

Ten things to consider when entering into public-private digitization partnerships

Over the past three years the British Library has brokered mass digitization partnerships with Google, Brightsolid, Find my Past, Cengage Learning and others. This article explores some of the major challenges underlying digitization partnerships, particularly public-private, covering many of the important aspects to be considered such as ownership, access, control and standards. It also covers topics like term (length of time), the importance of flexibility, maximizing use/re-use of digitized material and market penetration. Legal and other aspects of such partnerships are also detailed, with sections on the type of partnership that needs to be entered into (non-exclusive) and the role of the commercial partner. Finally, there is sound advice about risk assessment and cover. These lessons learned from experience are itemized in a handy ten-point checklist for anyone considering entering into a digitization partnership, and recommendations are made based on a wealth of acquired knowledge.

Introduction

In the form of what is hoped will be a handy ten-point checklist for anyone considering entering into a digitization partnership (particularly public-private), this article explores some of the major challenges that were faced by the British Library and covers many of the important aspects to be considered.

1. Ownership

This lies at the very heart of what you, as the licensor, are trying to achieve: the creation of digital assets over which you will ultimately exercise full control. It is likely that the primary driver for your mass digitization project is not revenue generation through royalties (though this can be a secondary and beneficial outcome of the business model), but in a time when resources are scant, your aim is to find a partner that will fund the highly expensive business of digitization whilst at the same time allow you to retain control of the long-term destiny of the resulting asset.

From the start of negotiations you need to be vigorous in asserting your ownership of the intellectual property rights (IPR) of the digital asset. The IPRs in most cases will be copyright and database rights (note ownership of the digital aspects *not* the underlying content). Be sure that you negotiate hard for ownership of *all* aspects of the digital object – not just the scans, but also the optical character recognition (OCR) and the associated metadata.

On expiry of the term (see below), the licensor will be in a position to assert ownership and will be free to make choices on how the material might be further exploited. One realistic choice for a public institution might be to make the digitized content free to the world, or at the least to the nation.

Your partner will probably fight hard for some element of ownership, even if this is only partial (for example, ownership of the OCR). Needless to say, ownership translates into control (and acts as an insurance policy in regard to the non-exclusive nature of the project: see below). Rather than relent and relinquish vital control of ownership, it is better to consider making concessions for a



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99 longer term of commercial exploitation if compromises are unavoidable in order to reach agreement (see below).

2. Term

In the early days of digitization, 'term' was often overlooked in the excitement of finding a partner that would cover the many millions required to digitize content. There are a number of institutions in the public sector that are sitting on legacy contracts in which there is a commitment to terms of 25 years or more.

Today, with ten years' experience of such projects, it is likely that the licensor will be looking forward to a fairly speedy end to the contract so that full ownership can be asserted and the institution can get down to the business of doing what it really wants with the asset (including the option of making the material free). There is no fixed period that can be recommended, as each project must be considered individually, but periods in excess of ten years need to be fully justified. The licensee will of course be pushing very hard for as long a term of exploitation as possible. (After all, this is how they make their money.)

If concessions are needed, you might consider a sell-off period that runs outside of the term of full exploitation (i.e. you may have asserted your rights over the material but you may grant the licensee the non-exclusive right to sell for a limited period of time). Equally, you might consider having terms that run to different lengths for different territories – this will allow your organization, for example, to do what it wishes with the material in the UK whilst allowing the partner to continue to sell in the US and elsewhere.

3. Flexibility

There is no single business model that works for all commercial partners. Each will have a different motivation for getting into a commercial relationship and each will have a preferred model. The drivers for Google, a business that makes its money on free-to-view material through revenues generated from advertising, are different from those of an aggregating publisher such as ProQuest or Cengage Learning that make their money by putting material behind paywalls and selling access to institutions.

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It is recommended that the starting point for your negotiations be from your own boilerplate contract – even though your commercial partner will push hard for discussions to start from their contract. However, note that for some of the bigger and more powerful potential partners, negotiating from their own contracts is a must. This is most notably the case with Google: if you absolutely insist on your own contract and are resolute on a fixed menu of non-negotiable terms and conditions, the negotiation is likely to be short and unsuccessful.

4. Maximize access and re-use

Trends in scholarly and more general communications encourage sharing, embedding, mash-up, repurposing and manipulation of digitized content. Many commercial partners will push hard to restrict uses to a tiny percentage of the material and to narrow the range of repurposing activities. Your organization should consider pushing back equally hard in the interests of the user and seek to maximize the uses to which the material can be put.

Again, policy will vary from partner to partner. The typical line of the commercial aggregating publisher is one of severe restriction; by contrast, the freedoms allowed under the standard Google contract are very generous (note that various Google mass digitization contracts are in the public domain). Google is unconcerned about the uses to which any of the materials are put with the single proviso that for the term of contract there should be no further *commercial* exploitation of the material. Should you wish to expose the content through Europeana, for example, then Google is usually happy for you to do so.

5. Maximize market penetration

With the possible exception of the ubiquitous Google, there are no potential commercial partners that can reach all possible markets and users.

