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The Rights Stuff: Ethical Decision-Making and Image Use in a Commercial Context

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The Rights Stuff: Ethical Decision-Making and Image Use in a Commercial Context

Abstract

This article discusses ethical decision-making and image use in a commercial context. The author takes a historical perspective to better understand how the image provider world transitioned from analog to digital and has subsequently changed. Archivision, a commercial business that licenses a research library of 114,000 images of world architecture, urban design, gardens, landscapes, archaeological sites, and art in museums and public places is used as a case study to explore rights issues and better understand the vendor perspective. The author suggests that due to the decrease in image vendors over the last several years, it is worth considering licensing commercial content in order to meet the fourth fair use factor, that focuses on the effect of the use upon the potential market, to insure a vibrant and competitive marketplace for high quality images. Burns concludes that commercial and non-profit partners as well as visual resources curators can work together to insure that rich image resources continue to grow and remain accessible to the people who need them for research, teaching, and learning. Ethical decision-making and practices surrounding image use can insure that we all stay in business and contribute to the development of digital libraries for current and future learners.

Author Bio & Acknowledgements

Maureen Burns is a information professional with over 30 years of experience curating and managing teaching collections of analog and digital images at UC Irvine, the Getty Villa, and CSULB. Presently working on a consulting basis, through IMAGinED, Burns handles sales for Archivision, consults on the CSU Japanese American Digitization project, and coordinates a UC Irvine NSF arts integration professional development program for K-12 teachers. With a doctorate in Educational Administration from the UCI/UCLA joint Leadership program, Burns is also the production editor for the electronic *Journal for Learning through the Arts*. Currently, she is serving on the VRA's Development and Financial Advisory Committees, is the Affiliate Representative to the College Art Association, active in the International and Southern California VRA Chapters as well as being a past VRA president and past director of the VRA Foundation.

An invitation to participate in "The Rights Stuff: Ethical Decision-Making and Image Use in Different Contexts" session at the Visual Resources Association (VRA) conference in Los Angeles, provided me with an opportunity to contemplate intellectual property rights and copyright issues for images.[1] My assigned role in this session was to provide a commercial perspective on the "rights stuff." It should be noted that I am not an official representative of the vendors who provide images and associated services to educational institutions or a copyright expert, but my professional experiences are multi-dimensional and rights issues inevitable. Bringing a variety of viewpoints to the table, I have experience with the following: 1) managing teaching image collections in academic and museum contexts; 2) assisting archives, libraries, museums, and visual resources collections with building shared image collections, and 3) working with Archivision as a sales representative and associate. I have contributed some of my own photography to many of these efforts and have had to consider the legality of doing so. Therefore, I felt that I could contribute to a discussion about accepted practices, permission processes, educational strategies, and ethical decision-making when it comes to image use.
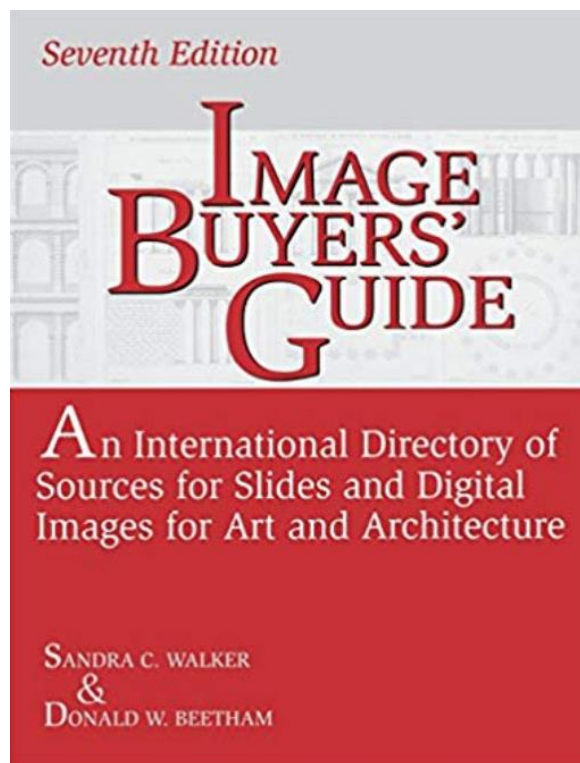

Figure 1. Cover of the *Image Buyers' Guide* published by Libraries Unlimited.

