

Signed 8/23/06
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LIBRARY BOOK SCANNING COOPERATION AGREEMENT

THIS LIBRARY BOOK SCANNING COOPERATION AGREEMENT (the "Agreement") is made and entered into by Internet Archive, a California nonprofit corporation ("IA") and Regents of the University of California on behalf of its California Digital Library, a non-profit academic institution ("UC") and is effective as of August 23, 2006 (the "Effective Date").

RECITALS

- A. IA has established the Open Content Alliance (OCA) to offer broad public access to a variety of content through the participation of contributors to the OCA and in accordance with the principles set forth at <http://www.opencontentalliance.org/participate.html>.
- B. Certain contributors to the OCA are furthering such OCA principles by providing financial support to IA for the scanning and digitization of printed books (herein, "Financial Partners").
- C. UC also provides financial support to IA, and desires to further such OCA principles by providing access to printed books in UC's collections and archives for scanning by IA and distribution in digital form.
- D. IA and UC desire to collaborate to enable such scanning and distribution of such printed books under the terms and conditions of this Agreement.

NOW THEREFORE, the parties therefore agree as follows:

DEFINITIONS

For purposes of this Agreement, the following definitions apply:

"Agreement" - this document, including all of its terms and conditions and any executed amendments or exhibits.

"Collection" - Volumes, in the public domain, and in the library collection(s) specified in Exhibits to this agreement as may be added by mutual agreement of the parties.

"Digital Collection" - the entire corpus of Digital Volumes from a Collection scanned into a set of Digital Files.

"Digital Files" - digital image and text files produced by IA pursuant to this Agreement.

"Digital Volume" - the digital representation of each physical item that will consist of image and text files and its associated metadata.

"Exceptional Materials" - materials designated by IA as incapable of being scanned efficiently.

"Financial Partners" - Contributors other than UC mentioned in the Exhibits that provide support to IA for the digitization of materials described in the Agreement.

"IA Digital Copy" means all copies of the Digital Collection(s) that are retained by IA.

"Premises" - location on property as may owned, leased, or managed by UC, where scanning of Volumes takes place.

"UC Digital Copy" means the copy of the Digital Collection that is provided to, or otherwise made available to, UC.

"Volume" - physical materials provided to IA by UC for purposes of scanning; typically a Volume will constitute a book.

AGREEMENT

1. Collection Scanning and File Sharing.

1.1 Overview. UC will make good faith efforts to provide IA with access to Volumes for the purposes of scanning. Materials will be supplied as part of Collections. The extent of each Collection will be documented in an Exhibit to this agreement. Exhibits will also identify specific information about how, and at what cost to whom the materials in the Collection will be scanned, as well as any specific terms and conditions that surround the use of the resulting Digital Files. This document describes the general roles and responsibilities of the UC and the IA.

1.2 Scanning, Digitization and Delivery of Materials. Collections will comprise Volumes provided by UC. The physical materials will be scanned into a set of Digital Files, the complete corpus of which shall be considered the Digital Collection. The extent and nature of the physical materials associated with each Collection and the file and metadata formats that characterize the Digital Files produced from them will be specified in Exhibits and be made available to UC also in a manner specified in Exhibits.

1.3 Supply of materials to IA. UC will provide the materials to IA in a manner specified in Exhibits and according to protocols jointly developed by IA and UC. Except in accordance with Section 1.5, UC will not knowingly include or provide to IA any materials for digitization that are not in the public domain or that are otherwise subject to the intellectual property rights of any third party(ies). IA may make its own determination as to the copyright status of the materials and will, in its sole discretion, determine whether or not to proceed with the scanning and digitization of them. IA will use reasonable commercial efforts to return materials to UC within one (1) week after they are scanned or after a determination is made by IA that the materials will not be scanned. Materials will be returned to UC in substantially the same condition as they were provided to IA, except for normal wear and tear (for example, with bound volumes, separation of adhered pages and cutting of pages that were uncut). If UC establishes that materials were not returned in substantially the same condition, IA will, at IA's option and UC's sole remedy, either replace the materials or pay UC for the repair or replacement of them up to a maximum as may be specified in Exhibit.

1.4 Exceptional Materials. IA will determine, in its sole discretion, what materials are incapable of being scanned efficiently. Exceptional Materials will be scanned by IA only at IA's discretion, in cooperation with Financial Partner.