The most obvious example of a more typical commercial partner is the traditional aggregating publisher. These make an excellent job of reaching the university and college market worldwide but they are not set up for the consumer market (and claims that they are should be scrutinized closely – it just is not what they are set up to do). As a consequence, those individuals who wish to access the digital material but are not attached to a learning institution are locked out.

To maximize access you should consider entering into further relationships that allow the material to be used by different communities and individuals. It is highly unlikely that your principle commercial partner, having paid for the expensive digitization process, would consider allowing your organization to broker arrangements for a third party. Far more realistic would be to allow for a sub-licensing arrangement brokered by your partner to, for example, a reliable business-to-consumer publisher. Your role, in the interests of maximizing access to the material, is to encourage your partner to make these sub-licensing partnerships happen but, with the necessary checks and balances in place, to allow them the freedom to run the relationship.

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6. The partnership needs to be non-exclusive

Entering into an exclusive partnership is always going to be problematic for a public sector organization. The idea that an institution would lock down part of its archive to all but a single commercial entity runs counter to the spirit of the museums, archives and libraries sector and besides, may be of dubious legality. However, for the commercial provider, having invested huge sums in mass digitization, leaving open the possibility that the licensor could simply hand over the same material to a rival is commercially unthinkable.

One solution to this potential impasse is to treat the underlying content and the digital version as entirely separate. Under a clause that grants the licensee a ‘period of preferential access’, the necessary contractual reassurance is given that the digital asset will not simply be handed over. At the same time, the contract should make it quite clear that the underlying material (text and images in the paper version) may be digitized again by a third party, creating a second version of the same material. Realistically, it is highly unlikely that a further commercial partner would consider re-digitizing an already scanned asset – the market in most cases is simply not big enough for two identical versions of the same content.

7. You are not the commercial partner

Having chosen a commercial partner you must allow them to do what they do best: act commercially. There is nothing more aggravating to a partner than an over-controlling public sector licensor. Of course, the base terms and conditions need to suit your organization, but the time to lay down the framework and the rules for this is whilst you are negotiating the contract. Once the contract has been signed, you need to trust your partner, a partner who presumably has been chosen from a wide field and been through a rigorous selection process, and allow them freedoms within the contract. On all the vital questions of marketing, distribution, pricing, sales and so on – the partner must be free to make decisions. You are there, on hand, to advise and support in any way that you can. In my judgement, there are three vital areas (PR, brand exploitation and subject-matter expertise) in which your organization will have a large role to play after the contract is signed – but the advice is not to overplay your hand and start meddling.

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8. Control your brand

One of the major attractions to a commercial partner contemplating entering into partnership with a public institution is brand association. There is little doubt that adding the branding of an organization with the weight and gravitas of the British Library, for example, adds lustre to the brand of the commercial partner. From the licensor's perspective, it is vital that you control this and that you are presented by your partner in a manner befitting a public institution.

Our experience has been one in which the brand is a little too prominent, rather than the obverse. Clear contractual guidelines that suit both parties need to be laid down in regard to the size, prominence and use of the host licensor's brand. Two considerations of note are firstly, determining how your organization feels about weaving the actual name into the product (as in, for example, 'The British Library X collection'). Secondly, where your partner is obtaining materials from a variety of different sources, how your organization sits alongside the brandings of those organizations.

9. Technical standards

The quality of digital scans and OCR improves by the day. In addition, the price of mass digitization on a page-by-page basis is falling.

It is important to keep a perspective on what you are doing. If you are scanning millions of pages or images, then the quality of image that you will require is going to be very different from the short run, high quality required where you are trying to give as faithful and high a resolution as possible for the full 'in facsimile' experience of, for example, art reproduction. The operating principle here is 'good enough' for the purpose to which the asset is being put. In addition, the accuracy of OCR improves all the time and, as improvements come onto the market, it is always possible for you to revisit the process. Other approaches such as crowd sourcing of OCR correction should also be considered.

The key point here is that in an insistence on overly high technical standards, you may effectively outprice yourself from the market by insisting on assumed standards that are neither expected nor required and, most crucially, that a commercial partner in a competitive world cannot afford.

10. Cover yourself

You should not be in the business of providing indemnities to third parties. Your partner should assume all commercial risks and it is their responsibility to ensure that they assess all risks. They should also be clear that they will be assuming those risks. In areas such as privacy violation, re-publication of a libel and unintentional breach of copyright, the contract should state that rigorous due diligence be exercised by the partner and responsibility for breach lies with the licensee. In addition, where there is the possibility that the interests of a third party could be breached, a vigorous notice and takedown policy should be written into the contract.

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Conclusion

The above list is, of course, by no means exhaustive. However, we have found that these are some of the main issues that have surfaced in our contract negotiations over the years. Armed with this basic checklist, and in the knowledge that there is still a wealth of wonderful material hidden away in public collections, it is hoped that others may be encouraged to take steps towards sharing their collections more widely with the help of private or commercial partners.

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