My starting point was to take a look at the last *Image Buyers' Guide* published in 1999.[2] There were a number of companies who had successful commercial businesses and many museums providing images to educational institutions, enough to fill a 200-page book. A recent trend in museums is to make their images openly accessible on the web, but some institutions still rely on image licensing for income.[3] For the reader who might not be familiar with this reference, it is an international directory of sources for slides and digital images that Sandra Walker and Donald Beetham published under the

auspices of the VRA. And, there were six previous editions about analog images called the "Slide Buyers' Guide." It is quite interesting to look them over to see what was said twenty years ago about copyright issues. I'm using it as a sort of milestone to better understand how the image provider world transitioned from analog to digital and subsequently changed.

VRA members also have access in MemberClicks, the VRA's organizational management software, to an *Image Provider Directory* in spreadsheet form that summarizes the status of many of these companies. Christine Fritsch, Assistant Curator in the Image Resource Center at the University of California at Santa Barbara, created this resource and updates it periodically to reflect the changing image vendor landscape. There were enough questions on the VRA-Listerv about whether commercial partners were still in business and how to reach the proprietors, that the VRA Executive Board asked for a volunteer to develop such a resource—Christine rose to the challenge. It is in spreadsheet form to allow for flexible filtering and sorting of the information and locked down to VRA members because there is personal contact information in it. To locate the *Image Provider Directory* VRA members should login to *Memberclicks* then search under *Community Info* or contact Christine directly to answer any questions about this resource.[4]

Archive Colour Slides Ltd.						
Archivision	see also: Scholars Resource, ARTstor Digital Library	60,000 images of architecture, archaeological sites, gardens, parks and works of art with broad appeal in humanities teaching	Architecture (most periods), landscape architecture, and public art		Educational Use: http://archivision.com/educational/index.html Commercial Use: http://archivision.com/commercial/index.html	President, photographer and contact for Candian Sales: Scott Gilchrist, B. Arch., M. Arch. Sales Representative for the Western US: Maureen Burns, Ed.D. Sales Representative for China & Hong Kong: S. Thorne Kelly
Art Color Slides		Lantern Slides		Presumed Out of Business		
Art Council Aids						Edna Ford
Art Images for College Teaching (AICT)		A free-use image exchange resource for the educational community. Original digital images (duplicate slides may be ordered) of art and architectural works in the public domain, also world cultural heritage sites			http://www.arthist.umn.edu/aict/	Allan T. Kohl

Figure 2. Example of entries in the *Image Provider Directory*.

Most image vendors are for-profit companies and many started out providing 35-millimeter slides or other analog images to educational institutions for a price (usually about $2-$10 per image with deeper discounts for purchasing in bulk). Since museums and other entities also made analog and digital images available, often charging fees to cover their costs, they are also mentioned in the *Guide*. Many image vendors did not successfully transition to digital images and went out of business. Some of them partnered with Artstor, the non-profit entity that is now a part of ITHAKA, and one of the