1.5 In Copyright Scanning. IA may from time to time, with the agreement of UC, identify and scan certain copyrighted materials in the UC's Collection, under terms and conditions set out in Exhibits.

1.6 Quality Assurance. Within ten (10) days after IA makes Digital Files available to UC, UC will monitor or sample the Digital Files to confirm that all pages are present and that the text is readable. If UC identifies a discrepancy and notifies IA of this discrepancy within such ten (10) day period, IA will, in IA's sole discretion and as its sole obligation, either retract such Digital Files from the Digital Collection or rescan the original materials. UC will cooperate with IA in re-supplying the

materials to IA in the event IA elects to rescan them. Unless UC notifies IA in writing of any such discrepancy within ten (10) days after such availability, such Digital Files shall be deemed accepted.

2. Grant of license. UC grants to the IA a non-exclusive, worldwide, perpetual, and unrestricted right to create Digital Files produced by scanning UC's Volumes.

2.1 Ownership and Use of IA Digital Copy. As between IA and UC, IA will own all right, title and interest in and to the IA Digital Copy. Subject to the terms and conditions of this Agreement and any applicable Exhibit, IA may use the IA Digital Copy, in whole or in part at IA's sole discretion, subject to copyright law.

2.2 Ownership and Use of UC Digital Copy. As between IA and UC, UC will own all right, title and interest in and to the UC Digital Copy. Subject to the terms and conditions of this Agreement and any applicable Exhibit, UC may use the UC Digital Copy, in whole or in part at UC's sole discretion, subject to copyright law.

3. WARRANTY DISCLAIMER. ALL INFORMATION, SERVICES, DIGITAL COLLECTIONS AND DIGITAL FILES PROVIDED IN CONNECTION WITH THE PERFORMANCE OF THIS AGREEMENT ARE PROVIDED "AS IS" AND WITHOUT ANY WARRANTY OR CONDITION OF ANY KIND, EXPRESS, IMPLIED OR STATUTORY, AND IA EXPRESSLY DISCLAIMS ANY AND ALL WARRANTIES INCLUDING ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, ACCURACY, TITLE OR NON-INFRINGEMENT.

4. Term and Termination.

4.1 Term. The term of this Agreement shall commence on the Effective Date and continue until the earlier of a period of three (3) years after the Effective Date, or completion of the scanning and acceptance of the extent of materials identified in extant Exhibits. This Agreement may be renewed or extended upon the mutual written agreement of the parties.

4.2 Termination. This Agreement may be terminated with or without cause by either party upon sixty (60) days prior written notice to the other party. Sections 2, 3, 4, and 5 shall survive any expiration or termination of this Agreement. In addition, upon the expiration or termination of this Agreement, IA will remove its equipment, software, materials, data and other information from the UC's Premises and UC will provide reasonable assistance for such removal.

Both parties reserve the right to terminate, in whole or in part, the performance of the work, if either is in material breach of its obligations under this Agreement. Prior to termination, the party intending to terminate will notify the other in writing of its intent to terminate and the reasons therefore, and award the other party thirty (30) days to cure the problem, and to document in writing the actions taken to cure it.

Upon termination, IA will:

- immediately cease digitization of materials as supplied by UC
- return to UC materials supplied by UC but still in the possession of IA
- plan to vacate the Premises between the notification and termination dates

Upon termination, UC will:

- Immediately cease shipping materials to IA
- Permit IA to retrieve IA property on Premises

5. **LIMITATION OF LIABILITY.** IN NO EVENT WILL EITHER PARTY BE LIABLE FOR ANY CONSEQUENTIAL, EXEMPLARY, SPECIAL, OR INCIDENTAL DAMAGES OR FOR ANY LOST PROFITS OR DATA, ARISING OUT OF OR RELATING TO THIS AGREEMENT EVEN IF SUCH PARTY KNEW OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF SUCH DAMAGES, REGARDLESS OF WHETHER SUCH DAMAGES ARE SOUGHT BASED ON BREACH OF CONTRACT, NEGLIGENCE OR ANY OTHER LEGAL THEORY. IN NO EVENT WILL IA'S TOTAL CUMULATIVE LIABILITY ARISING OUT OF OR RELATING TO THIS AGREEMENT, WHETHER IN CONTRACT OR TORT OR OTHERWISE, EXCEED ANY AMOUNT DUE TO UC AS SPECIFIED IN SECTION 1.3. IA'S FINANCIAL PARTNERS, CONTRACTORS AND SUPPLIERS SHALL NOT HAVE ANY LIABILITY ARISING UNDER OR RELATING TO THIS AGREEMENT.

