

10 Intellectual Property and Public–Private Partner Motivations: Lessons from a Digital Library

Melissa Levine

Introduction

Cultural institutions such as libraries and museums are characteristically associated with public interests, broadly considered here as encompassing both the public good *and* public goods.¹ These institutions often engage in collaborative relationships with for-profit firms or enterprises to better further a public educational, scholarly, or other publicly oriented mission. Thus, the public–private partnership model (PPP) is not new for memory institutions like museums, libraries, and archives, whether governmental actors like the Smithsonian Institution or private ones like the J. Paul Getty Museum. These relationships typically leverage mutual interests and recognize the distinct motivations of the respective parties. They often embody a symbiotic exchange of corporate expertise and financial resources, on the one hand – and on the other hand, subject matter expertise and collections associated the cultural institution, whether a museum, library, or archive. This is especially the case where the partnership facilitates the ability of a cultural institution to improve access to reproductions of collection images, books, films, and educational materials.

This chapter considers a partnership formed between the University of Michigan Library (UML or the Library) and Google Inc. (Google), leading up to the creation of the HathiTrust Digital Library (HathiTrust). It reflects on the key motivations for this collaborative relationship between the Library as a cultural institution housed within a public research university serving multiple stakeholders and Google as a private corporation with a duty to its shareholders. This PPP leveraged common interests *and* recognized the distinct goals of each partner. As each partner entered the relationship, it remained true to its core responsibilities and missions. The genesis of and ongoing collaboration exemplified by HathiTrust thus provides a case study of a unique and

¹ Many kinds of corporate entities address public or cultural purposes in each country. In this chapter, “cultural institutions” refers to organizational mission rather than the particular formal legal status as, for example, government agency, for-profit, tax exempt, or other corporate form. This chapter considers high-level common features of public–private partnerships in the cultural and educational arenas – regardless of the specific kind of entity. That said, there is an overarching recognition of the difference between an entity that has a public purpose for its stakeholders and a corporation with a primary duty to its shareholders. Further, the use of the terms “partner” and “partnership” throughout this chapter refer generically to the formalized collaborative relationships discussed and are explicitly not partnerships in the corporate legal sense.

successful PPP with broader implications for global intellectual property (IP) governance and the U.N. Sustainable Development Goals (SDGs).

As explored in this chapter, PPPs such as HathiTrust may help support the SDGs in the global context. But the inconsistency of library exceptions to copyright across nations as well as the lack of harmonization of such exceptions globally makes it difficult to apply such exceptions across borders. These IP concerns place high risk on partners and pose a huge disincentive for cooperation that otherwise might benefit research and education through libraries in support of addressing SDGs. Thus, the multilateral public law framework, in this case, the global copyright regime, is an essential aspect of understanding the work that PPPs can do to foster global development.

Arguably, the United States was a particularly fitting jurisdiction for the HathiTrust project, given the solid foundation of the fair use exception to copyright as an established part of the US Copyright Act,² and its robust interpretation in US case law. US copyright law specifically limits the copyright holder's rights by authorizing special uses for libraries and archives in Section 108 of the 1976 Copyright Act.³ In addition to special reproduction rights for libraries under prescribed circumstances, US copyright law additionally features fair use as stated in Section 107 of the 1976 Act.⁴ Indeed, Section 108 (which addresses exceptions and limitations to copyright, for libraries and archives) explicitly refers to the section 107 fair use as a right: "Nothing in this section in any way affects the *right* of fair use as provided by section 107 . . ."⁵

Despite these clearly available exceptions, the legal complexity of the Google scanning project and scale of resulting litigation against Google and UML and other libraries by authors and publishers over the better part of a decade was groundbreaking. That Google and HathiTrust prevailed in this costly litigation raises questions about lessons learned, specifically, whether this arguably unique approach is replicable in other jurisdictions – or whether instead the multilateral copyright framework requires recalibration in order to promote and support similar PPP collaborations elsewhere.

This chapter begins in Part I with a brief history of HathiTrust, including the motivations on the part of UML as well as Google to form this PPP. In Part II, it describes the background of general concerns, including those of research librarians with book preservation as well as those of librarians in general regarding access to information by persons with visual disabilities. The chapter then turns in Part III to the importance of copyright exceptions and limitations as a prerequisite for the partnership formed as a result of the mutual interests of UML and Google. Part IV then details the partnership itself, by discussing some key provisions in the partnership contract that allow the project to be of both private and public benefit. This section also touches upon significant social relationships that allowed the partnership to move forward constructively, as well as the benefits expected and realized by participating partners. The chapter concludes in Part V with an exploration of the role of IP as a distinct challenge to the partnership goals,

² U.S. Copyright Act, 17 U.S.C §§ 101–1332 (2012). Fair use is a unique feature of US copyright law, although Israel, Poland, and South Korea have similar provisions. Fair use and the related (but distinct) concept of fair dealing find their origins in England and have been translated in former UK spheres of influence. See Jonathan Band & Jonathan Gerafi, *FAIR USE/FAIR DEALING HANDBOOK* (2015), <http://infojustice.org/wp-content/uploads/2015/03/fair-use-handbook-march-2015.pdf>.

³ 17 U.S.C. § 108.

⁴ 17 U.S.C. §§ 107–108.

⁵ Limitations on Exclusive Rights: Reproduction by Libraries and Archives, 17 U.S.C. § 108(f)(4).

beginning with difficulties associated in locating the boundaries of the public domain. It also provides some suggestions for adjusting both international and national copyright practice as well as the existing legal and policy framework to better serve both public and private interests of PPPs with similar goals.

Overall, the case study explored here demonstrates how PPPs can propel nonprofit mission, thus helping libraries to better meet the informational needs implicit in the SDGs, by improving global access to knowledge and information with more clarity for both copyright holders and cultural institutions. The potential beneficiaries of the suggestions made here are not directly the cultural institutions per se. Rather, the ultimate beneficiaries are the individuals served by these institutions, including those who generate research and scholarship, encourage education, and engage in creative endeavor. Librarians among others are trying to address the critical need for access to information, knowledge, and exposure to the diversity of culture and opinion, for purposes of advancing any and all of the SDGs.⁶ PPPs can be effective ways to address the SDGs, yet successful partnerships can be challenging to form and maintain. This chapter attempts to provide some insights into why this particular PPP works.

I What Is HathiTrust?

At the core of the PPP between UML and Google was the decision to scan the collection of the UML. To understand the UML's reasons for this decision, one needs to know something about HathiTrust and its genesis. Research libraries contain centuries of collections in book format, in addition to other text and nontextual materials. Digital surrogates of participating research library collections form most of the corpus of HathiTrust. HathiTrust is a collaborative partnership of libraries engaged in shared solutions to preserve research library collections.

HathiTrust began in 2008 as a collaboration of the universities of the Committee on Institutional Cooperation and the University of California system to establish a repository to archive and share their digitized collections. HathiTrust has quickly expanded to include additional partners and to provide those partners with an easy means to archive their digital content.

The initial focus of the partnership has been on preserving and providing access to digitized book and journal content from the partner library collections. This includes both in copyright and public domain materials digitized by Google, the Internet Archive, and Microsoft, as well as through in-house initiatives. The partners aim to build a comprehensive archive of published literature from around the world and develop shared strategies for managing and developing their digital and print holdings in a collaborative way.

