



ASSOCIATION OF RESEARCH LIBRARIES

August 29, 2007

TO: NARA Vision
FROM: Prudence S. Adler, Associate Executive Director, ARL
RE: *Proposed Digitization Agreement* between NARA and GSU

This letter provides comments by the Association of Research Libraries (ARL) on the *Proposed Digitization Agreement* between the National Archives and Records Administration (NARA) and the Genealogical Society of Utah (GSU). ARL very much appreciates the opportunity to comment on the proposed *Agreement*.

There are some positive aspects of the *Proposed Digitization Agreement*. First, NARA is to be commended for requesting public comment prior to finalizing the *Agreement*. This is an extremely useful and important action by NARA and presents benefits to NARA, its partner and to the public. Nevertheless, it would be more helpful in the future if NARA would solicit, through an RFI, other potential partners who may be interested in digitizing these public domain resources that belong to the American people. Second, the terms and provisions in the *Proposed Digitization Agreement*, in many instances, recognize the value in making these digitized resources publicly and freely available. Finally, it is very helpful that the proposed agreement details the roles and responsibilities of each party including that GSU will adhere to NARA requirements.

There are a several issues that warrant clarification and/or additional information. Providing such information will assist the user communities in understanding the opportunity that this *Proposed Digitization Agreement* presents to NARA, other possible partners and to the public. ARL encourages NARA to publicly address these issues prior to finalizing the *Proposed Digitization Agreement*.

- 1.1: The *Proposed Digitization Agreement* refers to the Project Plan yet the NARA collections that will be digitized are not identified. Will the Project Plan be publicly available, and if so, when? As the collections/resources to be digitized are not identified, the scope of work appears to be open ended. Thus it will be key to both identify those resources to be digitized and conduct an RFI as other organizations may also seek to digitize NARA resources. In this regard, it will be extremely important for NARA to define the term "non-exclusive" used in the *Proposed Digitization Agreement*.

- 1.2: The *Proposed Digitization Agreement* provides limited information on the digitization specifications. Are these preservation quality standards? With the ongoing discussions with National Digital Information Infrastructure Preservation Program partners and others on preservation quality standards, will the digitization undertaken by GSU meet these standards?

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•1.4: NARA recognizes the importance of ensuring long-term public access to these public domain resources. Thus it would be most helpful to have additional information concerning the following statement:

“With respect to public access, if no language in a Project Plan grants a license to a third party to the Digitized Materials contemplated within that Project Plan, then GSU hereby grants to NARA a perpetual, royalty free, worldwide license to the Digitized Materials that are the subject of such Project Plan.”

This provision has the potential, depending upon how it is used, to undercut or negate, the successor provision regarding providing “NARA with a perpetual, royalty free, worldwide license.” It will be important for NARA to ensure that the amount of third party licensing that occurs is minimal and does not include new intellectual property rights and/or restrictions on public access.

- 1.4: The Proposed Digitization Agreement states that after five years from the date of donation, NARA will have “full and unrestricted rights to use them (donated materials).” What market studies were conducted to determine the five-year use limitation?
- 1.5: NARA proposes to “produce selected copies for researchers, for which NARA may charge a fee.” As NARA is not engaging in the digitization of these public domain resources thus is not accruing the costs of creating the product or service, the cost of duplication of these resources should be minimal. This would be consistent with OMB guidance and law both of which apply to NARA. More information regarding fee structures is needed.
- 1.6: Will the Digitized Images be searchable only via GSU’s metadata? This is an important consideration.
- 3.3: There is confusing and seemingly contradictory language in this section, in particular with the following two sentences.

“GSU hereby assigns to NARA all copyright that GSU does or may own in and to the Digitized Images by virtue of having created digital copies of original documents in the public domain.”
“GSU will own all copyright and other intellectual property rights to the Digitized Materials (the Digitized Images with the associated metadata).”

Is GSU claiming copyright to the Digitized Images? What rights are being asserted? This should be clarified. Case law is not settled in this arena. However, if in the future, a court decides that rights may exist, such rights should be assigned to NARA (as suggested in the *Agreement*) or to the public domain. It is understandable that GSU claims rights to the metadata. That may not be the case with digitizing public domain resources as there is nothing transformative in the mere act of digitization. This becomes particularly

important if for some reason circumstances change in the future, for example, if GSU is sold or goes out of business.

As a public policy matter, NARA should state that it does not recognize intellectual property rights in public domain materials based on mere digitization. It would be most helpful to have additional consideration of these issues.

Thank you very much for the opportunity to comment on the *Proposed Digitization Agreement*. ARL looks forward to working with NARA on this and other potential agreements.

Sincerely,

A handwritten signature in cursive script that reads "Prudence S. Adler".

Prudence S. Adler
Associate Executive Director
Association of Research Libraries