

## Digitization Agreement

National Archives and Records Administration (NARA)

and

Digital Commonwealth

This non-exclusive Digitization Agreement entered into this 6<sup>th</sup> day of June 2019, is by and between the Digital Commonwealth, a non-profit collaborative organization, and the National Archives and Records Administration ("NARA"), an independent agency in the executive branch of the United States Government with its headquarters in Washington, DC, with Digital Commonwealth and NARA being referred to as a "party" or collectively as the "parties."

### Recitals

- A. NARA maintains and makes available to the public certain historical records and other documentary materials of the US Government in printed, microfilm, microfiche, and other formats (the "Archival Materials") at its locations throughout the United States.
- B. Digital Commonwealth, founded in 2006, provides resources and services to support the creation, management, and dissemination of cultural heritage materials held by Massachusetts libraries, museums, historical societies, and archives. Digital Commonwealth currently has over 180 member institutions from across the state.
- C. NARA and Digital Commonwealth agree to cooperate in Digital Commonwealth's digitization of selections of the Archival Materials on the terms and conditions set forth in this Agreement.

### Definitions

“Archival Materials” the permanently valuable holdings of the National Archives of the United States in printed, microfilm, microfiche, and other formats.

“Digital Images” means digital reproductions of selections of the Archival Materials with no associated Metadata.

“Digital Materials” means digital reproductions of selections of the Archival Materials with associated Metadata.

“Metadata” means information about an analog or digital object, a component of an object, or a coherent collection of objects. For purposes of this Agreement, Metadata includes “Descriptive Metadata,” “Technical Metadata,” and “Preservation Metadata” relating to the images to be digitized by Digital Commonwealth under this Agreement, as follows:

- Descriptive Metadata provides information or reference points about the content or location of a Digital Image used for purposes of navigating through Digital Images, similar to tabs on a book. This Descriptive Metadata may include items such as records during a particular time frame, records from a particular location, or records of individuals whose family name begins with a certain letter. Descriptive Metadata is not as detailed or specific as indexing. Whereas indexing allows for the specific electronic search for a specific document, Descriptive Metadata only allows for documents with similar characteristics to be grouped together. This is equivalent to the hierarchy that natively exists in the archival structure of the records.
- Technical Metadata is technical information about the digital files and multi-file objects such as the processes used to reformat the records and pixel dimensions.
- Preservation Metadata includes a history log on the reformatting activities –examples of this Metadata can be found at <http://www.loc.gov/standards/premis/>.

“Project Plan” means a document completed and approved by Digital Commonwealth and NARA representatives that lists the Archival Material that NARA and Digital Commonwealth have agreed to digitize and provides the details about standards, Metadata, equipment, format,

personnel, and other required information for each selection of Archival Materials. NARA provides the template for Project Plans. No work will commence on a project until a Project Plan has been signed by both parties. Should a third party be named to execute work defined in a Project Plan, the third party will also be a signatory to the corresponding Project Plan. In lieu of a signed Project Plan, the parties may agree in writing to a pilot to test assumptions that leads to a Project Plan.

### Terms

#### 1. Creation and Use of Digital Materials

- 1.1. NARA agrees to provide Digital Commonwealth with controlled access to available subsets of Archival Materials to enable Digital Commonwealth to create Digital Images of such Archival Materials. The dates and other details of the access will be described in each Project Plan.
- 1.2. The nature, location, and details about the digitization process for each selection of Archival Materials will be listed in a Project Plan. All use of the Archival Materials must take place at the location set forth in the applicable Project Plan. Details of the scanning or other method of digitization, as well as the physical requirements of any non-NARA digitization location will be agreed to between the parties in each Project Plan. NARA reserves the right to inspect the location where Archival Materials are stored and digitized prior to signing of this agreement and during the term of agreement. The inspection may include receiving, storage, preparation, digitization, shipping and other areas related to handling of the Archival Materials. Archival Materials must be safeguarded against theft, vandalism, unauthorized use, damage, and alterations of any kind. Archival Materials must be stored in a facility that is equipped with environmental controls; a 24-hour security system; a fire detection and suppression system that complies with local fire codes; and a safe or vault for holdings that are of high intrinsic or monetary value. The Project Plan must specify the applicable environmental controls (to include temperature and

humidity) and whether the items are of high intrinsic or monetary value.