The primary community that HathiTrust serves are the members (faculty, students, and users) of its partners [*sic*] libraries, but the materials in HathiTrust are available to all to the extent permitted by law and contracts, providing the published record as a public good to users around the world.⁷

⁶ *Development and Access to Information 2017*, Int'l Fed'n of Libr. Ass'ns Insts. [IFLA] (2017).

⁷ See *Our Partnership*, HATHITRUST, www.hathitrust.org/partnership. See also *infra* note 23 for a description of the Committee on Institutional Cooperation.

Several key motivations for the scanning collections and creating HathiTrust from the perspective of research libraries include: general access to works in the public domain, general access to works for which permissions are secured, improved search and discovery, long-standing preservation concerns regarding brittle books, and the opportunity to provide meaningful accessibility to library collections for people with print disabilities.⁸ Preservation of and access to cultural collections were both significant priorities for the UML as well as other participating libraries. These two aims were addressed by the opportunity presented in the form of the mutually beneficial PPP between Google, the Library, and other libraries that participated in the Google Library Project (“Project”).⁹ They provide context for the formation of the PPP, the intersection of IP interests in the partnership relationship, and how the PPP advances the SDGs.

II The Preservation Problem: Books Fall Apart

In the late twentieth century, research libraries shared a serious concern about the survival of books in paper format in library collections. Libraries also increasingly recognized the need to develop new book preservation strategies beyond paper facsimiles and microfilm.¹⁰ In total, the scale of actual and likely loss was potentially staggering in terms of the physical media of paper on which memory, knowledge, and expression were significantly retained. The preservation concerns extended even more urgently to sound recordings and moving images, given the fragility of the media and even flammability in the case of films notorious for their physical instability and flammable qualities. As stated in a 2004 report by the Association of Research Libraries, “[d]igitization can address the conversion needs of other types of media beyond paper based printed materials (e.g., audio, film, video) and can allow collections containing a wide variety of formats to be presented

⁸ Regarding some of the issues associated with identifying whether a work is in the public domain, see discussion of the Copyright Review Management System *infra* note 52. Regarding permissions, copyright holders may give HathiTrust permission to “open” works that are in copyright. Copyright holders may designate a Creative Commons license. See *HathiTrust Permission Agreements*, HATHITRUST, www.hathi-trust.org/permissions_agreement (last visited Jul. 23, 2017).

These issues are also discussed by the trial court in *Authors Guild v. HathiTrust*, with particularly relevant commentary on the proposition of making books available for blind people (“Although I recognize the facts here may on some levels be without precedent, I am convinced that they fall safely within the protection of fair use such that there is not genuine issue of material fact. I cannot imagine a definition of fair use that would not encompass the transformative uses made by [the HDL] and would require that I terminate this invaluable contribution to the progress of science and the cultivation of the arts that at the same time effectuates the ideals espoused by the [Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat 327 (codified as amended at 42 U.S.C. §§ 12101, et seq.)].”). *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 460–64, (S.D.N.Y. 2012) [hereinafter *HathiTrust* district court opinion].

⁹ Another benefit: once in digital formats, these initiatives improved access by making it easier to locate works through aggregators, especially those tailored to the interests of education and culture like the Digital Public Library of America (DPLA) available at <https://dp.la/>, and Europeana available at www.europeana.eu/portal/en.

¹⁰ There was similar concern about the need to develop collection and preservation strategies for digital content – both digital copies of analog materials and “born digital” materials. For example, *LC21: A Digital Strategy for the Library of Congress* published nearly twenty years ago by the National Academy of Sciences identified well-known and still relevant preservation challenges for digital collections specifically listing fragile storage media, technology obsolescence, and “legal questions surrounding copying and access.” *LC21: A DIGITAL STRATEGY FOR THE LIBRARY OF CONGRESS*, NAT’L RES. COUNCIL (2000), www.nap.edu/read/9940/chapter/1#ii.

and seamlessly accessed from a single interface.”¹¹ Regarding the preservation concern for books in particular, Shannon Zachary of the University of Michigan observes that “people were aware of the problem of deteriorating modern paper even as early as the first quarter of the 19th century and certainly by the last quarter. Many papers turned brittle, but not all paper. The big push about the ‘brittle book crisis’ came in the 1980s.”¹²

The brittle book problem refers to paper produced from the mid-nineteenth century using materials like wood pulp and alum-rosin sizing that has a high level of acid. Over time, the acid in the paper causes the paper to become brittle. Such paper often becomes yellow or brown in color and crumbles easily even with careful handling. Before the mid-nineteenth century, paper was typically made from mildly acidic or alkaline materials like cotton or linen rag. These older papers can last for centuries without becoming brittle, especially if stored and handled with care. Ironically, it is the relatively newer materials of the late nineteenth through the twentieth century that are at greatest preservation risk. As these books held in library collections age, they represent an urgent preservation concern. Research libraries have a critical stewardship role, first in preserving books and then in providing meaningful access to them for research and learning.

Libraries preserve and care for brittle books (and all kinds of media) and they reformat – or replace such books when possible to ensure continued access to these works. According to Zachary, “[t]he brittle books crisis has also been mitigated since the early 1990s, when significant numbers of paper mills converted to an alkaline process (for economic reasons, not for preservation). Most paper made today – even wood pulp paper – is naturally alkaline.” That said that, “there are still a lot of brittle books out there on the shelves published between around 1870–1990.”¹³

In the early 2000s, many research libraries were contemplating the implications and possibilities of digitizing all the books in library holdings. By 2000, there was growing experience with digitization in the field, in the form of initiatives like the Library of Congress’ American Memory, a seminal digitization initiative through the 1990s that aspired to (and exceeded in) the goal of digitizing five million objects about American history in a variety of media.¹⁴ By the early 2000s, research libraries had an overarching preservation concern and a foundational belief that digital preservation deeply supports and enhances research and scholarship.¹⁵ But they had no means to take on the

¹¹ Kathleen Arthur et al., *RECOGNIZING DIGITALIZATION AS A PRESERVATION REFORMATTING METHOD*, ASS’N OF RES. LIBRS. (2004), www.arl.org/storage/documents/publications/digitization-preservation-reformatting-2004.pdf.

¹² Email from Shannon Zachary, Head of Preservation, University of Michigan Library, to author (February 15, 2017).

¹³ For more on library concerns with the brittle book problem, see Deanna Marcum, *DUE DILIGENCE AND STEWARDSHIP IN A TIME OF CHANGE AND UNCERTAINTY*, ITHAKA (2016), www.st.ithaka.org/publications/due-diligence-and-stewardship-in-a-time-of-change-and-uncertainty/ (discussing a recent historical look at preservation). See also Mary Lynn Ritzenthaler, *PRESERVING ARCHIVES AND MANUSCRIPTS* ch. 3 (2nd ed., 2010) (providing a good introductory description on the nature of paper and how it deteriorates). The 1993 edition is available full text. See HATHI TRUST, <https://babel.hathitrust.org/cgi/pt?id=mdp.39015032925144;view=1up;seq=1>; Abby Smith, *THE FUTURE OF THE PAST* (1999), www.clir.org/pubs/reports/reports/pub82/pub82text.html (provides another excellent overview of the brittle book problem).

