

CASE #4

Intellectual Property Concerns in Undocumented Corporate Collections

AUTHOR:

Katherine McCardwell

Archivist 1

Colorado State Archives

katherine.mccardwell@gmail.com

(formerly Librarian/Archivist at Robert W. Richardson Library at Colorado Railroad Museum, Golden, CO)

OVERVIEW:

This case study illustrates the challenges faced and steps taken by the Robert W. Richardson Railroad Library, part of the Colorado Railroad Museum, to deal with intellectual property concerns in their undocumented corporate collections. The case study addresses several points from the [SAA Code of Ethics](#), most prominently judgment (in reference to consultation with peers and the documentation of decisions made) and access and use (with reference to balancing claims by competing stakeholders, particularly users and content creators).

Many museums have found undocumented collections items in their holdings; so, too, special collections and archives, inside and outside the museum. In order to best serve users of archives, archivists must address the implicit issues of intellectual property and copyright ownership. Doing so presents the opportunity to brainstorm and consult with colleagues facing similar challenges, and to build relationships with content creators and copyright holders. The end result is a user group with greater understanding of and respect for intellectual property, more thoroughly documented collections, and content creators with an increased interest in working with institutions to steward their own documentary histories.

DATE:

November 2014

KEYWORDS:

Access | Corporate Records | Donor Relationships | Ethics |
Legal | Museum Archives | Privacy | Professional Conduct |
Professional Judgment | Rights Management

Introduction and Institutional Context

The Colorado Railroad Museum began as the private collection of a single individual, Robert W. Richardson. Richardson ran the Iron Horse Motel in Alamosa, Colorado, and as part of the attraction he displayed some of his personal collection at the motel. In the late 1950s he moved his business and the collection to Golden, Colorado. For a time, he continued to operate the hotel in this new location, but soon dropped that business and, with the financial backing of fellow railroad enthusiast (or “railfan”) Cornelius Hauck, gradually transitioned the management and ownership of the “museum” to a non-profit foundation, the Colorado Railroad Historical Foundation, Inc.

At the time, the museum was envisioned as a working and authentic rail yard with an emphasis on full-size equipment. The audience was assumed to be other railfans, so interpretation was minimal. Visitors were expected to know the context and importance of what they saw, and the museum was as much a pilgrimage site as an educational or research facility. Since the 1990s, the museum has been in the process of professionalizing and ensuring compliance with standard museum practice, in terms of what it does (exhibits, educational programming, restoration, and research) and how it does it (through grants, donations, and collaboration with other cultural institutions).

Despite the early emphasis on locomotives and rolling stock, Richardson also was a collector of books and other documentary materials. Like many railfans, he was an avid photographer and amateur cinematographer, and accumulated a large collection of graphic media that he had created and collected through trade and gift. For years, these materials were stored in his house and, later, in the basement of the museum structure. As the bulk of materials grew, incoming documents, which did not fit inside the buildings, were stored in railcars. In 1997, the museum constructed a building expressly for the use of the museum’s library/archives, named the Robert W. Richardson Railroad Library after the museum’s late founder. Because more material was stored in railcars around the grounds than thought, and because the library received ongoing donations, the structure was already out of space at the time of its completion.

The museum remained largely volunteer run until the early 2000s. The Richardson Library in particular, from 1998 to 2012, had a quasi-volunteer staff person—compensated for travel costs but not for time, thus “first among equals,” so to speak—in addition to approximately twenty-five periodic volunteer assistants. All of these individuals had a passion for Colorado railroad history, and many were prolific authors and acknowledged experts in their field. Only four of these, however, had experience in library or archives work: three as volunteers at an accredited institution and one as a library student assistant during college. Recordkeeping was informal, when undertaken at all; it was assumed that someone would surely remember where everything was and where it came from. Additionally, many of the volunteers, including the staff member, were uncomfortable with computers, so little was recorded, and that which was recorded was often corrupted through the poor computer skills of some of the volunteers. Moreover, processing, such as it was, did not respect provenance; incoming donations were

pieced out into various subject boxes—normally by railroad, but sometimes by format or by some other category (e.g., “humorous” or “valuable”).

In its defense, donations received by the Colorado Railroad Museum were irregular. Donations almost never came from creators, but rather from collectors, who acquired items on a range of topics from a range of sources, as railroad items are often highly collectible and widely traded. The original order was lost through the actions of collectors, and the more immediate provenance was lost at the point of donation and “processing.”

