole.” After a certain period—one year, say—both parties can assess or reassess costs and workloads and other variables. “The commercials all want long contracts—like 10 years,” one told us. “We’re often trying to shorten them, building in steps and opportunities for cost-adjustments.” It often takes both parties longer than they expected to ramp up production. When you do a pilot, one university librarian advised, make sure it involves a more-or-less random selection of materials, so that all types of challenges can be anticipated before live production begins. And not just challenges. One university librarian involved with Google now told us that the Google Print project would generate massive digital text files that were likely to have tremendous ancillary benefits—“transformative uses”—for the development of automated searching techniques and semantic web applications in fields from astronomy to bioinformatics.

**Question set: Does your organization have adequate access to the legal, financial and other expertise it needs to evaluate and pursue these collaborations? What are the best sources of legal, financial or other advice for these projects?**

Regarding access to expertise and support for crafting business relationships and agreements to govern the use of cultural materials held by universities, one library administrator told us that while in theory the necessary expertise should be available within a major university, in practice it often is not. Legal assistance is most often the easiest to secure, as draft agreements are often put or required to be put before university general counsels. At universities, libraries, and museums, it was generally agreed, general counsels want to protect the institution, and are understandably risk averse. The scrutiny over a potential deal often may start from the position that the deal is a bad idea in the first place.

On the business side of these transactions, the sentiment expressed by one museum librarian is fairly typical: “We do not have sufficient expertise or support here to do business planning,” he told us. His institution would benefit from having such support extended to it, he said. There is no tradition of going, say, to the faculty of your business school and asking for advice on proposed commercial transactions. “A lot of people say, we need a lawyer to help us,” said one museum administrator, “when in fact what we are facing is a business decision.” There may be listservs and discussion groups online, but you tend not to take these decisions to those public fora, especially when you are looking to receive particular bits of advice on pricing, for example. As a result, there is rather a lot of—“too much,” in the view of one librarian—reliance on one’s commercial partner for advice.

Another suggestion we heard for overcoming legal and business risks was to have major foundations “indemnify” or partly protect institutions from future losses where experimentation is required to balance mission, revenue, and the promise of open access. While on the one hand this may seem helpful, it is unlikely that those with substantial assets to protect will want to expose those assets to potential liability. “We have board members who are generous with their time and lawyers whom we pay,” a foundation head told us, “but when the rights are too complex we drop plans to publish or distribute that item—a sobering consequence, actually, of not having the legal apparatus of, say, a Paramount.”

Other institutions including several prestigious archives have spent significant amounts of funds on consultants like McKinsey & Company and Gartner. Some found that they have “wasted a lot of money”; others, including one working with digital video, that they had “saved a fortune.” The latter reaction probably accounts for why many consulting firms including the two mentioned here have opened divisions to deal with the issues of nonprofit institutions.

#### **IV. Recommendations of Interviewees**

During interviews with representatives of commercial and non-commercial institutions, we sought to collect recommendations for future activity—actions that might be taken by individual organizations, and others that might be implemented more broadly across the community. In some cases, a recommendation suggested by one interview subject was shared with other interviewees for their reactions. The recommendations provide a snapshot of how the community views some of its most pressing needs. Our hope is that, from these recommendations, an action agenda might emerge both for individual organizations and for the cultural community more broadly.

##### **Recommendations for Individual Organizations**

###### Assemble inventories and take the initiative

Several library administrators recommended that individual institutions put their own organizational houses in better order. One suggested that cultural and educational institutions more systematically identify their assets and quantify them. “Put intellectual property administration under one office,” as some museums have done, he urged us, so that rights can be exploited from a single management unit inside. If libraries and others need guidance or tools for identifying, valuing, and managing the intangible assets they have, the people who are properly equipped to do these valuations are curators who have been on the inside, he said. On the other hand, several library and archive directors have hired outside specialists and consultants to do such inventories. Nonprofits have to take the initiative in finding deals and in executing them, several commercial interviewees said, rather than sit and wait for a commercial vendor. “You go in that way, you control your product,” said one. “Start with a market-oriented inventory of the assets you have, and then get a sense of what it will cost to extract it and package it and produce it,” a venture capitalist told us.