largest providers of digital images for educational contexts.[5] Others formed a collaborative and called it *Scholars Resource*.[6] In periodic posts to the VRA-Listerv, Renate Wiedenhoeft, the *Saskia* partner, curates the images around a topic or theme, such as a recent post on "Abstract Expressionist Painters," then draws upon the images in the various vendor partner collections and makes this group available for sale. There are various ways to purchase images from Scholars Resource, whether single images, thematic groups of images, or complete vendor collections. One of these *Scholars Resource* partners, called *Archivision Inc.*, provides a good case study to explore rights issues and provide a commercial perspective to this discussion.[7] Of course, the image vendors in this consortium may not all do business in exactly the same way.
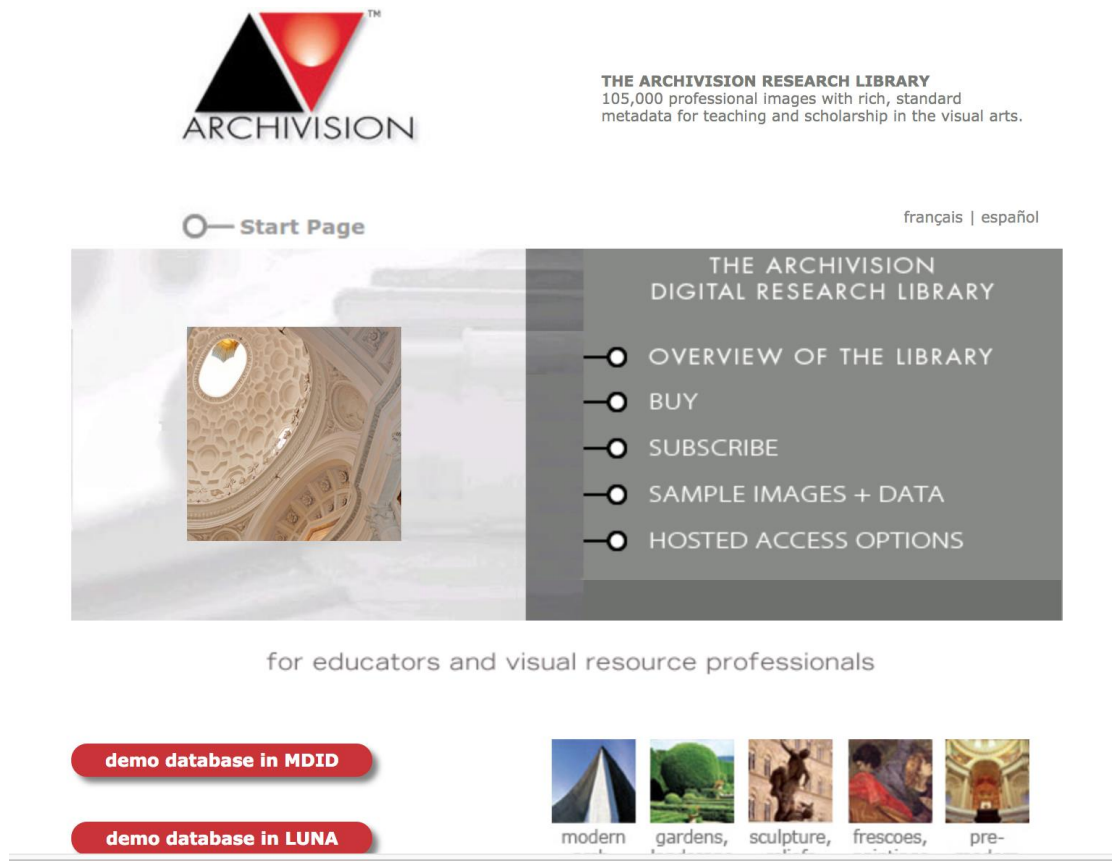
Figure 3. Landing page of the Archivision website.

Although a partner in Scholars Resource, the Archivision Research Library is also marketed and sold directly through the proprieter. It contains approximately 114,000 digital images of world architecture, urban design, gardens, landscapes, archaeological sites, and art in museums and public places, professionally shot by Scott Gilchrist, photographer and trained architect.[8] The collection has been meticulously built over the last 25 years, covering the gamut from ancient monuments to cutting-edge contemporary constructions, in order to provide educational institutions and others with detailed documentation of the built environment.