6. **INDEMNIFICATION.** The IA shall indemnify, defend, and hold harmless UC and its officers, employees, agents, affiliates, and representatives, from and against any and all claims, demands, suits, judgments, liabilities, causes of action, losses, expenses, damages, fines or penalties, including court cost, reasonable attorneys' fees and charges (whether incurred as the result of a Claim or a claim to enforce this provision), and pre- and post-judgment interest (collectively "Claims") of any person not a party to this Agreement, arising or resulting from any bodily injury or tangible property damage attributable to the negligent or intentional acts or omissions of IA, its officers, employees or agents arising from the IA's performance hereunder, but only to the extent of and in proportion to such acts or omissions. The IA shall provide prompt written notice to UC of any such Claim. NO LIMITATION OF LIABILITY SET FORTH ELSEWHERE IN THIS AGREEMENT IS APPLICABLE TO THIS INDEMNIFICATION.

UC shall indemnify, defend, and hold harmless the IA and its officers, employees, agents, affiliates, and representatives, from and against any and all claims, demands, suits, judgments, liabilities, causes of action, losses, expenses, damages, fines or penalties, including court cost, reasonable attorneys' fees and charges (whether incurred as the result of a Claim or a claim to enforce this provision), and pre- and post-judgment interest (collectively "Claims") of any person not a party to this Agreement, arising or resulting from any bodily injury or tangible property damage attributable to the negligent or intentional acts or omissions of UC, its officers, employees or agents arising from UC's performance hereunder, but only to the extent of and in proportion to such acts or omissions. UC shall provide prompt written notice to the IA of any such Claim. NO LIMITATION OF LIABILITY SET FORTH ELSEWHERE IN THIS AGREEMENT IS APPLICABLE TO THIS INDEMNIFICATION.

7. **General.**

7.1 **Independent Contractors.** The parties are and at all times will be and remain independent contractors as to each other, and at no time will either party be deemed to be the agent or employee of the other. No joint venture, partnership, agency, or other similar relationship will be created or implied as a result of this Agreement. Neither party will have the authority to, and will not purport to, enter into any contract on behalf of the other party, or commit them to any obligation. The relationship under this Agreement is nonexclusive and each party may have similar agreements with others provided such agreements do not conflict with this Agreement.

7.2 **Governing Law.** This Agreement, and any and all actions arising from or in any manner affecting the interpretation of this Agreement, will be governed by, and construed solely in accordance with, the laws of the State of California, without giving effect to any conflicts of laws principles that would require the application of the laws of a different state.

7.3 **Assignment.** This Agreement may not be assigned or otherwise transferred by either party, without the prior written consent of the other party, except in the event of a merger, acquisition or reorganization of all or substantially all of the assets of such party relating to this Agreement. Any purported assignment without such prior written consent shall be null and void and of no legal effect.

7.4 Disclosure of Terms. This Agreement and its terms and conditions may be disclosed and made publicly available by either party.

7.5 Notice of Claims. In the event either party receives notice of any claim related to any of the Digital Files, such party shall promptly provide written notice to the other party of such claim and shall provide reasonable assistance to such party in responding to such claim. Promptly upon IA's written request, UC agrees to discontinue any public display, use and distribution of any Digital File for which such a claim has been made.

7.6 Ownership of Software and Tools. UC acknowledges and agrees to the extent permitted by state and federal law, that as between UC and IA, title to (i) software and systems IA has developed, will develop, and will employ for the scanning project, and (ii) all applicable copyrights, trade secrets, patents, and other intellectual property rights in such software and systems is and will be vested in IA. UC further agrees that IA may license any rights in such software and systems.

IA acknowledges and agrees to the extent permitted by state and federal law, that as between UC and IA, title to (i) software and systems UC has developed, will develop, and will employ for the scanning project, and (ii) all applicable copyrights, trade secrets, patents, and other intellectual property rights in such software and systems is and will be vested in UC. IA further agrees that UC may license any rights in such software and systems.