###### Develop Internal and/or Shared Expertise

One museum employee indicated that the community would benefit from more legal resources and business planning resources being available to the sector. Internal legal advice, he told us, has been excellent for contracts, but his deals could benefit from “more cutting-edge legal advice,” especially now in the digital age. “A lot of the standards have not been litigated,” he told us, referring to music and audio files in particular. He told us that he “would love to have more expertise in business planning” available. “We do produce business plans; they’re required” by the institution, he told us. When it comes time to calculate projected income, he would “love to have a super computer software system to help us analyze sales data—what products appeal to whom?” Many interview participants told us that they have been focused in recent years on learning more about business planning and product development—and not just for dealmaking with business enterprises. Some in the field have even begun to conduct what one museum librarian called “retrospective business planning,” applying contemporary business models and metrics to the distribution and sales statistics of publications from previous decades in order to understand the overall microeconomic

economic behavior of, say, a museum publishing program over a 10- or 15-year patch of time.

Businesspeople—stakeholders in this process directly or indirectly—echoed several recommendations from the nonprofit side. One publishing consultant told us that the community needs to learn the “vocabulary” of deal-making—and develop the cognitive skills to enter confidently into deal-making. A lawyer we spoke with expressed this in similar terms. “Help to structure the thinking of nonprofits so that they can communicate in the same language as for-profits,” he said. This attorney related a historical anecdote from the Allied intervention in Soviet Russia, where, in 1918, British soldiers were advised to repeat the words “yellow-blue” (roughly, “I love you” in the phonetic Russian) as they prowled around Archangelsk in the cold, looking for company. Knowing key phrases often works. Understanding how the other side is thinking about the arrangement is even better. “If McGraw-Hill Higher Education says they want an exclusive,” said one entrepreneur, “what they really mean is that they want you to exclude Pearson and Thomson....” One research institute director suggested that a booklet or a website could be prepared that would be available to noncommercial organizations considering these deals—material that would include sample contracts, and a short glossary of terms like “indemnification.”

### Be Assertive and Be Realistic

When you do come to the contract stage, make everything, especially your current and potential differences and disagreements, explicit. When you establish governance mechanisms for the project, in addition to building in annual reviews of progress, have a shorter-term review period for these predefined, potentially “hot-button issues.” Choose the issues that are most important to you. As one participant said: “You won’t go wrong if you always push for short exclusivity periods and higher royalty rates.” Wherever possible, a venture capitalist and an accountant agreed, noncommercial institutions should conclude agreements that base royalties on revenues, rather than unit sales. If an audit is ever required, the dollars received from sales by a commercial company can be tracked through financial statements and tax returns. Remember, another told us, that there often can be no communication in a company between the business people who make the deal with you and the editorial people who manage your content. Make sure both sides meet all the players before the collaboration really begins. But don’t try to accomplish more than is realistic. Several commercial representatives insisted that the community recognize that not everything—indeed, in context, actually very few things—can be made into a business. “Everyone is bludgeoning themselves to death over sustainability,” one publishing consultant told us, “but not everything can be sustainable.” Another entrepreneur reminded us, with equally colorful language, “There is no such thing as a business plan for saving the redwoods.”

### **Recommendations for the Cultural Community as a Whole**

#### Assemble “best [business] practices”

The general recommendations that we heard and processed included first and foremost compiling and making available “best practices” for these commercial relationships.

These “best practices,” however they might be written or compiled, published or distributed, would include “case studies” of selected deals, especially the fairest of them, that have been done to date. (One museum had completed an internal best practices and competitive landscape report for its own deals to date; and another library recently had finished and published a major internal review.<sup>20</sup>) Some thought it would be useful to create a reference database of commercial-noncommercial relationships that could be sorted by keywords indicating the type of deal (“image licensing” might be a term in that thesaurus) or the name of the commercial partner (“Random House,” e.g.). Another librarian overseeing moving image collections asked for some entity to make available form agreements, on the model of the representative licensing agreement that the American Film Marketing Association had created for its members in previous years. “We had put together an advisory committee made up of five international distributors and five producers,” he told us, and “every few months they sat down to talk about these problems. A committee of six lawyers volunteered and drafted these things,” he said. A similar source for the nonprofit community would be helpful. In general, there was considerable interest in there being greater transparency to allow cultural organizations to learn more from one another. A number of interview subjects expressed the hope that copies of specific agreements that have been concluded with commercial entities could be made more readily available. In thinking about providing access to best practices, another attorney indicated it would be helpful for the community to define “the warning track” or danger zone for agreements—a sort of *worst* practices—and show that it’s further away than most people think. Having examples of how people crossed the line and wound up disregarding mission would be instructive, too.