¹⁴ Note: the author served as Legal Advisor to American Memory and the National Digital Library Project at the Library of Congress from 1996 to 2001.

¹⁵ See, e.g., Abby Smith, *THE EVIDENCE IN HAND: REPORT ON THE TASK FORCE ON THE ARTIFACT IN LIBRARY COLLECTIONS* (Council on Libr. and Info. Res. 2001), www.clir.org/pubs/reports/pub103/pub103.pdf (discussing the preservation challenges for collections including analog (physical) materials, digital

Box 10.1. Alignment of Public and Private Goals

Mary Sue Coleman, then president of the University of Michigan, articulated compelling urgency and opportunity in a pivotal 2006 speech to the American Association of Publishers (AAP). Her speech described the opportunity presented by the university's partnership with Google, the urgency of the problem it addressed, and the opportunity it envisioned to preserve books for scholarship. It also summarized the university's motivation in the context of library professionals' concerns and thinking circa 1990s about digitization as preservation. Additionally, it framed how the parties were poised for even greater opportunities to serve the public good in line with their respective missions:

The University of Michigan's partnership with Google offers three overarching qualities that help fulfill our mission: the preservation of books; worldwide access to information; and, most importantly, the public good of the diffusion of knowledge . . . We are the repository for the whole of human knowledge, and we must safeguard it for future generations. It is ours to protect and to preserve.¹⁶

Herculean and costly digitization task of this ambition despite the urgency. Thus, the need and idea were already in place, and were ignited by the resources presented by Google.

When Google approached the Library, it presented an opportunity that aligned the right resource with the right need at the right time to help stem the exposure presented by the brittle book problem. (See Box 10.1.) The ensuing relationship created a path forward to address an impending preservation issue that would have had a dramatically negative effect on libraries and, in turn, memory, knowledge, and scholarship available for current and future scholars.¹⁷

III The Access Problem: Books for People with Print Disabilities

In addition to preservation, libraries recognized the tremendous opportunities digital formats offered to advance access for people with print disabilities, by enabling archival search generally, and therefore facilitating a profound range of new scholarship and

reformatting, and born digital). "If libraries, archives, or historical societies do not collect instances of recorded information, then the chance of their survival is slim. Loss is inevitable." *Id.* at 3. Smith notes that humanities scholars already valued then-new databases that made it feasible to search collections more thoroughly than before. "The observation that use is "obligatory" means that these scholars are now able to avail themselves of otherwise-scarce texts." *Id.* at 26. The report also acknowledges the challenges to preservation presented by copyright. *Id.* at 54.

¹⁶ Kevin Bergquist, *Google Project About the Public Good*, UNIV. REC. (Feb. 8, 2006) www.ur.umich.edu/0506/Feb06_06/22.shtml (quoting Mary Sue Coleman, President, Ass'n of Am. Univs., *The Khmer Rouge and the Public Good*, at the annual meeting of the Professional/Scholarly Publishing Division. The title of her talk references destruction of Cambodia's national library: "Nature, politics and war have always been the mortal enemies of written works . . . In the 1970s, the Khmer Rouge regime in Cambodia took over the national library, throwing books into the street and burning them, while using the empty stacks as a pigsty. Less than 20 percent of the library survived.").

¹⁷ As it happened, the Library did not scan the most fragile items with Google, choosing to handle those more individually. In the end, it chose to scan the multitude of items that were at risk of becoming subject to the inevitable short-term deterioration concerns of brittle books. Once brittle, the scanning process is necessarily more bespoke to the item and cannot easily be handled efficiently or at scale.

research possibilities. HathiTrust also recognized that “[o]ne key facet of the access services that HathiTrust provides is to users who have disabilities – for example, blindness, dyslexia, physical or cognitive impairments – that prevent them from being able to easily read printed material (“print disabilities”).”¹⁸ The Chafee Amendment to the 1976 Copyright Act¹⁹ approved this important possibility for improved means of access for people who have print disabilities.²⁰

For people with print disabilities as well as other readers, digital formats offer greater access (as well as greater enablement of archival search generally) and therefore facilitate a profound range of new scholarship and research possibilities. Important exceptions and limitations to copyright undergird the HathiTrust model and are discussed later in this chapter. Arguably, the existence of a strong and evolving fair use right in US copyright was a fundamental requirement for the creation of the Google Library Project and HathiTrust more generally. The Project involved scanning entire library collections by Google, typically in exchange for a set of scans those respective libraries could use for their own purposes as permitted by law. These secure digital copies were key to addressing the preservation issue presented by the brittle books problem. The partnership relied on several provisions of US copyright law such as sections 107 and 108, which limit the otherwise exclusive rights of authors. This also presented the opportunity to provide access to people with print disabilities because the digital formats can be marked up for use with readers and other devices that support reading by the blind and others for whom books are inaccessible.

Roughly concurrently with the formative years of HathiTrust, the World Intellectual Property Organization (WIPO) facilitated the negotiation of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (the Marrakesh Treaty or the Treaty). The Treaty was adopted on June 27, 2013, and went into effect on September 30, 2016.²¹ As of April 2018, thirty-five countries were signatories.²² (To date, the United States is not a signatory.) The importance of this Treaty cannot be overstated in terms of its potential impact on millions of lives. According to the World Blind Union, less than 10 percent of all published materials are accessible to blind and low vision people. This has enormous impact on human development.²³ The World Health Organization (WHO) statistics as of 2010 estimated that more than 285 million people worldwide live with visual impairments,

¹⁸ Angelina Zaytsev, *HathiTrust and a Mission for Accessibility*, 18 J. ELEC. PUBL’G (2015), <http://quod.lib.umich.edu/j/jep/3336451.0018.304?view=text;rgn=main>. Zaytsev is HathiTrust Collection Services Librarian.

¹⁹ 17 U.S.C. § 121. According to the Chafee Amendment, when authorized entities reproduce and distribute copies or phono records of previously published works in specialized formats exclusively for the blind or print disabled, such reproduction and distribution does not constitute infringement.

²⁰ *HathiTrust* district court opinion, *supra* note 8; Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014); Author’s Guild, Inc. v. Google Inc., 804 F. 3d 202 (2d Cir. 2015).

²¹ *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled*, WORLD INTEL. PROP. ORG. [WIPO] (Jun. 27, 2013), www.wipo.int/treaties/en/ip/marrakesh/.

²² *WIPO-Administered Treaties: Contracting Parties>Marrakesh VIP Treaty (Total Contracting Parties: 35)*, WIPO, www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=843 (last visited Apr. 18, 2018).

²³ “In developed regions like North America & Europe, employment of blind people is only about 25% and in developing areas of the globe like Africa, Asia & Latin America, the number of blind people employed falls below 10%.” In addition, “. . . over 90% of all published materials cannot be read by blind or low vision people.” *WBU Priorities and Goals*, WORLD BLIND UNION [WBU], www.worldblindunion.org/English/our-work/our-priorities/Pages/default.aspx (last visited Jul. 30, 2016).

thirty-nine million of whom are blind.²⁴ This is a profound area of concern and suggests opportunity in significantly addressing the SDGs.