Figure 4. Archivision images of the *Mithraeum* under Santa Prisca in Rome (left) from circa 220 CE (shot in 2016) and *CitiLifeMilano* housing complex (right) by Zaha Hadid built 2009-2013 (shot in 2018).

One of the strengths of the collection is the completeness of the visual documentation of any given art or architectural work, from overall views to exacting details. For example, there are 323 images of Sagrada Familia in Barcelona and 932 of the Alhambra in Granada to date (see images below). What separates the Archivision material from Google images or the casual shots many of us take as we travel is the high quality of the images and the extensive descriptive metadata that is applied to each architectural or artistic work.[9] This provides added value for image users to develop a deeper understanding of what is specifically depicted and the architectural monuments as a whole, but also detailed metadata improves online search and discovery as well as aid preservation. The descriptive metadata follows the VRA Core 4.0 schema, a data standard for the description of images and works of art and culture.[10] As an added bonus, Archivision staff can provide clients with descriptive metadata in Microsoft Excel, VRA Core 4.0 XML, and RDF, which is especially important for linked open data and future archiving. Archivision is the only vendor providing these metadata options with their images. For structured terminology, the Getty Vocabularies provide authoritative information to ensure efficient online search and retrieval.[11] Expansive information from hundreds of resources, such as Grove Art Online, is added to the description field for research and study purposes.[12] The Boeri Studio's Vertical Forest building below is a good example of one of the many architectural monuments documented in Archivision with a glimpse of the display metadata alongside.

Title:	Bosco Verticale
Alternate Title:	Vertical Forest
View:	Overall view of taller tower (110 m height), seen in summer
Creators:	Boeri Studio (Italian architectural firm, founded 1993)
Date:	completed 2014 (creation)
Style/Period:	Twenty-first century
Location:	site: Milan, Lombardy, Italy
Location Note:	Porta Nuova district, between Via Gaetano de Castillia and Via Federico Confalonieri
GPS:	+45.4855+9.1905
Culture:	Italian
Measurements:	8,900 m2 (area, exterior terraces)
Materials:	steel; glass; concrete; plant material
Work Types:	buildings; multistory buildings; high-rise buildings; complexes; housing projects
Description:	The first example of the Vertical Forest consists of two residential towers of 110 and 76 m height, (with a footprint of 1,500 m2) in the center of Milan, on the edge of the Isola neighborhood, hosting 800 trees (each measuring 3, 6 or 9 meters), 4,500 shrubs and 15,000 plants from a wide range of shrubs and floral plants distributed on staggered terraces according to the sun exposure of the facade. On flat land this equals, in amount of trees, a 2 hectares (20,000 square meter) forest. In terms of urban densification each tower is the equivalent of an area of single family dwellings of nearly 50,000 sq. meters. The vegetal system of the Vertical Forest contributes to the construction of a microclimate, produces humidity, absorbs CO_2 and dust particles and produces oxygen. (Source: Stefano Boeri Architetti; www.stefanoboeriarchitetti.net/en/)
View Description:	The plantings all change with the seasons and have autumn and spring colors.
Classification:	Architecture and City Planning
Technique:	construction (assembling); gardening
Image Rights:	© Scott Gilchrist, Archivision, Inc.
Vendor ID:	1A1-BOERI-BV-A01
MDID Identifier:	100224
Archivision Set:	Archivision Addition Module Thirteen
Collection:	Archivision Module 13
Record created:	Oct. 25, 2018

Figure 5. Archivision image of *Bosco Verticale (Vertical Forest)* in Milan right) by the Boeri Studio completed in 2014 (shot in 2018) with extensive descriptive display metadata (left).