In 2012, two notable changes occurred. First, the institution as a whole adopted standardized donation paperwork and processing policies, which covered financial, in-kind, and artifactual/documentary donations. Second, the former library quasi-staff member retired. There was no succession planning, nor was the transition to professional management planned in advance. For a period of several months, there was no staff person in the library, and volunteers kept the library open when they were available. Donations continued to be accepted and stored wherever space could be found, but often without compliance with the still-unfamiliar donation documentation. In May 2012, the museum hired its first professional librarian and archivist, who began addressing the problems that had accumulated. Foremost among them were concerns surrounding the collection itself, particularly ownership issues. (Other issues, specifically processing, access, security and preservation, are not addressed in this case study, though they are still part of the overall project.)

This case study is undertaken as a reflection on several values as set forth in the [SAA Code of Ethics for Archivists](#) (emphasis added):

- Professional Relationships: Archivists cooperate and collaborate with other archivists, and *respect them and their institutions’ missions and collecting policies*. In their professional *relationships with donors, records creators, users, and colleagues*, archivists are honest, fair, collegial, and equitable.
- Judgment: Archivists exercise professional judgment in appraising, acquiring, and processing materials to ensure the preservation, authenticity, diversity, and lasting cultural and historical value of their collections. Archivists should *carefully document their collections-related decisions and activities to make their role in the selection, retention, or creation of the historical record transparent to their institutions, donors, and users*. Archivists are encouraged to consult with colleagues, relevant professionals, and *communities of interest* to ensure that diverse perspectives inform their actions and decisions.
- Access and Use: *Recognizing that use is the fundamental reason for keeping archives, archivists actively promote open and equitable access to the records in their care within the context of their institutions’ missions and their intended user groups*. They minimize restrictions and maximize ease of access. They facilitate the continuing accessibility and intelligibility of archival materials in all formats.

Archivists formulate and disseminate institutional access policies along with strategies that encourage responsible use. *They work with donors and originating agencies to ensure that any restrictions are appropriate, well-documented, and equitably enforced.* When repositories require restrictions to protect confidential and proprietary information, such restrictions should be implemented in an impartial manner. In all questions of access, archivists seek *practical solutions that balance competing principles and interests.*

- *Privacy: Archivists recognize that privacy is sanctioned by law. They establish procedures and policies to protect the interests of the donors, individuals, groups, and institutions whose public and private lives and activities are recorded in their holdings.* As appropriate, archivists place access restrictions on collections to ensure that privacy and confidentiality are maintained, *particularly for individuals and groups who have no voice or role in collections' creation, retention, or public use.* Archivists promote the respectful use of culturally sensitive materials in their care by encouraging researchers to consult with communities of origin, recognizing that privacy has both legal and cultural dimensions. Archivists respect all users' rights to privacy by maintaining the confidentiality of their research and protecting any personal information collected about the users in accordance with their institutions' policies.

Because many small institutions face similar challenges in transitioning from volunteer-administered organizations to professionalized institutions, the administration of the Colorado Railroad Museum, which supports the sharing of this case study, hopes our experiences will be useful for other “first-generation” archivists and collections managers in small and professionalizing institutions.

Narrative

At the beginning of the new archivist's tenure, because there were so many opportunities for improving technical and public services, and because there were so many stakeholders with competing ideas of what had to be done and what certainly should not be done, the new archivist adopted a policy of observation and listening before making any changes. She anticipated spending at least a year trying to learn the culture of the institution, the personalities of the various stakeholders—ranging from current and former board members to volunteers to other staff—and the way the library was functioning prior to any changes she might make. She also spent a good deal of time trying to learn the system by which things were filed, and to decipher the acronyms and sometimes-cryptic comments in the spreadsheets composing the “catalog.” Additionally, she had to learn about the context of the creation of the records in the library, the majority of which were corporate records from now-defunct companies, many of which had undergone numerous mergers and name changes.

After about a year and a half, the archivist had a reasonable grasp of how the library functioned, what materials were retained because no one wanted to be the “bad guy” who threw away admittedly irrelevant materials, who donors were and what “gentlemen’s agreements” had been made with them, where the “minefields” were, and who supported upcoming changes in the library.

During this first year, she learned in bits and pieces the information laid forth in the institutional history above. She found extremely limited documentation of any previous donations, and she heard a number of stories of who donated what, approximately when, and how they came into possession of the materials they donated. Few of the corporate records had been donated by the companies themselves. Personal donations were generally made with a handshake, with no documentation of physical ownership or reference to any transfer or licensing of intellectual property rights. Some materials were clearly copies made from originals at other museums and libraries, complete with “do not copy or redistribute” stamps on the back. The archivist was concerned that the museum was not adequately protecting itself from liability, and that reference services, including photocopy requests and requests for permission to publish images and maps, were suffering because of a lack of clarity regarding the rights the library itself held. Additionally, she was concerned that the library was not demonstrating good faith with reference to other museums and libraries holding originals to which the Railroad Museum held obvious copies.