We are starting to see the fruit of HathiTrust's commitment to provide meaningful access to the visually impaired globally. Access at HathiTrust partner University of Australia is already having impact.²⁵ The primary impediment to making greater access possible for the millions of people affected by visual impairment is existing copyright laws that fail to have clear, appropriately calibrated limitations to address this urgent need. HathiTrust can be part of addressing this challenge. Obvious and compelling reasons exist to assist this huge population. The technical issues can be efficiently addressed. The challenge is one of our own making, one that can be addressed in a cost-effective manner and without negative impact on copyright holders. This is possible with better implementation of appropriately calibrated, well-managed copyright exceptions as discussed later in this chapter.²⁶

IV The Partnership

A *The Partnership Contract*²⁷

In 2004, the University of Michigan entered a cooperative agreement with Google that formed the basis of the PPP contemplated in this chapter. This was a public document from the outset.²⁸ This public transparency provides a rare opportunity to describe and analyze the promises and pitfalls of this hybrid public–private institutional framework.²⁹

²⁴ *Global Data on Visual Impairments 2010*, WORLD HEALTH ORG. [WHO] (2012), www.who.int/blindness/publications/globaldata/en/.

²⁵ See Paul Harpur, *My Experience and the Experience of Millions*, HATHITRUST: PERSPECTIVES FROM HATHITRUST (May 24, 2017), www.hathitrust.org/blogs/perspectives-from-hathitrust/my-experience-and-experience-of-millions (discussing the ‘book famine for the print disabled’ and the transformative power of HathiTrust’s work in this area: “A decade ago I was very print disabled. Now, with help from the HathiTrust and others, I am far less print disabled. In fact, when it comes to accessing many academic and cultural works, I am more print inconvenienced now. My parents, supporters and I used to spend hours scanning books for my studies and work. Now I ignore books I cannot access in an E-Book format that is not available in an E-Book that is accessible to persons with print disabilities. While it would be ideal to have reading equality; to go from difficult, time consuming and expensive access to a few books, to easy, cheap and rapid access to millions of books in a matter of a few years is an amazing, liberating and joyous experience. I would like the HathiTrust to be aware of the substantial personal and professional impact they are having upon the world’s print disabled.”). See also Paul Harpur, *DISCRIMINATION, COPYRIGHT AND EQUALITY: OPENING THE E-BOOK FOR THE PRINT DISABLED* (2017).

²⁶ See also Susan Isiko Štrba, chapter 9, *infra*.

²⁷ The words contract, partnership, and cooperative agreement are used interchangeably in this chapter. Formally, the document was called a memorandum of understanding (MOU).

²⁸ “We knew that the agreement would get a lot of attention and thought that rather than putting people to a lot of trouble and inundating the FOIA [Michigan Freedom of Information Act] office with requests that it would facilitate both ease of access and our proclivity toward transparency to put it up.” Email from Jack Bernard, Assistant General Counsel, Office of the VP & Gen. Counsel, Univ. of Mich., to author (May 24, 2017). See Michigan Freedom of Information Act, M.C.L. 15.231.

²⁹ Google entered subsequent, similar agreements with other libraries. For example, in 2006 the Committee on Institutional Cooperation (CIC) entered a similar relationship with Google. The CIC “is a consortium of the Big Ten member universities plus the University of Chicago. For more than half a century, these world-class research institutions have advanced their academic missions, generated unique opportunities for students and faculty, and served the common good by sharing expertise, leveraging campus resources, and collaborating on innovative programs.” *About*, BIG TEN ACAD. ALL. [BIG], www.btaa.org/about. Other

Box 10.2. Access Provisions in the Google-UML Partnership Contracts

4.4.2 Use of U of M Digital Copy in Cooperative Web Services. Subject to the restrictions set forth in this section, U of M shall have the right to use the U of M Digital Copy, in whole or in part at the U of M's sole discretion, as part of services offered in cooperation with partner research libraries such as the institutions in the Digital Library Federation. Before making any such distribution, U of M shall enter into a written agreement with the partner research library and shall provide a copy of such agreement to Google, which agreement shall: (a) contain limitations on the partner research library's use of the materials that correspond to and are at least as restrictive as the limitations placed on U of M's use of the U of M Digital Copy in section 4.4.1; and (b) shall expressly name Google as a third party beneficiary of that agreement, including the ability for Google to enforce the restrictions against the partner research library. [added emphasis.]

Contracts between Google and its other library partners are not in all cases publicly disclosed, and the precise terms of partnership agreements vary by library; however, at least some of these other partner libraries were presumably entitled to a copy of the digital copies made from its respective collections, in the same way that UML is.

At its most basic level, the Google-UML agreement provided that Google would be permitted to borrow books in order to scan the UML's collection to produce a set of digital facsimiles; in exchange, the library would receive access to a full set of those scans.³⁰ In negotiating the agreement, the university included a clause regarding the right and ability of the Library to share its library copy with members of the Digital Library Federation (DLF) and other similar consortia.³¹

This clause provides the foundation for the subsequent creation of HathiTrust by explicitly permitting the UML to use its digital copies at its discretion in cooperation with other research institutions. (See Box 10.2.)

The UML's agreement with Google is ongoing. There are dates in the agreement for trigger events, as well as obligations in contract regarding quality of scans, security, and uses of the scans. These terms are critical for ensuring that the both parties maintain their commitments. The agreement reflects mutual interdependencies and business goals.

early participants included the New York Public Library, Harvard, Stanford, and Oxford University. The overarching collaboration was referred to as the "Google Print Project" and later as the "Google Book Search Project."

³⁰ U. MICH., COOPERATIVE AGREEMENT (2004), www.lib.umich.edu/files/services/mdp/tum-google-cooperative-agreement.pdf.

³¹ The DLF was founded in 1995 with the vision of creating a distributed, open, digital library. It was initially composed of twelve academic libraries along with the Library of Congress, New York Public Library, the U.S. National Archives, and the Commission on Preservation and Access (now the Council on Library and Information Resources). DIGITAL LIBRARY FEDERATION [DLF], www.diglib.org/aboutdlf/ (last visited Aug. 1, 2017). Note that the Library of Congress and the U.S. National Archives are agencies of the US federal government. Today, the DLF has grown to 162 members today and, "is a robust and ever more diverse and inclusive community of practitioners who advance research, learning, social justice, and the public good through the creative design and wise application of digital library technologies." For a list of the current membership, see *Our Members*, DLF, www.diglib.org/members/. For more about the founding of the DLF, see Robert L. Jacobson, *Librarians Agree on Coordination of Digital Plans*, THE CHRON. OF HIGHER EDUC., May 12, 1995, www.chronicle.com/article/Librarians-Agree-on/84554/.

By contrast, many if not most purely charitable relationships can typically be rescinded at any time. Successful PPPs are likely to share meaningful obligations, enforceable through explicit contractual provisions.

B *Partnerships Shaped by People, Relationships, and Common Interests*

The contract between Google and the University of Michigan is an important artifact for understanding the motivations of the partners and the long-standing personal relationships that girded the Project. Google was quite candid in its interest in this partnership. The contract is a pragmatic business expression of Google's audacious investment in the PPP. Publicly available annual reports include letters from Google founders Sergey Brin and Larry Page to shareholders that mention the Project and where it fit in the overarching aspirations of the company relative to short-term profit.³²

Additionally, one of the interesting aspects of this story is how it underscores personal connections as opportunities for common understanding and partnership building. (See Box 10.3.) Personal relationships engender trust and constructive risk taking. Universities have a central role in this story as platforms for relationship building. These connections between people and the sharing of ideas among them shaped a sense of what might be possible and demonstrate a series of social networks. In the absence of these social networks, it is unlikely that this project would have occurred at all.