#### Gain a Better Understanding of Copyright, and Consider Reforms

We heard from numerous interviewees the desire for guidance through the field of copyright. Some were looking for resources like Lib-License—some kind of community infrastructure that would provide background guidance and a shared forum for discussion and advice—while some felt that a more dramatic approach was needed.

Several noncommercial and commercial participants in our study told us that today’s copyright law—with its “draconian” and “out-of-date” restrictions—does not properly reflect the reality of creation, publication, technology, and use patterns. As Associate Librarian of Congress Deanna Marcum recently noted, in 1790, in the nation’s first copyright act, the U.S. Congress decided that the appropriate limit for copyright holding should be 14 years. In the past 40 years alone, however, “Congress has extended the term for copyright eleven times. The most recent extension was in October 1998, when the Congress determined that the limit should be the length of an author’s lifetime plus

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<sup>20</sup> See *Business Enterprises at the Library of Congress: Planning the Library’s Strategy for Sales and Fee-Based Services* (Washington, DC: Library of Congress, July 2003). Potential business partners have been “perplexed and deterred by the lack of databases cataloging the special collections, by lengthy and ill-defined review processes, by very slow turnaround times, and by micromanagement of some elements of product development accompanied by no management of others.”

*seventy* years.”<sup>21</sup> One librarian direly warned that these restrictions will “drag the entire body of Western cultural knowledge” under a dark rock. The sector as a whole has “a difficult time” understanding how rights and copyright work, and how to balance open access and digital rights management. As Marcum has written, “One of the great ironies of the digital era is that, as technological means for expanding access to information have vastly increased, so have legal restrictions on providing access.”<sup>22</sup> This is true not just for text but for audio and video as well.

In 2005, the Library of Congress has begun to host a study group to analyze that section of the copyright regime that governs the work of libraries and archives—how they receive and consume intellectual property, and how they produce and distribute it. Titled, after the relevant part of the U.S. copyright law, the Section 108 Study Group, and launched under the aegis of the NDIIPP and the U.S. Copyright Office, the effort has as its charter “to conduct a reexamination of the exceptions and limitations applicable to libraries and archives under the Copyright Act, specifically in light of the changes wrought by digital media.” Co-chaired by a university law professor and librarian and the former general counsel of a major publicly traded publisher, the group includes representatives from commercial enterprises and noncommercial institutions who together have major stakes in changing the legal regime governing this sector.<sup>23</sup> As the establishment of this group signifies, there is great interest among both commercial and noncommercial interviewees for additional work in the area of copyright.

#### Study the General Economics of the Field

Many of the interview subjects we questioned expressed the belief that now is a time when it is necessary to develop a better sense of the basic economics in the field overall. Many scholars, one administrator told us, have trouble distinguishing between price and cost. “Libraries,” he said, “the most important resource to them, seem to be free.” Providing a better sense to institutions across the sector of the true costs of sustaining libraries and museums and research programs would be of benefit to commercial publishers, too. This is an important point. After all, it was in reaction to Corbis’s early behavior, the hard-driving pricing and negotiating stances of publishers like Reed Elsevier, and other commercial business practices that library groups banded around open access models, cut their purchasing budgets for monographs and subscriptions, and continue, indeed, to do so. Many of these hard feelings—and some of these questionable business practices—endure. In our talks with noncommercial institutions, we heard publishers being called “inflexible,” “unwilling to change,” and “exploitative.” The

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<sup>21</sup> Deanna B. Marcum, “The DODL, the NDIIPP, and the Copyright Conundrum,” the European University Institute, Florence, Italy, March 19, 2004.

<sup>22</sup> Deanna Marcum, “The Sum of the Parts: Turning Digital Library Initiatives into a Great Whole,” keynote address to the Joint Conference on Digital Libraries, Denver, June 8, 2005.

<sup>23</sup> For the membership of this committee and other additional information, see: <http://www.loc.gov/section108/>.

creation of some sort of analysis of or guide to the costs and economics of the field would help to address many of the concerns and needs expressed in this area.