Archivision is one of the few remaining vendor collections that continues to grow with 9,000 new images and descriptions added annually. Intended for use primarily in educational contexts, the Archivision Research Library can be licensed to own in perpetuity, allowing it to be added to any existing institutional digital collection or preservation repository, either by individual modules or in its entirety. Or, it can be accessed through subscription or hosted services since many institutions cannot or do not want to load the images and metadata locally. Therefore, Archivision partners with vrcHost and Luna Imaging to make the collection accessible and usable for research, study, and teaching through the MDID or LUNA, web-based image management applications with great functionality.[13] In this way, the Archivision content can be instantly accessed through dedicated hosted instances delivering full services and technical support, such as installation, integration, and maintenance that provide

sophisticated tools for managing the Archivison collection and presenting a variety of digital media, especially in classroom situations.

Figure 6. Archivision image of the *Alhambra Palace Complex* in Granada 9th century to 1492 (shot in 2018).

Getting back to rights issues, when image vendors were just selling 35-millimeter slides, they tended to use contracts with the buyer to retain the rights to their images and to prevent the images from being copied or distributed to those who had not yet purchased this material. In the *Image Buyer's Guide,* I found a "Clarification on Copyright" written by the Slide Producer's Association over thirty years ago (before most visual resources collections were digitizing their slide collections), asserting that their images are original creations protected under International Copyright Laws. Furthermore, it says, "No purchased slide may be reproduced or transmitted by any other means, electronic or mechanical, including photocopy, slide duplicator, video recording, or any information storage or retrieval system now known or to be invented, without permission."[14] And, permission was contingent upon signing a site license agreement and payment of licensing fees. It was noted that the VRA did not endorse this statement.

Figure 7. Sample Archivision licensing agreement from 2018.

Archivision started with slides, but embraced digital technology early on and transitioned seamlessly to a digital operation. So, what does one of these site licenses look like (see above)? A current Archivision digital license, for those who decide on the ownership in perpetuity option, allows for the following use privileges that are laid out in a site license that is signed by the purchasing institution and then co-signed by Scott as the business owner. Archivision grants to the licensee a non-exclusive, non-transferable perpetual license to install and use the images and metadata for education, research, and personal purposes on all computer systems now or in the future owned or leased by the institution, provided such authorized users access the licensed materials through a secure network. The licensee may also install licensed Archivision images into a third party remote hosting system or access pre-loaded options as long as access to the images remains bound by the terms of this agreement. The licensee is asked to use reasonable security measures to restrict the use of the Archivision images only to authorized users, usually faculty and students, using an authorization/authentication protocol, e.g. username and password, IP address, or proxy cache to restrict access. The licensee is not liable for costs associated with copyright or release claims made against Archivision or against the licensee, but is asked to take reasonable steps to prevent placement of Archivision images onto the open Internet in anything larger than a thumbnail-sized file. If an authorized user would like to publish any of the Archivision images, Scott is very

generous with charging reasonable publication fees without a lot of strings attached. A one-time nominal fee is usually paid to license a given image and he does not usually assert limitations in terms of the number of times the image can be published or the quantity of publication runs. Scott tries to keep his pricing way below that of stock photography businesses. Any for-profit use needs to be negotiated with Scott, but he is quite flexible since he wants his images to be used and useful. There are other details in the Archivision site license, but this summary covers the main characteristics of such an agreement.

What gives Scott the right to assert such a site license? He has traveled the world photographing architectural monuments and associated artworks at great personal expense using his expertise as an architect and professional photographer to deliver high quality images. They are described in great detail by an information professional cataloger whom he pays for delivering extensive, standardized VRA Core 4.0 metadata. His sales staff works on commission, but he accomplishes much of this work himself too. Of course, he also bears the equipment costs of cameras, computers, servers, etc. to stay technologically current and absorbs all the other costs of running such a business, such as technical support, lawyers, accountants, etc. This is an example of a small business with one person bearing the burden of the expenses and the copyright risks. Scott is asserting his copyright as the photographer of the images that he has taken, not to the monument/object depicted in the picture. Of course, both the object owner and the photographer both have to be taken into consideration since there are at least these two levels of copyright.

Figure 8. Archivision image of *Sagrada Familia* in Barcelona by Antonio Gaudi begun in 1882 (shot in 2008).