Libraries engaged in these partnerships with Google began to think about what they could do to advance their collective mission as the result of this initiative. For example, there was a long-standing, recognized need for a shared digital repository.³³ Research

³² The 2004 Founders' IPO letter starts with the defining statement that, "Google is not a conventional company." The letter continues affirm its commitment to "making the world a better place" along with a global perspective:

We have also emphasized an atmosphere of creativity and challenge, which has helped us provide unbiased, accurate and free access to information for those who rely on us around the world . . .

We will not shy away from high-risk, high-reward projects because of short term earnings pressure. Some of our past bets have gone extraordinarily well, and others have not. Because we recognize the pursuit of such projects as the key to our long term success, we will continue to seek them out. For example, we would fund projects that have a 10% chance of earning a billion dollars over the long term. Do not be surprised if we place smaller bets in areas that seem very speculative or even strange when compared to our current businesses. Although we cannot quantify the specific level of risk we will undertake, as the ratio of reward to risk increases, we will accept projects further outside our current businesses, especially when the initial investment is small relative to the level of investment in our current businesses.

Larry Page and Sergey Brin, *IPO Letter: An Owner's Manual for Google Shareholders* (2004), available at <https://abc.xyz/investor/founders-letters/2004/ipo-letter.html>.

³³ "Digital Repositories offer a convenient infrastructure through which to store, manage, reuse, and curate digital materials. They are used by a variety of communities, may carry out many different functions, and can take many forms. The meaning of the term 'digital repository' is widely debated. Contemporary understanding has broadened from an initial focus on software systems to a wider and overall commitment to the stewardship of digital materials; this requires not just software and hardware, but also policies, processes, services, and people, as well as content and metadata. Repositories must be sustainable, trusted, well-supported and well-managed in order to function properly. Digital Repositories are also commonly referred to as 'institutional repositories' or 'digital archives.'" Nadja Semple, *Digital Repositories*, DCC Briefing Papers: Introduction to Curation. Edinburgh: Digital Curation Centre. Handle: 1842/3372. Available online: www.dcc.ac.uk/resources/briefing-papers/introduction-curation.

Box 10.3. Personal Relationships Leading to the Partnership

The significance of individual participants can be surmised in some of the relationships. For example, Google's Manager of Library Partnerships, Ben Bunnell, received a master's degree from the University of Michigan School of Information in 1998 and later graduated from the University of Michigan's Ross School of Business with a Master's in Business Administration in 2002. Bunnell is Google's Manager of Library Partnerships having joined Google AdWords in 2002 and the Book Search Project in 2004. In another University of Michigan connection, Google founder Larry Page earned his undergraduate degree at the University of Michigan in 1995, majoring in engineering and concentration in computer engineering.³⁴

Jeremy York was one of the early HathiTrust staff members, serving first as Project Librarian from 2008 to 2013 and then as Assistant Director from 2013 to 2015. York began working for HathiTrust in 2008, the same year he finished his Master of Science in Information degree at the University of Michigan School of Information. At that time, there were 2.2 million scans of books in MBooks, the Library's digital book repository. MBooks was expanded and rebranded to become HathiTrust in October 2008. York recalled that in the fall of 2006, Paul Courant (then provost and later Dean of Libraries at the University of Michigan) and Bunnell (an alum) visited one of his classes to talk about the Google Library Project. The discussion focused in particular on the relationships Bunnell had with both Google and the University, which were instrumental to the partnership's formation.³⁵

libraries have a long history of working cooperatively to address common challenges. Consistent with this cooperative culture, the formation of HathiTrust was:

a bold move by leading research libraries to move their collections and traditional values into a new digital era. The governance and repository structures . . . have been engineered to create a library that never forgets . . . HathiTrust can be the universal library, but it is something we will all need to be a part of, and something it will take all of our institutions to create.³⁶

C Partnership Motivations: Private and Public Benefits

Google's motivations are stated on the Google Books web page regarding the Library Project:

The [Google] Library Project's aim is simple: make it easier for people to find relevant books – specifically, books they wouldn't find any other way such as those that are out of print – while carefully respecting authors' and publishers' copyrights. Our ultimate goal

³⁴ *Growth Strategies: Larry Page and Sergey Brin*, ENTREPRENEUR (Oct. 6, 2008), www.entrepreneur.com/article/197848; Nicole Casal Moore, *Google Co-Founder, U-M Alum Larry Page to Present Commencement Address*, MICH. NEWS (May 3, 2009), <http://ms.umich.edu/new/releases/6934-google-co-founder-u-m-alum-larry-page-to-present-commencement-address> (referencing date of graduation).

³⁵ Email from Jeremy York, PhD student at the University of Michigan School of Information, to author (Feb. 17, 2017). See Tom Tigani, *University-Google digitization effort turns page toward future book access*, THE UNIV. REC. ONLINE (Dec. 4, 2006), www.ur.umich.edu/0607/Dec04_06/09.shtml (for other comments from Bunnell).

³⁶ Jeremy York, *This Library Never Forgets: Preservation, Cooperation, and the Making of the HathiTrust Digital Library*, ARCHIVING 2009 FINAL PROGRAM AND PROCS. 5, 9 (2009).

is to work with publishers and libraries to create a comprehensive, searchable, virtual card catalog of all books in all languages that helps users discover new books and publishers discover new readers.³⁷

This language states Google's plain aspiration in partnering with libraries to create universal access to the world's knowledge and to develop improved search tools. The digital corpus resulting from electronic facsimiles of analog library collections would facilitate research and development for Google's products and services, such as its translation capacities. At the same time, its stated shared goals with the libraries and publishers included increasing access to information and expanding markets for books, respectively.

For participating libraries, the various goals of preservation, accessibility for people with print disabilities, access to public domain works, access to in-copyright works where permission was granted by a copyright holder were – and are – all aligned with Google's business proposition regarding HathiTrust. There was widespread recognition of the enormous investment by and risk to Google, in order to achieve this undertaking. As one knowledgeable observer noted,

The library project is breathtaking in its scope and cost, and revolutionary in its implications . . . While a handful of governments and corporations had the money and . . . the interest to undertake this project, none had stepped up to the plate. Google was willing to spend big to make this happen, and it was willing before anyone else. If there are financial risks, copyright thickets, and logistical problems, and there undoubtedly are, Google had the courage and vision to see that risks were worth taking and the problems worth solving. (This doesn't detract from earlier digitization projects from others, some of them very large; none is this large.)³⁸

For libraries, the scanning meant that there would be an enormous advance in a collective solution to the brittle book concern for a huge number of books, which would also have the collateral effect of increasing access for reading where legally feasible (for example, works in the public domain, works subject to rights like fair use or library exceptions, or with permission of a copyright holder). Libraries did not have the resources to address these concerns and opportunities at the scale Google was able to invest. Further, until that time, libraries had tended to focus on materials in the public domain. Works still in copyright were copied for preservation and access once they began falling apart – which made the timing and resource decisions an ongoing conundrum for libraries as stewards of memory.³⁹ Libraries were not willing to be challenged in court and actively avoided conflict around IP.