How to begin to address, retroactively, these questions of ownership? How to balance the needs of users against the rights of material creators and owners?

Because the library was already serving approximately twenty users per day, some stopgap measures had to be put in place. Volunteers, many of whom had been involved with the museum for more than ten years, were unaware that there were any problems, as previous volunteer staff had not been conversant with intellectual property concerns. Some board members thought that nonprofits didn’t have to comply with copyright; a number of volunteers suggested that in terms of respecting copyright and intellectual property rights, if they stamped the items in question with the institution’s name, then the institution was “covered.” Clearly this indicated a need for ongoing copyright education.

As a first-response to these concerns, the archivist prepared some basic copyright training FAQs, which she made available to board members, volunteers, and users to address any violations committed due to lack of knowledge, rather than intentional non-compliance. Additionally, signs were posted on copiers and scanners to remind volunteers that materials they were working with were potentially covered by copyright law, and that they should check with the archivist if there were any questions about the legality of making copies of a given item.

On the user side, updated and more specific user agreements—including codes of behavior, camera use, reproduction policies, and publication policies—were updated. The majority of users intends to comply with copyright, but due to the complexity of the issue, needed more

guidance than the volunteers had been able to provide. A better understanding of copyright from the perspective of the user and the volunteers radically lessens the chance of accidental inappropriate reproduction or publication.

Some small steps also were taken in terms of reprocessing the photo collection, with an eye to what could and could not be reproduced, beyond a simple reference photocopy. The archivist assigns some of the volunteers the task of sorting through the photo file and segregating any photos marked as originating with another cultural institution. These photos go in a file labeled “restricted,” from which photos cannot be published or reproduced as high-quality prints, but are filed with “unrestricted” photos of the same subject. (Although these labels may leave something to be desired, they were judged better than “no rights” or “copyrighted,” in terms of volunteers understanding the implications for use.) Now, when users or volunteers are working with the photo collection, it is immediately apparent which photos may be used freely, and which require additional permissions for anything beyond a reference copy. Given space constraints, it would be preferable simply to weed these restricted photos, as nearly all were acquired from Denver-area cultural institutions, where they are still publicly accessible, but the culture of the Railroad Museum currently is not comfortable with the idea of weeding, whether for reasons of scope or ownership and usability. While this will presumably one day change, until that point, the “restricted” files make copyright compliance easier, and when weeding is a possibility, these “restricted” files will be easy to pull, review, and, where appropriate, discard.

While these measures provide a “first line of defense” against copyright violations, their success depends on the institution being able to ascertain the copyright status of the materials in question. Given the lack of donation documentation and rights licensing, and the number of immediately-apparent photocopies in the collection, how could the library address the issue of rights management for these found-in-collection items?

Perhaps of most immediate concern were the large corporate collections produced by a number of historic railroad companies. These collections contain corporate financial, administrative, personnel, and engineering records, as well as maps, technical drawings, A/V and graphic material, etc. Many of the materials were not published, so seem most likely to fall under the rubric for unpublished corporate materials, making them protected for 120 years from the date of creation.¹ This was problematic, however, in that it meant that the vast majority of the library’s holdings would have to be closed, after having been inappropriately opened. This would be a significant inconvenience for the library’s users, and would effectively shut down the archives portion of the library, as only a very small portion of these collections had yet entered into public domain based on age.

The archivist considered trying to find the donors of the materials, but she was fairly certain that they had not had legal ownership of the intellectual property rights of the items in question. Additionally, many of the known donors were deceased, and tracking their heirs and

¹ Peter B. Hirtle, [Copyright Term and the Public Domain in the United States](#), Cornell Copyright Information Center, updated January 1, 2014.

the unknown donors seemed impossible, especially given that there was no documentation tying any particular items to a particular donor. It seemed more straightforward and rigorous to attempt to contact the creating companies. Many of those, however, had also gone out of business, with the vast majority of them being absorbed by three to five still extant railroad companies. Unfortunately, the museum did not retain legal counsel who the archivist could approach for advice at this point. It seemed likely, however, that the intellectual property of the absorbed-railroads was also acquired by the purchasing railroad when they acquired one of these failing businesses in its entirety. Approaching these contemporary corporations with a retroactive request for ownership and licensing rights for historic documents also carried significant risk. What if they said no, and even asked for the items back? Was it better to hold copies of materials they couldn't legally use, and might not legally own, or to return materials to a place where they might never be accessible? What were other institutions with similar collections doing?