#### Establish exhibitions and agents

Several interviewees suggested holding a “fashion show” for assets within cultural and educational institutions. “We need a Frankfurt Book Fair for the born-digital,” one respondent told us—a trade fair for prospective partners to visit. A foundation director recommended that a go-between or agent be created—in the typical role of a scout, or an agent—“a liaison” between commercial entities and cultural institutions, “one schooled in the ways of nonprofits.” Others requested that the sector spend more time and resources instructing stakeholders in what one called “tradedcraft”—what trustees are supposed to do on a board, for example, and how to buy directors and officers insurance. Other forms of institutional cooperation were also encouraged. Look at how many of the same books are being digitized by different libraries and presses, one librarian told us. “Look instead at what is in special collections.”

#### Assemble model business plans

A number of interview subjects expressed the hope that copies of specific agreements that have been concluded between other parties could be made more readily available. Another librarian told us that model business plans for library-digitization and library-publishing initiatives, especially some of the larger ones, and especially some of the multi-year and multi-institutional projects, would be a great help. “We have a draft business plan for this little imaging database,” she told us, “but not yet for the larger project. How much revenue do we hope to generate? What amount of staff resources will this take? How will this contribute to the mission?” A digital librarian amplified this point. Some of the business models even of the most sophisticated digital publishing initiatives today are seen as obsolete, he told us. “We cannot base our new models purely on selling access to content.” New business models are emerging at a bewildering rate. “What can we learn from the entertainment industry,” one interviewee asked, which has come up with new, flexible business models that allow for the “iPodification of content”? In such a dynamic environment, commercial/noncommercial collaborations may well help the nonprofit sector remain current and knowledgeable about possibilities.

## V. Conclusion

In concluding this report, we return to the governing objectives—the mission—of the not-for-profits we interviewed. As one librarian told us, “our highest mission is to open up our knowledge resources,” and to make them as accessible as possible. “We like to develop tools” to “make the treasures that we are sitting on available to the widest audience. We like to give it away. But we don’t have the resources to do that,” this librarian said, “so we are trying to develop funding streams/revenue sources to achieve this higher end.” Not everyone agrees that this is a business for noncommercial entities. One museum executive said flat-out that “it is inappropriate to get revenue based on commercial relationships. When we think of a profit motive,” he said, “we lose sight of our own business.” Seeking ways to license images commercially, for example, which his institution does, can get in the way of the free flow of research and education, he said.

Looking ahead, the future most likely will involve a range of solutions. As one interviewee, a businessperson turned archivist, told us, over the short term we will see a mix of commercial, noncommercial, and do-it-yourself solutions for digitizing and publishing all of the content from these cultural and educational institutions. Some of the noncommercial solutions may not look altogether different from their commercial equivalents when it comes to pricing plans and market behavior. Some scholars and librarians will “flinch at the very words business plan,” an entrepreneur told us, just like the word “academic” can have pejorative connotations in the business world. But the skill sets that get developed from business planning will be of value to cultural and educational institutions whether they are going it alone or just modeling alternative futures. “Business expertise,” he said, “is relevant no matter what your attitude is toward collaboration with a commercial party.” Lines will blur. Libraries will become bigger publishers. Publishers will become information repositories and archives.<sup>24</sup> And commercial companies will no longer always be seen as the enemy, the dark side, or the devil. “We respect everybody’s right to make a buck,” one digital librarian told us. Over the longer term, it is likely that all parties will be involved in building the common digital library of millions of items—text, images, books, specimens, sounds. The entities involved in the process, whether they are commercial or nonprofit, will need to watch their numbers.

The fact is, a bomb *was* dropped when Google made its announcement in December 2004—but it was just another bomb in a new, growing war against traditional ways of thinking and doing in publishing, education, information, and culture. From the Internet to Napster to the iPod to Google, the past itself is under assault. In this battle, new balances between the market, broadly defined, and the mission will need to be found.

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<sup>24</sup> For a comprehensive review of this dynamic, see John Unsworth, “Pubrarians and Liblishers: New Roles for Old Foes,” keynote address at the 2005 annual meeting of the Society for Scholarly Publishing, Boston, June 2, 2005, at: <http://www3.isrl.uiuc.edu/~unsworth/otherpubs.html>.