Smoking, vaping, beverages, and food must be prohibited in the receiving and shipping areas, the Archival Materials storage area, and any area where the Archival Materials are digitized.

- 1.3. The Project Plan must contain detailed information about the transport, packing, care and handling, and return shipping of the Archival Materials to be digitized. Original Archival Materials must travel separately from digital copies made from them. They must not travel together in the same vehicle or on the same day in order to preclude the loss of all copies of the Archival Materials in case of an accident or disaster on the road. The original Archival Materials must return to the National Archives within a specified the number of days of the digitization being completed, as defined in the Project Plan.
- 1.4. NARA will provide the original copy of Archival Materials for scanning unless a usable Microform Publication (microfilm or microfiche) or other suitable surrogate is available. The format of the Archival Materials to be scanned will be described and agreed to in the Project Plan. Generally records will be in good condition. NARA will not, knowingly, send Archival Materials in poor condition for digitization. If during handling or digitization of the materials, they are damaged (pages torn, water damaged sustained, marking applied to the records, etc.) the Partner shall immediately stop work, remove the records from the digitization work flow process, and notify the NARA Project Manager (listed in the Project Plan) of the nature and extent of the damage and wait for further instructions. The Partner shall not attempt to repair or continue to digitize the Archival Materials.
- 1.5. Digital Images will be created to meet imaging standards that will be provided by NARA and described and agreed to in a Project Plan. The assumption is that projects will be digitized at 300ppi, but occasionally, depending on individual projects and records, NARA may require a different ppi. Because physical

materials and customer-driven needs may vary for selections of Archival Materials, imaging standards and other specifications will be incorporated into each Project Plan.

- 1.6. Digital Commonwealth will at all times comply with applicable NARA requirements for the handling of the Archival Materials, and, when required by the Project Plan, NARA will provide training and oversight in the proper handling of the Archival Materials. Any digitization equipment to be used by Digital Commonwealth in conjunction with NARA holdings must be approved by NARA prior to use, with such approval not being unreasonably delayed or denied. For each Project Plan, Digital Commonwealth will propose the digitization equipment to be used for the records specific to that Project Plan. All equipment must conform to NARA regulations (e.g., 36 C.F.R. 1254.80), or as agreed to in a Project Plan. NARA and Digital Commonwealth will designate points of contact for each location prior to the start of a project. The points of contact will provide guidance and assistance on all the requirements for the particular project.
- 1.7. Digital Commonwealth and NARA agree that Digital Commonwealth may perform all digitization activities themselves or may engage with one or more of its member institutions for this work. In such cases where member institutions are performing part or all of the digitization activities outlined in the Project Plan, Digital Commonwealth remains responsible for ensuring adherence to all of the provisions outlined in this Agreement and the Project Plan.
- 1.8. The Digital Materials will either be hosted in the Digital Commonwealth repository and displayed publicly on their website, [www.digitalcommonwealth.org](http://www.digitalcommonwealth.org) or the Digital Materials will be hosted by a Digital Commonwealth partner institution with the metadata for the Digital Materials harvested into the Digital Commonwealth repository and displayed on [www.digitalcommonwealth.org](http://www.digitalcommonwealth.org). Digital Commonwealth will provide a direct link to NARA's Catalog (NAC) or any successor to NAC. NARA will provide a direct link

from NAC or its successor to an agreed upon page on each Digital Commonwealth site which includes the Digital Materials. Pursuant to each Project Plan, the Digital Materials will include all Metadata identified by NARA as necessary to allow NARA to maintain or recreate the archival hierarchy of a series of records (i.e., files, items, subseries, etc.) and to provide easy access to files and/or items in the series. The required Metadata for each project will be outlined in the Project Plan for that project.