The archivist contacted a handful of other museum and special collections with significant railroad corporate holdings, and received a surprisingly wide range of suggestions. Some concurred that contacting the creating institution, or its current owner, was the best route and that, in the end, this option had no significant downside. Others felt that continuing to provide access until asked to stop was permissible, as it prioritized providing access. Still others felt that the point was largely moot until the library could establish physical ownership through the donor, and that the library should get rid of all copies held, as establishing any sort of intellectual property license based on a photocopied original was unlikely to be successful. Some suggested the library would do best to treat the items as “abandoned property” held by a museum, and to follow the established protocol for establishing ownership of abandoned property.

The range of responses was interesting, both for the creative problem solving it showed, and for the breadth of interpretation of the [SAA Code of Ethics](#) it illustrated. They did not, however, clearly point out a “standard” way to address this problem.

As an additional deciding factor, an opportunity to work with a representative of one of the corporations in question presented itself. The representative had contacted the trustee over a donation known to have arrived at the museum in late 2011 or early 2012, and given the timing of this contact, the archivist thought she should begin the conversation while she had the opportunity to work with a strategically-placed representative who was open to the idea of the library stewarding these materials. The collection that precipitated this collection had arrived through unofficial channels—an employee had somehow taken possession, stored the documents for years, and then willed them to a friend, who in turn donated them to the Museum—and the representative was concerned that there might be private information included. Given this unorthodox donation to serve as a jumping-off point, the time seemed right to begin a discussion of rights transfer and licensing issues that might prove mutually beneficial.

Conclusion

In the final analysis, the archivist felt that the library would be best served if negotiations were established with the current owners of the creating corporations. The deciding factor was largely the nature of the Richardson Library and its parent organization: as a small and professionalizing museum that has not, to date, fully established itself as an accredited museum, and as a young and evolving institution in the cultural resources community, the museum has much to gain by demonstrating that it both can and will play by the rules and conduct itself in a professional and collegial manner. Historically, the museum has not functioned as a traditional museum with special collections and seems to have convinced itself of its “outsider” status. Idealistic though it may be, the archivist felt that this problem—of questionable physical and intellectual ownership of original corporate collections—presented the opportunity for the library to address past laxity with its collections while establishing a good-faith relationship with corporations, which continue to be the main source of records that the museum would like to continue collecting.

To date, the archivist has approached personal contacts at two of the three main corporations in question; she has not yet contacted the third corporation, but plans to do so once she is able to identify an appropriate contact person. At the time of this writing, negotiations were still under way, although some informal agreements already have been reached. Though not as “open” as the archivist might like, these yet-to-be-formalized terms and conditions—at the very least—allow for significant use of the materials in question, do not present an undue hardship for the library, and take the first step in establishing a professional working relationship with the corporation in question, and its affiliated historical society and archive.

While the archivist is delighted to be making even this amount of progress on such a thorny issue, she acknowledges that this progress represents only a single step in the right direction. It does not begin to address a significant portion of the collection, drawn from personal rather than corporate collections. It also may have the unintended consequence of providing an excuse to delay implementing the museum’s newly approved scope statement and deaccessioning out-of-scope materials, particularly the copies from other cultural institutions. During the archivist’s discussions with other institutions about rights, she also tried to clarify how these institutions wanted the library to deal with copies from their collections, and most were happy with the “restricted” file system outlined above. Notably, when the archivist indicated to her contact at another cultural institution that she would be willing, and indeed pleased, to comply with a cease-and-desist letter asking the library to destroy the non-permitted copies it has from the other institution, that institution’s representative declined to make that request, citing concern for public relations and the institution’s public image. Thus, though not all progress is occurring as swiftly as the archivist would like, she is pleased that the library is taking the appropriate steps to establish control of its collection, and to participate in the Denver-area cultural community as a responsible, ethical, and professional institution.

The archivist has tried to keep the rest of the staff abreast of any developments in this project, and the response has been largely positive. The guest services and technology (website and

multimedia) staff are pleased to see this issue addressed, as they are involved in any duplication-for-pay that the library undertakes. Additionally, they are the archivist's liaisons when the library is asked to participate in new product development—publications, calendars, art prints, etc.—and since there is no formal rights management structure as part of this process, all staff involved feel relieved that someone is monitoring copyright compliance and protecting the museum from liability. Other staff members with collections duties, particularly restoration personnel, have been highly supportive, because this project signals a sea-change in how the museum's collections are managed. Staff and volunteers are beginning to feel that they can interact with other area cultural institutions, rather than as outsiders in the museum world, because they are addressing issues not yet in compliance with museological or archival best practices.