³⁷ *Google Library Project*, GOOGLE BOOKS, <https://books.google.com/googlebooks/library/> (last visited Jul. 7, 2017).

³⁸ Peter Suber, *Google's Gigantic Library Project*, SPARC OPEN ACCESS NEWSL. (Jan. 2, 2005), https://dash.harvard.edu/bitstream/handle/1/4552061/suber_googlelibraryintro.htm?sequence=1.

³⁹ For example, the groundbreaking Making of America digitization project (MOA) began in 1995 as a joint effort of Cornell University and University of Michigan. The project focused on materials dating into the 1930s. After MOA, Michigan shifted to digitizing materials that met preservation requirements, regardless of copyright status with the belief that Section 108 supported that activity. Access to the preservation copies might be limited due to possible copyrights. Email from John P. Wilkin, Juanita J. and Robert E. Simpson Dean of Libraries, Univ. of Ill. at Urbana-Champaign, to author (May 30, 2017). "Making of America (MoA) is a digital library of primary sources in American social history from the antebellum period through reconstruction. The collection is particularly strong in the subject areas of education, psychology,

That said, in the larger legal context, new uses of digital technology were being litigated, thus giving early reassuring guidance for legally responsible strategies. For example, the 2003 case of *Kelly v. Arriba* held that making thumbnail copies of in copyright works for search purposes was a fair use under US law.⁴⁰

There were and are many vocal critics of Google who were concerned that this scanning Project would result in a monopoly on world knowledge.⁴¹ In the case of the Library's contract with Google, this fear was ultimately unfounded because provisions were made for the Library to retain its own set of scans for its own purposes. The Library would ultimately be able to use the scans however it saw fit within the confines of its responsibility as a steward of the copyrights embodied in the works.⁴²

The partnership contracts between Google and its respective library partners such as UML functionally served as an escrow to the copyrighted works. Thus, Google could not proverbially hold the knowledge of the world hostage. Key contractual provisions in the UML partnership agreements prevented that risk and facilitated significant advance toward a leap in research and access to knowledge without fear of information lock-up. (See Box 10.2.) The formation of HathiTrust and retention of preservation scans by libraries with a distinct public mission, rather than a corporate commercial responsibility, reduced the risk of intellectual monopoly. The partnership relationship as expressed in the contracts reflected the different roles and responsibilities of the parties and the commitment to their respective stakeholders and shareholders.

The contracts provided for long-term independence from each other. This mutual independence may be an important aspect of a successful PPP because the incentives were functional, aligned to each partner's distinct mission. Google's stated interests were idealistic but also consciously aligned with their responsibilities to their stockholders as a publicly traded company. The Library, in obtaining its own set of scans, acted consistently with its centuries' old mission to its stakeholders as custodian of information for the public.⁴³

American history, sociology, religion, and science and technology. The collection currently contains approximately 10,000 books and 50,000 journal articles with 19th century imprints." For more details about the project, see *About MoA*, MAKING OF AM. [MOA], <http://quod.lib.umich.edu/m/moagrp/about.html>. Making of America was supported by a grant from the Andrew W. Mellon Foundation. MOA website at <http://quod.lib.umich.edu/m/moagrp/about.html>

⁴⁰ *Kelly v. Arriba Soft Corporation*, 280 F.3d 934 (9th Cir. 2002) *withdrawn*, re-filed at 336 F.3d 811 (9th Cir. 2003); Pamela Samuelson, *Mass Digitization as Fair Use*, 57 COMM. ACM 20 (2014), <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3353&context=facpubs>; See *Authors Guild v. HathiTrust*, *supra* note 20.

⁴¹ The 2013 documentary, *Google and the World Brain*, presented this anxiety. While the film included interviews with supporters of the Project, many interviewees expressed the fear that Google would monopolize the world's knowledge as contained in the worlds' great libraries. *GOOGLE AND THE WORLD BRAIN* (Polar Star Films 2013).

⁴² *Id.* The title references H. G. Wells's essays in book of speeches he gave at the Royal Institution of Great Britain in which he expressed his sense of urgency and possibility of a utopian collective intelligence. H. G. WELLS, *WORLD BRAIN* (Methuen Publishing, Ltd.1938).

⁴³ Academic research utilizing the corpus as data (rather than as books for reading) is possible through the HathiTrust Research Center (HTRC), jointly launched by Indiana University and the University of Illinois at Urbana-Champaign. "Leveraging data storage and computational infrastructure at Indiana University and the University of Illinois at Urbana-Champaign, the HTRC will provision a secure computational and data environment for scholars to perform research using the HathiTrust Digital Library. The center will break new ground in the areas of text mining and nonconsumptive research, allowing scholars to fully

Some of Google's purposes coincided with library purposes; search and discovery were critical to the early discussions for all parties, in addition to preservation and access for those with print disabilities. For Google, possession of these scans – even if not used as books for individual reading purposes – provided a rich opportunity for research and product development in semantics, linguistics, machine intelligence, and improved search engine functions to name a few examples. As documented by the University of Michigan,

Bunnell said [the] company and University officials also would like to expand access to texts in different languages. Bunnell said a system that would answer queries in one language by searching library data in all languages is a sort of “holy grail” that company officials and librarians everywhere would like to see one day, “but we’re not there yet.”⁴⁴

These product development goals obviously impacted the overall market in digital information. Google had developed the Google Publisher Partner program that facilitated sales for and by publisher copyright holders of books embodied in the digital copies held by Google.⁴⁵ Thus the Project also arguably gave Google a competitive advantage that was hotly contested in litigation by other corporate behemoths in the digital technology industries.⁴⁶

Some research indicates that, “the typical half-life of a publicly traded company is about a decade.”⁴⁷ In contrast, the University of Michigan observed its bicentennial in 2017. Research library collections like UML are developed over centuries with a consciousness in each generation of the importance of collection and preserving for the very long term. The continuing mission of these research libraries differs radically from the drive of publicly traded companies to deliver near-term positive earnings in quarterly reports and financial value over time. The partnership was structured in a way that took into account the legitimate and distinct responsibilities of the respective parties: for the libraries, to their stakeholders, and for Google, to its shareholders. Pragmatism would seem to improve the likelihood of success of facilitating the differences between parties with such different goals.

utilize content of the HathiTrust Library while preventing intellectual property misuse within the confines of current U.S. copyright law.” See *Our Research Center*, HATHITRUST, www.hathitrust.org/htrc.

⁴⁴ See Tigani *supra* note 34. UML was also motivated by these opportunities. “I believe that these were also library purposes, from the beginning. Search and discovery were critical to the early discussion, along with preservation and access for those who have print disabilities.” Email from Paul Courant, Arthur F. Thurnau Professor, Harold T. Shapiro Collegiate Professor of Public Policy, Professor of Economics, Professor of Information, and Faculty Associate in the Institute for Social Research, Univ. of Mich. to author (Jun. 4, 2017).

⁴⁵ See Corinna Baksik, *Fair Use or Exploitation? The Google Book Search Controversy*, 6 PORTAL: LIBRS. AND THE ACAD. 399, 401 (2006), www.press.jhu.edu/sites/default/files/PLA-6.4-baksik.pdf (discussing Google's publisher program and its opt out policy implemented in the summer of 2005). “The policy allows copyright holders to upload a list of titles that they do not want scanned as part of the library project. When Google encounters these titles in a library, they will not scan them.” The Authors Guild and the Association for American Publishers still filed suit against Google in September and October 2005, respectively.