7.7 Notices. All notices or reports permitted or required under this Agreement will be in writing and will be delivered by personal delivery, facsimile transmission, or by certified or registered mail, return receipt requested, and shall be deemed given upon personal delivery, five (5) days after deposit in the mail, or upon acknowledgment of receipt of electronic transmission. Notices shall be sent to the addresses set forth in the signature blocks below. Either party may amend its address upon written notice to the other.

7.8 Waivers; Amendment. No waiver of any terms or conditions of this Agreement will be valid or binding on a party unless such party makes the waiver in writing. The failure of one party to enforce any of the provisions of this Agreement, or the failure to require at any time the performance of the other party of any of the provisions of this Agreement, will in no way be construed to be a present or future waiver of such provisions, nor in any way affect the ability of a party to enforce each and every provision thereafter. This Agreement may not be altered, amended, modified or otherwise changed in any way except by a written instrument signed by the authorized representatives of each party.

7.9 Severability. If any provision of this Agreement is found or held to be invalid or unenforceable by any tribunal of competent jurisdiction, then the meaning of such provision will be construed, to the extent feasible, so as to render the provision enforceable, and if no feasible interpretation would save such provision, it will be severed from the remainder of this Agreement, which will remain in full force and effect.

7.10 Entire Agreement. This Agreement, including its fully executed Exhibits and amendments, constitutes the entire agreement and final understanding of the parties with respect to the subject matter hereof, and supercedes the Partnership Agreement (September 15, 2005) between IA and UC. This Agreement is intended by the parties to be a complete and wholly integrated expression of their understanding and agreement.

7.11 Amendment. No modification or claimed waiver of any provision of this Agreement shall be valid except by written amendment signed by authorized representatives of UC and IA.

In Witness Whereof, the parties hereto have caused their duly authorized representatives to execute this Agreement as of the Effective Date.

"UC"

"IA"

REGENTS OF THE UNIVERSITY OF CALIFORNIA

INTERNET ARCHIVE

Laine Farley
By
Laine Farley
Printed Name
Interim Executive Director, California
Title Digital Library

Address:

415 20th St., 4th Flr
Oakland, CA 94612

BK
By
Brewster Kahle
Printed Name
Digital Librarian
Title

Address:

116 Sheridan Ave
San Francisco, CA, 94129

EXHIBIT A.

THE MICROSOFT COLLECTION OF AMERICAN LITERATURE, AMERICAN HISTORY, AND WESTERN AMERICANA

1. **Overview.** With the financial support of Microsoft (the Financial Partner), the IA and the UC will, within the term of this agreement, cause to be developed a collection of American Literature, American History, and Western Americana based on bound, out-of-copyright and public domain, printed materials drawn from the UC's holdings.
2. **Collection scope.** UC will supply to IA for scanning up to 30 million pages of bound printed Volumes of out-of-copyright materials of American Literature, American History, and Western Americana.
3. **Costs of digitization.** The costs will be born as follows.
 - a. UC will bear the cost of selection, packing, insurance and shipping to and from a digitization/production center based in the San Francisco Bay area, and providing IA with access to bibliographic metadata for the printed materials that are scanned. IA will bear the cost of unpacking, assessing, digitizing (non-destructive scanning of every physical page in a bound volume), creating technical metadata per minimal standards agreed to by the parties, re-packing books in their original crates, insuring them for the time they are on the Premises of the scanning center, and for IA's quality control of content files prior to delivery to UC Libraries. For volumes that are not part of UC libraries' American Literature, American History, and Western Americana collections, UC will pay digitization costs at the rate of \$.10 per page.
 - b. If UC establishes that materials were not returned in substantially the same condition as they were supplied to IA for the purposes of scanning, IA will, at IA's option and UC's sole remedy, either replace the materials or pay UC for the repair or replacement of them, up to a maximum of \$100 US Dollars per Volume.
4. **File Formats.** Each Volume in the collection provided by the UC will be scanned into a set of Digital Files (image and text files) with associated metadata (i.e., a Digital Volume). The entire corpus of Digital Volumes shall be considered the Digital Collection. Unless agreed otherwise in writing by both parties, IA will adopt the following file formats and metadata for the Digital Volume.
 - a. JPEG2000 cropped and deskewed images at a size resolution to be determined one for each page including the front and back covers;
 - b. Searchable color PDF file with Image-over-text format;
 - c. animated gif. thumbnail file;
 - d. Djvu. Xml file containing the OCR and associated x, y coordinates;
 - e. Scan data.xml file containing metadata captured at time of scanning;
 - f. Files.xml containing manifest data;
 - g. Meta.xml file containing bibliographic and operational metadata; and