Much of what Scott shoots is in the public domain, but for the things that are not, locking the system down to educational users allows for the assertion of fair use. Scott checks museum and other cultural site policies about photography and complies with their posted rules. For example, he has been shooting many monuments in Italy because the Italian state museums have recently opened up their photographic policies and are allowing photography in many cultural institutions. Scott is primarily licensing the Archivision images to be used for educational purposes. He is relying on the fair use factors to interpret the educational use of the images he has photographed.

Most information professionals are quite familiar with fair use, since our visual resources collections would not function well without it, but just as a quick reminder, in United States case law, judges have to balance all four fair use factors:

1) the purpose and character of the use,
2) the nature of the copyrighted work,
3) the amount and substantiality of the portion taken, and

4) the effect of the use upon the potential market.[15]
It is the 4th factor that is of the most interest to this discussion.

One of Archivision's clients, the University of Colorado (CU), has a "Best Practices for Acquiring Digital Content for Image Collection Managers" statement that was the result of a consultation with campus legal counsel about fair use.[16] In it, they assert that CU should be licensing content whenever it is "reasonably available" in order to satisfy the 4th fair use factor about the effect on the marketplace. Their "Best Practices" web page has more information about this interpretation of fair use in a research university setting. Of course, other institutions may interpret the copyright issues differently.

Figure 9. University of Colorado's *Best Practices for Acquiring Digital Content for Collection Managers* website.

In the light of the decrease in image vendors in the last twenty years, perhaps it is worth considering "reasonably available" content, like Archivision's, and similar practices to the University of Colorado's, in order to ensure a vibrant and competitive marketplace for quality images. Although some visual resources collections may not have substantial enough budgets to consider licensing digital images on a regular basis, they do have the ability to partner with libraries, central computing, digital humanities, and faculty may even want to use some of their research funds for this purpose. It is common practice for vendors to adjust product pricing based on the size of the institution's student population to make the images more affordable and they will often also adjust to particular local situations.

I encourage VRA members to get to know these commercial partners, whether image vendors or other types of businesses. The reason Scott is in business is because he

is passionate about architectural history and photography. He wants as many institutions as possible to: 1) access the Research Library, 2) find Archivision useful for education, and 3) see more of his images in research publications.

The VRA has always had a number of commercial partners who provide goods and services to information professionals. They usually support VRA initiatives, such as travel awards, and professional development activities at summer institutes and conferences, such as exhibits, receptions, sessions, workshops, keynotes, etc. Often perceived as big businesses, they are in reality small, collaborative operations that are doing similar work to that of the visual resources curator, museum professional, librarian, or archivist. For example, they also photograph and curate images for teaching and learning; digitize collections for online access; catalog at the item level; and, develop and provide collection management software, online presentation tools, hosted solutions, preservation services, etc. In addition to these services, commercial partners often collaborate with information professionals to further develop their services based on specific needs, determine added value tools for users, implement new technologies, and share lessons learned.

Brewster Kahle, founder of the Internet Archive, provided his vision of what it will take to fully transform libraries from analog to digital by 2020 in an article. He suggested "that by working together, we can efficiently achieve our goal. This will require the library community working with philanthropists, booksellers, and publishers to unleash the full value of our existing and future collections by offering them digitally."[17] It is notable that he sees the value of commercial, non-profit, and institutional partners working together. Kahle's mention of libraries' extensive collections and strong public service mission, made me think about VRA and the digital image landscape. In our world as well, it seems that a similar emphasis on the participation of multiple sectors and a variety of collaborations would be ideal.

To build digital image collections that will last, with maximum utility for research, teaching, and study, we need curators and curatorial approaches for selection, processes for determining what has already been digitized or can be improved upon, ways to source the missing material that needs to be digitized, extensive descriptive metadata to differentiate visual resources collections from Google image searches, robust discovery interfaces for access, media management systems for maintenance/preservation, and novel presentation mechanisms.