⁴⁶ See, e.g., *Author's Guild, Inc. v. Google*, *supra* note 20.

⁴⁷ Madeleine I. G. Daep et al., *The Mortality of Companies*, 12 J. ROYAL INTERFACE 1 (Apr. 1, 2015) discussed in Bourree Lam, *Where Do Firms Go When They Die?*, THE ATLANTIC, Apr. 12, 2015, <http://tsif.royalsocietypublishing.org/content/12/106/20150120>.

Box 10.4. The Litigation⁴⁸

The Authors Guild, Inc. (Authors Guild), a collective of individuals and associational organizations, first brought action against HathiTrust, Inc. (HathiTrust), a public–private partnership of universities and university officials, in the Southern District of New York. The Authors Guild alleged that the HathiTrust Digital Library (HDL), a mass digitization of copyrighted books owned by universities, was a violation of the Copyright Act. The US District Court found that HathiTrust’s use of copyrighted works constituted fair use and therefore not an infringement of copyright. Upon appeal, the US Court of Appeals for the Second Circuit affirmed this decision. The Second Circuit’s fair use analysis included examining the purpose and character of the new work. HathiTrust’s provision allowing print-disabled individuals to read the books contained in the HDL was, according to the court, a valid purpose under fair use. The Chafee Amendment within the Copyright Act as well as the Americans with Disabilities Act also supported HathiTrust’s purpose in copying books to increase access to print-disabled individuals. In addition, the Court observed the amount of copying was reasonably necessary in relation to the purpose because full-text and image copies were necessary to fulfill their purpose of facilitation of searches and access for print-disabled individuals.

The Authors Guild also brought action against Google, Inc. (Google) who partnered with HathiTrust through the Google Books project. The US District Court found transformative use because the original texts were turned into “a comprehensive word index that helps readers, scholars, researchers, and others find books” by allowing users to see snippets of the original. The Second Circuit agreed that Google’s search function is highly transformative. It also found that the snippet view provides the user with just enough context on the page to make sense of the results from the search function. Though Google made entire copies of books, this was found to be a reasonably necessary amount, much like in the aforementioned *HathiTrust* case because Google’s snippet view function indicates only what is necessary and therefore does not usurp the original in the marketplace.

V Intellectual Property at the Core of the Partnership Equation

This narrative presents a kind of success, but with great cost and challenge even where the parties are aligned. The Google/UML partnership is one kind of relationship where practical interests were aligned in the face of considerable copyright questions for all parties that are the subject of now familiar litigation. (See Box 10.4.)

A Copyright and Access to Knowledge

In this new arena, there is an opportunity to change the deeply embedded assumptions about copyright and its relationship to access to knowledge and core development interests. Is it an overly broad truism that strong IP rights inevitably incentivize creation, innovation, and investment? Can the mutual incentives and motivations in this particular PPP demonstrate elements that could be modeled in other kinds of partnerships? Is the larger opportunity to advance the SDGs more effectively and predictably with

⁴⁸ *Author’s Guild v. HathiTrust* and *Author’s Guild, Inc. v. Google Inc.*, *supra* note 20.

more robust, internationally coherent copyright exceptions and limitations in support of the work of libraries and archives? These are key questions that global and national copyright policy must face in order to maximize access to knowledge consistent with the SDGs. While PPPs can facilitate work on the SDGs, in the domain of copyright and libraries, the most cost effective and least time intensive path is to update and align existing exceptions and limitations to copyright already provided to libraries.

There are some ways to generalize about lessons from this particular partnership. That said, for libraries to provide meaningful access to information in a shared way, the greater urgency is in consequential exceptions and limitations to copyright, which are tailored to meeting the mission of libraries while respecting the interests of copyright holders – a subject on ongoing multilateral consideration under WIPO.⁴⁹ Meaningful copyright exceptions and limitations at a global scale may be more effective at making broader progress on the SDGs in terms of knowledge sharing. Greater clarity for library-type uses would be likely to discourage infringement and create more fertile ground for respect for IP law, because the balance between the interests of rights holders and users would be better calibrated across different geographic regions.

Cultural trade statistics published by the United Nations indicate that the vast majority of import and/or export of cultural material is between the United States and Europe, and between Asia and southeast Asia, with a growing dominance of China. Other countries represent only small overall percentages.⁵⁰ Are these markets then neglected because they are not economically worth providing services for information provision? Are there other factors? What partnerships would be commercially valid for companies *and* support the SDGs in most of the countries located in the developing world? There is an obvious need for broader library use rights and multiple ways for qualified libraries to work together, but we are just beginning to explore these possibilities through settings like WIPO.

There is an analogous challenge in determining whether a work is in the public domain, as a legal matter. This legal issue is addressed next.

B *The Difficulty of the Public Domain*

One practical response to the question of the copyright status of books in HathiTrust was the Copyright Review Management System (CRMS) project, which emphasized the identification of books in the public domain within the HathiTrust collection. This

⁴⁹ Library issues were addressed as recently as May 1–5, 2017, at the meeting of the World Intellectual Property Organization’s (WIPO) Standing Committee on Copyright and Related Rights (SCR/34) regarding limitations for libraries and archives. Among them, the Committee will update Kenneth D. Crews’ study on these limitations (first published in 2008, updated in 2014 and 2015) and to continue collection of data relating to limitations and exceptions for museums. WIPO, *Standing Committee on Copyright and Related Rights: Summary by the Chair*, WIPO Doc. SCCR 34 (May 1–5, 2017), www.wipo.int/edocs/mdocs/copyright/en/sccr_34/sccr_34_ref_summary_by_the_chair.pdf; see also Teresa Hackett, *Three Outcomes for Libraries at WIPO*, ELEC. INFO. FOR LIBRS. [EIFL] BLOG, (May 22, 2017), www.eifl.net/blogs/three-outcomes-libraries-wipo.

⁵⁰ See U.N. EDUC., SCI., AND CULTURAL ORG. [UNESCO]: INST. OF STAT., *The Globalisation of Cultural Trade: A Shift in Consumption, International flows of cultural goods and services 2004–2013*, 16–19 figs.4, 5, & 6 (2016).

CRMS project was only possible because of the existence of the scans produced by the Google/Library PPP. CRMS was the brainchild of John Wilkin as the founding director of HathiTrust.⁵¹

In negotiating the contract with Google and forming HathiTrust, Wilkin recognized the urgency of identifying public domain works in HathiTrust and making them as widely available as possible. CRMS identified public domain books that were: (1) published in the United States between 1923 and 1963 (“CRMS US”); and (2) published in the United Kingdom, Canada, and Australia (“CRMS World”). The CRMS US reviews focus on the existence or absence of formalities once required for works published in the United States under US law; the CRMS World reviews focus on identifying author death dates.

This copyright determination initiative was achievable through an interface that made possible secured access to scans to designated reviewers. The biggest challenge and cost of copyright research is the difficulty of obtaining legally relevant information in a cost-efficient way. To this point, the CRMS project reflected a significant investment. The initiative continued formally for nine years supported by three critical grants from the Institute for Museum and Library Services (a federal agency of the US government) totaling US\$2,016,192 in grant funding, over sixty reviewers, and seventeen libraries.⁵²

It should be a relatively simple and straightforward task to determine whether a given book is or is not in the public domain in a given jurisdiction. It is not. In fact, it is a complex task with often-indeterminate results that can vary by jurisdiction. This makes international solutions both critical and challenging. Identifying works in the public domain is a significant piece of the overall access picture, in addition to aligned library exceptions. Access to works in the public domain is critical to the overall bargain of copyright.