- 1.9. Digital Commonwealth will donate a copy of the Digital Materials to NARA in the electronic format specified in the Project Plan. This donation will occur prior to or simultaneously with Digital Commonwealth's initial publishing of the Digital Materials covered by a Project Plan. Digital Commonwealth will use reasonable efforts to make corrections that are necessary to ensuring the accuracy of the Digital Materials and the integrity of its archival structure within a mutually agreeable reasonable period of time of identifying a problem or receiving a NARA request for correction, and Digital Commonwealth will deliver the revised data (images and/or Metadata) to NARA when the correction is completed.
- 1.10. Should Digital Commonwealth cease to exist, or a successor company or organization that will operate with essentially the same purposes as Digital Commonwealth cease to exist, or Digital Commonwealth has transferred its rights to the Digital Materials to a third party which intends to use them in like manner, NARA shall immediately: (a) receive all Archival Materials not already in NARA custody; and (b) receive a copy of Digital Materials not previously provided to NARA (Digital Commonwealth or the successor company or organization will make all reasonable efforts to deliver this copy to NARA before it ceases to exist). Any successor company, organization, or third party shall be bound by the terms of this Agreement in accordance with Section 11 below

## 2. Obligations

2.1. Cost for any access or services provided under this Agreement will be borne by each party.

3. Public Domain: Ownership

3.1. U.S. Government works, which comprise the majority of Archival Materials in the National Archives of the United States, are not eligible for copyright protection in the United States and, as such, are in the public domain.

3.2. The parties acknowledge that nothing in this Agreement is intended to alter or impair any rights of control, custody, ownership or use that NARA or the U.S. Government may have in any Archival Materials. NARA shall not transfer control, custody or ownership over any Archival Materials to Digital Commonwealth or any third party.

3.3. The parties will use all reasonable efforts to ensure that the Archival Materials digitized under this Agreement are in the public domain. In accordance with 36 C.F.R. 1254.62, for any Archival Materials digitized that are not in the public domain, Digital Commonwealth will be responsible for obtaining any necessary permission for use, copying, and publication from copyright holders and for any other applicable provisions of the Copyright Act (Title 17, United States Code).

3.4. The parties will promptly notify each other in writing of any claim made by a third party that any of the Archival Materials are covered by copyright or any other intellectual property right. Following such notification: a) the parties will use their best efforts to identify and exclude from their own website any images subject to such restrictions that have not been cleared with the rights holder; and b) compliance with copyright laws and observance of the reproduction rights of any third party will be the sole responsibility of each party, separately, with respect to any Digital Materials under its control.

4. Privacy

- 4.1. NARA is responsible for protecting the privacy of living individuals mentioned in its records. For purposes of this Agreement we are concerned with sensitive personally identifiable information (PII) – i.e., information which, if lost, compromised, or disclosed without authorization, could result in substantial harm, embarrassment, inconvenience, or unfairness to an individual. The most common type of sensitive PII is Social Security Numbers, particularly when linked to date of birth, mother’s maiden name, or other types of identifiers; but sensitive PII can also include private medical information. NARA withholds from public access records that are less than 75 years old and contain sensitive PII.
- 4.2. NARA applies this standard to all NARA records before making them available to the public, including the Archival Materials made available to Digital Commonwealth for digitization.
- 4.3. In the event sensitive PII is discovered in the Archival Materials, or in the Digital Materials following digitization, Digital Commonwealth will immediately notify NARA in writing.
- 4.4. In the event NARA discovers that any Archival Materials contain PII, NARA will immediately notify Digital Commonwealth.
- 4.5. At the direction of NARA’s Senior Agency Official for Privacy, Digital Commonwealth may be required to take mitigating actions to protect the sensitive PII, including but not limited to: removal of the information from public access, deletion of images containing sensitive PII from Digital Commonwealth’s electronic storage devices and backup systems, and immediate return of the Archival Materials for further screening. In such an event, NARA and Digital Commonwealth will work together to ensure that as much information as possible remains available for digitization and public access using available search and redaction technology to protect the privacy of living individuals.

5. Limitation of Liability



5.1. In no event shall either party be liable to the other for any incidental, consequential, special, exemplary, or other indirect damages, or for lost profits, lost revenues, or loss of business arising out of the subject matter of this Agreement, regardless of the cause of action, even if the party has been advised of the likelihood of such damages.

6. Marks and Other Designations; Public Announcements

6.1. NARA agrees that Digital Commonwealth may make reference to NARA and use any NARA trade names, trademarks, service marks, seal, logos or other designations in connection with its activities contemplated under this Agreement, provided that Digital Commonwealth obtains NARA's prior written approval for each usage, which approval will not be unreasonably delayed or withheld. Absent express written authorization, the use of the NARA trade names, trademarks, service marks, seal, logos or other designations shall not imply or state that NARA or any part thereof, or any NARA official or employee, endorses the policies, activities, products, services or opinions of Digital Commonwealth or any third party.