But this is not new. Ellen Dunlap, president of the 193-year-old American Antiquarian Society, in a talk to the American Library Association's 2005 midwinter meeting, quoted from amusing and highly relevant correspondence between the legendary book and microfilm publisher Albert Boni and the Society from 1955, when the same issues arose even then concerning marketing, scheduling, pricing, capacity, timing, and contract negotiations. Nor are the issues of business management unique to cultural heritage nonprofits.<sup>25</sup> Nor are they only an American problem.<sup>26</sup> The good news is that, in the end, as one digital librarian told us, "we"—cultural and educational institutions, and businesses—"are more alike than different, as we both start to maintain digital collections for the long term." Librarians speak increasingly today of building the "global digital library." Museum curators speak of "heading toward a kind of digital global museum." And Google, which has already cataloged more than 8 billion web pages and one billion images, has put out there as its stated mission "to organize the world's information and make it universally accessible and useful."<sup>27</sup> "We tend to think of ourselves in different worlds," one librarian told us, "when in fact we are all occupying the same one." It well may be that, with greater general dialogue and some of the recommendations, above, implemented, not-for-profit/commercial collaborations will proceed much more fluidly in the future, and allow for greater investment from the private sector in the digitization and publication, broadly defined, of cultural heritage material.

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<sup>25</sup> See Michael Skapinker, "Non-profits must evolve to survive," *Financial Times*, May 5, 2005 (Even among international development nonprofits, "there is increasing pressure for more accountable and competent management..."); and Steve Case, the co-founder of AOL, on how to catalyze the growth of nonprofit organizations "running for-profit ventures to finance social change," in "Purpose and Profit Go Together," *Wall Street Journal*, May 10, 2005.

<sup>26</sup> See "Museums should be business-like," in BBC News Online, <http://news.bbc.co.uk/1/hi/entertainment/arts/3907425.stm>. A report from the U.K. Public Accounts Select Committee quotes the Committee Chairman Edward Leigh: "Unbelievably, some museums and galleries have made losses on activities that were supposed to generate income, and have an inadequate grasp on the costs involved." See: <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmpublic/430/430.pdf>

<sup>27</sup> See Deanna Marcum, "The Sum of the Parts"; Ben Williams, lead librarian at the Field Museum, quoted in James Gorman, "In Virtual Museums, An Archive of the World," *New York Times*, January 12, 2003; and Delaney and Barnes, "For Soaring Google, Next Act Won't Be as Easy as the First."

## About the Author

**Peter B. Kaufman** is the president and founder of Intelligent Television ([www.intelligenttelevision.com](http://www.intelligenttelevision.com)), a new company that executive-produces nonfiction programming in close association with libraries, museums, universities, and archives. Current productions include a history of the American South in the 20<sup>th</sup> century in association with the University of Virginia, a television and radio series about memory in America in association with the Library of Congress, the story of the world's largest failed art museum with a consortium of international museums, and a history of labor in America with a consortium of American universities. He is a member of the national Commission on Cyberinfrastructure for the Humanities and Social Sciences, supported by the Andrew W. Mellon Foundation and sponsored by the American Council of Learned Societies, and a member of the Social Science Research Council's Digital Cultural Institutions Project, supported by the Rockefeller Foundation.

Mr. Kaufman's current research with Intelligent Television includes an investigation of the economics of open content with the support of the William and Flora Hewlett Foundation; consulting with the Library of Congress M/BRS division on marketing strategies for the Library's moving-image and recorded-sound archive; and developing new, open, international production models for television and film with the support of a variety of international government agencies.

Mr. Kaufman previously served for three years as director of strategic initiatives at Innodata Isogen, where he oversaw the company's relationships with libraries, museums, and universities; for seven years as president and publisher of TV Books; for five years as president and executive director of PUBWATCH; and for four years as director of publications at the Institute for East-West Studies in New York. A long-time Senior Fellow of the (non-profit) World Policy Institute at the New School ([www.worldpolicy.org](http://www.worldpolicy.org)), he has worked at a variety of not-for-profit institutions (including some that were intentionally not-for-profit), and he has written extensively on publishing for *The New York Times*, *The Nation*, *Publishers Weekly*, *Scholarly Publishing*, *The Times Literary Supplement*, and *International Book Publishing: An Encyclopedia*.