One suggestion based upon this extensive CRMS experience is that perhaps library exceptions could consider the application of the rule of the shorter term *in the context of libraries* so that works in the public domain in their country of origin could also be made available in an appropriately prescribed way for the balance of the term in the context of a qualified library (which would have to be defined). This might at least allow access for the difference in the term, whether or not the country overall adheres to the rule of the shorter term, especially for works that are not commercially available.⁵³

⁵¹ John P. Wilkin served as the associate university librarian for publishing and technology at the University of Michigan Library and as executive director of HathiTrust. He conceived and was the initial principal investigator for the first grant supporting the CRMS project. I served as the principal investigator for the two subsequent grants.

⁵² Grant numbers LG-05-08-0141-08, LG-05-11-0150-11, and LG-05-14-0042-14.

For a detailed discussion of CRMS, see FINDING THE PUBLIC DOMAIN: COPYRIGHT REVIEW MANAGEMENT SYSTEM TOOLKIT (Levine, Melissa et al. eds., 2016), <http://quod.lib.umich.edu/cgi/t/text/idx/c/crmstoolkit?page=home>. See also, Melissa Levine, *Finding the Public Domain: The Copyright Review Management System*, ITHAKA, (Oct. 26, 2016), <https://doi.org/10.18665/sr.289081>.

⁵³ WIPO, *Berne Convention for the Protection of Literary and Artistic Arts*, Article 7 §8 (1979) (“In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work”).

C Meaningful Policy, Effective Law

As a public policy matter, library use rights are well established and ubiquitous in national and international law – although they vary in form and consistency. Key limitations to the otherwise exclusive rights of a copyright holder such as fair use are explicitly included in US copyright law to further legal and public policy, as described earlier. This illustrates that strong copyright needs to be balanced with strong, properly calibrated rights for the public, including those for libraries to support initiatives like the HathiTrust that fill a need not met by the private sector alone. These rights of the public and, in tandem, the various copyright exceptions and limitations in support of public uses, are as important as the rights of copyright holders in maintaining the system. That said, an intrinsic tension plays out in the international copyright background regarding the activity of a PPP such as HathiTrust. Library exceptions at the WIPO level require that limitations on an author’s otherwise exclusive IP right are subject to the three-step test; that is, these exceptions may be allowed only to the extent that they “do not conflict with a normal exploitation of the work” and “do not unreasonably prejudice the legitimate interests of the author.”⁵⁴ Arguably, there are also practical tensions between right to education and authorship in the various international human rights instruments that cover the area of knowledge and education.⁵⁵

In US research libraries, there is growing confidence regarding the application of fair use in recent years as the result of the litigation arising from the Google Books Project (see box 3) as well as other cases like *Kelly v. Arriba Soft*. However, at the time the UML and Google entered their formal relationship, there was considerably more legal uncertainty than exists today. The partners had to commit resources and accept the risk of mounting a legal defense, which posed a significant cost even anticipating that they would prevail. In the absence of appropriate, administrable exceptions to copyright tailored to libraries, the potential legal risk and litigation costs make this kind of partnership prohibitive for most, thus reducing the possibility of otherwise valuable PPPs that would respect copyright and simultaneously support the SDGs.

⁵⁴ *Berne Convention*, *supra* note 53, at Article 9 §2. Right of Reproduction. This is often referred to as the three-step test. Article 11 of the Marrakesh Treaty duplicates the language of the three-step test in the TRIPS Agreement, which refers to legitimate interests of the rights holder, and that of the Berne Convention and the WIPO Copyright Treaty, which refer to the legitimate interests of the author. WIPO *Copyright Treaty*, WIPO (Dec. 20, 1996), www.wipo.int/treaties/en/ip/wct/; TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S 299 (Apr. 15, 1994). See Laurence R. Helfer et al., *THE WORLD BLIND UNION GUIDE TO THE MARRAKESH TREATY* 51–59 (2017); Martin Senftleben, *COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW* 52 (2004).

⁵⁵ *United Nations Universal Declaration of Human Rights of 1948*, which explicitly addresses a right to education in Article 26 while the latter part of Article 27 recognizes authors’ intellectual property rights, each expressing core humanist values written in the wake of the Second World War’s devastation. Section 1 of Article 26 of the *United Nations Universal Declaration of Human Rights of 1948* states in part that, “Everyone has the right to education.” Section 1 of Article 27 states that, “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Section 2 states that, “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” G. A. RES. 217 (III) A, *Universal Declaration of Human Rights*, U.N. Doc. A/810, at Article 27 (1948), www.un.org/en/universal-declaration-human-rights/.

Productive results such as this could be obtained through more collaborative partnerships, fewer hardline positions on copyright matters in the library context, and more nuanced understanding in WIPO and similar international fora. Private sector support for library-type exceptions to copyright would facilitate preservation and some level of access by institutions with publicly oriented missions. Carefully tailored library-type exceptions to copyright in public laws, including treaty law, would facilitate preservation, encourage legally appropriate access, and reduce concerns about the complexity of navigating varied legal regimes in a cost-effective manner. They may also reduce copyright infringement and increase respect for rule of law that will, over time, improve the security of works relying on copyright for investment.

These partnership relationships did not explicitly assume any formal development agenda in the context of the SDGs (which were formulated roughly concurrently with the establishment of Google). Yet, the SDGs are implicitly served through increased access to information and broader participation in the knowledge ecosystem, because each SDG requires access to information and knowledge for reliable research and to inspire new ideas and connections.⁵⁶ The issues and opportunities raised by this particular library–corporate relationship have bearing upon the successful implementation of all of the SDGs to the extent that greater access to knowledge, expression, and information are foundational to informed decision making, research, education, and innovation. Access to knowledge and information is assumed as an underpinning to all the SDGs. Libraries have a significant and unique but not exclusive role in this endeavor.

Conclusion

What are the ingredients for a sustainable partnership commitment? This is an essential question to ask in any relationship and is not unique to PPPs. This chapter demonstrates some best practices that optimize the success of one particular partnership that promotes preservation of and access to knowledge.

As a practical matter, it is possible for anyone, anywhere to have access to cultural collections in electronic form. The romantic promise of a global digital Library of Alexandria is tantalizingly possible. With sufficient private investment, cultural institutions could provide unprecedented access to research, scholarship, and memory collections. In turn, more universalized access to such collections would contribute to new knowledge generation that is foundational to achieving any and all of the SDGs. Strategic partnerships between cultural institutions, like public libraries and private sector partners reflect mutual incentives. Private actors can be incentivized to work with cultural institutions for reasons that go beyond producing reproductions (search engine, natural language research, access to collections, or reputation enhancement by association). The relationship benefits each entity and their respective constituents. The PPP between UML and Google – among others – amply demonstrate the power of such partnerships to support knowledge preservation and facilitate access to knowledge by people with print disabilities.

⁵⁶ IFLA, *supra* note 6.

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