Not all responses have been entirely positive, however. While some higher-level administrators are displeased with the potential loss of revenue, the archivist is documenting that the losses are not as great as the administrators may believe. She also suggests to the administration that the non-monetary benefits from this process are themselves worth more than the to-date financial losses, and may result in financial gains in the future, as other corporations and institutions decide they want to do business with the museum, based on its professional reputation. Support from the board is mixed: some board members are not convinced that this is a serious issue, because they do not perceive it as ever having been a problem before; others are highly supportive of the museum proceeding according to standard operating practice and participating more fully in the museum and library community. Library volunteers are still confused, it seems, because this process is so radically different from how the previous staff acted; however, none have actively resisted or complained, and many seem to have taken the copyright education to heart and have added it to their repertoire of library skills and knowledge.

Discussion

Questions

- Librarians and archivists generally want to promote greater use, not to invite potential restrictions. Did the archivist act properly in prioritizing creators' rights, and thus potential restriction of resources, over users' rights, which would argue for greater access until such time as the corporations requested a closure of these records?
- Lacking recourse to legal counsel, is it fair to assume that the corporations—which absorbed the creators of the museum's corporate documents—retain the intellectual property rights from their acquired companies?
- Should the archivist have pursued an abandoned-property approach instead?
- Should the archivist retain materials to which licenses cannot be obtained, until such time as they become public domain? Even if the materials in question are photocopies rather than originals? Even if the materials in question are not otherwise publicly

available, by virtue of being on deposit with a facility that is not open to the general public?

Suggested Answers

The decisions outlined above illustrate the best possible course of action. While the archivist earnestly hopes to be able to negotiate some public access, with a time-delimited closure for relatively recent documents that might contain items reflecting on trade secrets or other privacy issues, she knows that had she not approached the corporations in question, she would not feel that she could ethically provide access to, and potential reproduction services for, these materials. It would be surprising and disheartening if one of the corporations in question requests the return of some or all of the documents, but since the institution cannot produce documentation of legal ownership, they have been from the beginning on ethically and legally shaky ground, and further secrecy is unlikely to produce the desired end result. Privileging the rights of users above that of creators seemed perhaps more desirable in the short run, as it would make more users happy and generate more revenue from copies, thus making the board happy, but worse in the long run in terms of future collection and establishing working relationships with corporations and with other cultural institutions.

The archivist does wonder if the abandoned-property approach might have been viable, and indeed advisable. It is likely that it is the route she will advocate for establishing ownership of undocumented personal collections in the library, particularly given that the contact person for these collections is not immediately evident. With reference to corporate collections, however, it would be disingenuous to suggest that it was not apparent who to contact for permission, given that the creators' names were clearly associated with the documentary collections in question. Additionally, there might be something to be gained by requesting proof of the acquisition of intellectual property rights from the companies they acquired; however, all cultural institutions, and corporations, the archivist contacted agreed that this was a fair assumption. None seemed to think that requesting documentation of this assertion would be anything other than a time-consuming formality.

For materials to which licenses cannot be obtained, such as copies of materials held in other institutions, the archivist would like to remove the copies from the collection. The library is extremely short on space, and the space that could be reclaimed through this process would be extremely valuable to the institution. Given the current political climate at the institution, however, it is likely that significant weeding cannot be undertaken for another five to ten years. A good deal more volunteer and trustee education is necessary before the institution undertakes a weeding project, which today would be perceived as hostile and irresponsible. As library stakeholders become more familiar with research processes, many involving Internet access to digital collections at other repositories, they will become more confident in their ability to access proxies of the originals, and thus not feel the need to retain copies of copies taken from other institutions. For truly rare items that are not generally available, however, such as those held at institutions that are closed to avocational researchers, this archivist finds arguments for retention generally compelling.

Though this project is far from completed, these early steps have been positive, both in terms of initial outcomes and the intellectual work the process has asked the institution as a whole to undertake. Although this process is not perfect, the decisions outlined in the narrative do represent an honest effort to follow Verne Harris' recommendation that, when faced with an ethical challenge in the archive, archivists should acknowledge the rights of all stakeholders, consider competing claims, consult with respected colleagues, and in the end, listen to their conscience.²

² Verne Harris, *Archives and Justice: A South African Perspective* (Chicago: Society of American Archivists, 2007), 247, quoted in Randall C. Jimerson, *Archives Power: Memory, Accountability, and Social Justice* (Chicago: Society of American Archivists, 2009), 353.