6.2. Neither party will issue any public announcement regarding the existence or content of this Agreement or any Project Plan without the other party's prior written approval.

7. Notices

7.1. Notices provided under this Agreement will be effective if delivered to the then current principal business address of the other party. The current addresses are:

If to Digital Commonwealth:

Digital Commonwealth

210 Park Avenue, Suite 311, Worcester, MA 01609-2246

Attention: \_\_\_\_\_

If to NARA:

National Archives and Records Administration

8601 Adelphi Road

College Park, MD 20740-6001,

Attention: Chief Innovation Officer

- 7.2. Any Notices regarding a dispute under this Agreement, except for matters addressed under Section 8 (Termination: Survival), shall be given to the above listed contacts to resolve. If the listed contacts cannot resolve the dispute, the Parties agree to first try in good faith to settle the dispute by mediation administered by a neutral acceptable to the Parties before resorting to arbitration, litigation, or some other dispute resolution procedure. The Parties agree to share all costs of mediation equally. NARA shall exercise its authority to engage in mediation, arbitration, or other form of dispute resolution in accordance with the Administrative Dispute Resolution Act of 1996, as amended, 5 U.S.C. §§ 571-84.

8. Term: Termination: Survival

- 8.1. This Agreement is effective as of the Effective Date and will remain in effect for a period of five years or one year after the completion date of any project defined in a Project Plan, whichever is longer (the "Expiration Date").
- 8.2. Either party may terminate the Agreement for a material breach by the other party, by giving ninety calendar days written notice, provided that such termination shall not be effective if such alleged material breach is cured within the ninety calendar day notice period and the allegedly breaching party provides notice of such cure to the other party.
- 8.3. Notice of termination under this sub-Section will immediately halt work on the creation of Digital Images on all ongoing Project Plans, and on all signed Project

Plans under which digitization has not begun. In the event of breach by either party: a) all Archival Materials must be returned to NARA custody immediately upon notice of termination under this sub-Section; b) a copy of all Digital Materials related to such Archival Materials existing at the time of the breach must be turned over to NARA; and c) Digital Commonwealth shall retain all Digital Materials and the right to use them consistent with the terms of this Agreement.

8.4. The provisions of sections 1.9 - 1.11, 2, 3, 4 and 5 shall survive termination subject to the provisions above.

9. Choice of Law

9.1. Each of the individuals signing this Agreement certifies that he or she has legal authority to enter into this Agreement on behalf of his or her Party.

9.2. This Agreement shall be governed by and in accordance with the laws of the United States. In the event federal law does not address an issue, the applicable law shall be District of Columbia law without application of conflicts of law provisions

10. Relationship of the Parties

10.1. This Agreement does not constitute, and is not intended to give rise to, a partnership or joint venture between the parties. Each party will operate under the terms of this Agreement as an independent entity and not as an agent for, or an employee of, the other.

11. Assignment

11.1. Neither NARA nor Digital Commonwealth may assign any of its rights or obligations under this Agreement without the prior written consent of the other party. NARA will not unreasonably withhold or delay its consent.

12. Entire Agreement; Modification

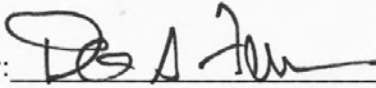
12.1. This Agreement constitutes the entire understanding of the Parties with respect to the matters addressed herein. This Agreement supersedes and replaces any prior or contemporaneous documents, correspondence, conversations, agreements, and other written or oral understandings. The Agreement may be amended, modified, or waived only by written agreement, signed by the authorized representatives of both Parties. In the event of a conflict between an approved Project Plan and this Agreement, the terms of this Agreement will apply.

13. Date of Execution

13.1. This agreement will be considered executed on the date that the last party signs it.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date hereof.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

By:  \_\_\_\_\_

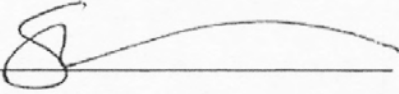
Name: David S. Ferriero

Title: Archivist of the United States

Date: 6 June 2019

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date hereof.

Digital Commonwealth

By: 

Name: Sadie Roosa

Title: President, Digital Commonwealth

Date: 5-14-19