h. MARC or MARCXML record if it were retrievable from UC or RLG catalog.

5. **Method of File Transfer:** Each Digital Volume will be made available to UC at substantially the same time and in substantially the same manner as such Digital Volume is made available to the Financial Partner (Microsoft). The files will be made available to the UC via one or more of FTP, http, or RSYNC from either the Internet Archive servers at the Scanning Center or on the Internet Archive's hosts in other datacenters. IA will use its best commercial efforts to make each Digital Volume available for download for a period of one (1) year after receipt of notification that the Digital Volume is available.
6. **Attribution.** Attribution for the support of the UC will be noted as "University of California Libraries" in the metadata files, and such other location(s) as may be determined by IA, when the Digital Volumes and Digital Collections are made available by IA.

7. **Additional Restrictions on Use:**

- a. Subject to the terms and conditions of the Agreement and this Exhibit A, UC may (a) reproduce, store and host the Digital Files and Digital Collections in its electronic archives and display and distribute such materials directly to end users of such archives; and (b) authorize and permit end users of Library's archives to download, reproduce, print, display and publish the Digital Files and Digital Collections; provided, that UC includes in its terms of use agreement for end users of such archives a restriction prohibiting any re-hosting of all or a material portion of the content (*i.e.*, "bulk re-hosting") of any Digital Collection. The restriction on "bulk re-hosting" shall expire with respect to each Digital Collection six (6) years from the date the first Digital Volume of such Collection was first made available by IA to Microsoft. For the avoidance of doubt, indexing, searching and cataloging the Digital Collections and Digital Files by any third party shall not be restricted.
- b. UC agrees that it will not, before six (6) years from the date the first Digital Volume of such Collection was first made available by IA to Microsoft, without the express written permission of the Financial Partner (Microsoft), transfer its copy of the Digital Collection to, or authorize or permit use of such Digital Collection by, a commercial third party for the purpose of that third party's commercial exploitation of the Digital Collection.
- c. Subject to the restrictions set out in this Section 7, and for clarification on the restrictions set out in Section 7a above, UC may transfer its copy of the Digital Collection to a
- i. commercial third party where that third party acts as a data service to UC in order to:
 1. make the digital copy openly accessible via UC's website;
 2. ensure the digital copy is preserved; and
 3. exploit the digital copy for the sole commercial benefit of UC or the University of California.
 - ii. non-profit or not-for-profit archive in the US or abroad in order to:
 1. provide access to or preserve the Digital Files.

- c. For purposes of the Digital Volumes and/or Digital Collections scanned in cooperation with Financial Partner (Microsoft), in consideration for its financial support, Financial Partner (Microsoft) is an intended third-party beneficiary of UC's obligations under Section 7.a of this Exhibit A, with rights to enforce these obligations.
- d. Notwithstanding the rights under Section 2 of the Agreement or Section 7 of this Exhibit, UC agrees not to publish, publicly display, or otherwise make available any Digital Volume from the Collection in any manner until UC receives written authorization from IA to proceed with such publication, which authorization will be provided within one (1) year from the Effective Date.
- e. Where the UC employs a commercial third party as data service for its copy of the Digital Collection or provides a copy to a non-profit or not-for-profit archive organization as referenced in Section 7.b.ii., it will impose on that third party the same restrictions that are set out in this Section 7.

8. In Copyright Scanning. The scanning and digitization of any copyrighted materials is subject to the authorization of the copyright holder(s) and any special restrictions or other terms and conditions agreed to in writing with such copyright holder(s). Upon IA's reasonable request, UC will make such copyrighted printed book available to IA for scanning. IA may, in its sole discretion, elect not to proceed with the scanning and digitization of such copyrighted work.