Commercial and non-profit partners as well as visual resources collections all want to stay in business in this digital world. Users want to get their information online and VRA's commercial partners want to help accomplish this and contribute to the development of digital libraries for current and future learners. The ethical decision-making surrounding image use, discussed here today, might just be the ticket for insuring that rich image resources continue to grow and remain accessible to the people who need them for research, teaching, and learning. From the image vendor perspective, it starts with information professionals like you who can promote accepted practices and educate image users. We all add value to the digital image experience and should work together.

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[1] I would like to express my gratitude to Bonnie Rosenberg and Sara Schumacher for inviting me to participate in the VRA/LA 2019 session. For more information about it, see: https://vra2019.sched.com/event/HSpE/session-the-rights-stuff-ethical-decision-making-and-image-use-in-different-contexts

[2] Sandra C. Walker and Donald W. Beetham, *Image Buyers' Guide: An International Directory of Sources for Slides and Digital Images for Art and Architecture*, 7th Edition (Englewood, CO: Libraries Unlimited, 1999).

[3] Kristin Kelly, "Images of Works of Art in Museum Collections: The Experience of Open Access, a Study of Eleven Museums," CLIR publication, no. 157, Council on Library and Information Resources, Washington, DC, June 2013.

[4] I would like to acknowledge Christine Fritsch for all of her terrific efforts on this *Image Provider Directory* and provide her contact information fritsch@hfa.ucsb.edu for any questions.

[5] Artstor (website), accessed June 3, 2019, https://www.artstor.org/.

[6] Scholars Resource (website), accessed June 3, 2019, https://www.scholarsresource.com/.

[7] Archivision (website), accessed June 3, 2019, http://archivision.com/index.html.

[8] Scott Gilchrist has a Bachelor's degree from the University of Oregon and Master's degree from the University of Toronto in Architecture. Additional information about Archivision can be found in the following article. Maureen A. Burns and Andreas Knab, "Instant Architecture: Hosted Access to the Archivision Research Library with Built-In Image Management and Presentation Tools," *VRA Bulletin* 45, no. 1, (2018): https://online.vraweb.org/vrab/vol45/iss1/10.

[9] Susan Jane Williams, an indepenedent consultant, is the primary Archivision cataloger. Any questions about the extensive description and standards used for Archivision or requests for access or updates to the metadata should be sent to her at susan@archivision.com.

[10] VRA Core 4 (website), accessed June 4, 2019, https://www.loc.gov/standards/vracore/.

[11] Getty Vocabularies (website), accessed June 4, 2019, https://www.getty.edu/research/tools/vocabularies/.

[12] Grove Art Online (website), accessed June 4, 2019, https://www.oxfordartonline.com/groveart.

[13] vrcHost (website), accessed June 4, 2019, https://www.vrchost.com/; MDID (website), accessed June 4, 2019, https://www.mdid.org/; Luna Imaging (website), accessed June 4, 2019, http://www.lunaimaging.com/.

[14] Norine D. Cashman and Mark Matthew Braunstein, *Slide Buyers' Guide: An International Directory of Slide Sources for Art and Architecture*, 5th Edition (Englewood, CO: Libraries Unlimited, 1985): xviii.

[15] "More Information on Fair Use," U.S. Copyright Office Fair Use Index (website), accessed June 4, 2019, https://www.copyright.gov/fair-use/more-info.html.

[16] "Best Practices for Acquiring Digital Content for Image Collection Managers," University of Colorado Digital Library (website), accessed on June 4, 2019, https://content.cu.edu/digitallibrary/bestpractices.html.

[17] Brewster Kahle, "Transforming our Libraries from Analog to Digital: A 2020 Vision," *Educause Review* 52, no. 2 (March/April 2017): https://er.educause.edu/articles/2017/3/transforming-our-libraries-from-analog-to-digital-a-2020-vision.