While this book has been written for the senior managers of any type of organization, most of the examples come from the business context. Businesses have tended to think more about their intellectual property than nonprofits have in the past. It’s a mistake for most nonprofits to ignore intellectual property strategy. This chapter takes up some of the special circumstances that relate to nonprofits that may not apply in the context of business organizations. The primary difference is that the intellectual property strategies of openness may help nonprofits achieve aspects of their mission such as the broad dissemination of knowledge that are less important to businesses.

There are more similarities than differences in the strategic approaches that businesses and nonprofits should take to intellectual property. Both types of organizations
have brands to consider; hire and manage personnel who create intellectual property; and need revenues to continue operating. In these respects and many others, most organizations share a series of traits that are relevant to intellectual property strategy.

The primary difference that I’ll focus on here between businesses and nonprofits has to do with their respective missions. Most businesses, by law, need to focus largely on generating returns for their shareholders. They have a lot of latitude in terms of how they go about it, but they are primarily established for the purpose of maximizing profitability. To a large extent, they in fact have a legal obligation to focus on profitability rather than on other ancillary goals. Not so for nonprofits, which are set up to achieve a greater range of goals. These goals may include generating revenues to sustain operations, but also tend to include intangibles like creating and spreading knowledge, improving public awareness of a cause, bringing about social change, curing disease, and so forth. This difference in orientation opens up new possibilities for nonprofits that may not exist for all for-profits. This complexity can make the job of intellectual property strategy more important, not less so, and makes the need for creativity in this respect even greater.

The easiest case to make for the significance of an intellectual property strategy is for nonprofits in the knowledge-disseminating field. As in the case of for-profits, though, this is not the only type of nonprofit that can benefit. Non-
profits that have the most obvious need for an effective intellectual property strategy include universities, museums, libraries, and public media organizations. These institutions are akin to the media companies, software firms, and biotechnology entities that have such strong interests in intellectual property in the for-profit context.

Each of these knowledge-disseminating institutions is in an information business at core. These types of institutions are devoted to one or more parts of the process of creating, curating, distributing, and preserving various forms of ideas, expression, and knowledge. Their goals may be accomplished through a broad range of activities related to intellectual property. They may succeed by creating intellectual property, setting it in the context of other information such as metadata, sharing it with the public, and preserving it for the long term.

Let me start with one of the clear cases, where it is plain that intellectual property interests are relevant to the institution at a core level. Consider the interests of a major library. This library holds materials that are intended, as a matter of the library’s mission, to be made available to the public, but that are not held by anyone else. This scenario applies equally to the New York Public Library, the Bodleian Library at Oxford University, the ancient abbey library in the heart of St. Gallen, Switzerland, the religious libraries of East Asia that hold ancient writings, and thousands of other libraries around the world. In
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each case, they hold intellectual property in the form of materials that are unique.

The question for each of these libraries is what to do with the intellectual property in their possession. Some of the time, the materials are held in copyright by someone else, such as the author or publisher of a recently published book. In that case, the choice is made clear through the law: the library may acquire, catalog, contextualize, reference, and lend the work in various ways, but not much else. Yet what about a rare or even unique ancient manuscript to which copyright no longer applies?

The library has a few choices. One option is to do nothing in particular. This ancient manuscript is kept in a climate-controlled environment. Its value has been assessed at over a hundred thousand dollars if it were sold in an auction. It may or may not have been insured. When a patron comes to ask for it, the library can decide whether or not to bring the manuscript out and let them look at it, or can keep it locked up.

In the digital era, the library’s options have grown. A new option is to invest in the digitization of the manuscript. By using an elaborate system of cameras and cradles, a valuable manuscript can be digitized without much risk to the material itself. The digital version could be used as a backup in case the original is harmed, stolen, or lost to fire. Or the digital version could be the one that is shared
with researchers when they come to do their work on the document instead of the original one, which can be fragile.

The library has a few additional options related to the digitization of the work. In the real world, libraries have tight budgets and cannot afford to digitize everything they have the right to digitize. Let’s imagine that this library does not have the money to digitize this manuscript and others like it over the course of the coming decade, but they would like to do so. The library could partner with a for-profit publisher. The publisher might well pay to digitize the collection of works, subject to a contract that would let the publisher sell the digital files to other libraries for a limited period of time—say, five years. For every sale, the library would receive a cut of the royalties paid by the other libraries to the publisher. At the end of the contract term, the library would get the digital scans of the works back, free and clear.

In this licensing example, most parties involved clearly benefit. The library with the manuscript gets to have it scanned sooner than it otherwise would have and also benefits from a modest stream of royalty revenues. The publisher or publishers who license the works get access to materials to sell to other libraries as part of their digital collections that they otherwise would not be able to sell. The other libraries that pay for the publisher’s digital collections can then make the manuscripts available to their
patrons, who now do not have to fly to the first library to view them (with the corresponding benefits to the environment for the carbon not emitted).

Why might this strategy not be sound? One argument is that the public at large could be harmed by this approach. If the library were simply to digitize the manuscript on its own and put it on the Web, the contention goes, then the public at large would have had access to the knowledge earlier than under the library-publisher partnership model. That may be true, but it is not practical; libraries today, facing consistent budget cuts, are forced to reduce services, not to increase them. Where funds are constrained, this type of library-publisher agreement serves the public better and more quickly than waiting for library budgets to improve. Alternately, if a library enters into an exclusive license with one publisher rather than licensing broadly, competing publishers might be harmed by the exclusive deal, or perhaps the public broadly would be harmed indirectly through the lack of competition. But in most cases, these potential harms are outweighed by the many public benefits of this type of licensing arrangement.

The library then faces another choice at the end of the five-year term. With the scan of the original manuscripts now in hand, should the library put it on the Web for anyone to see, perhaps contextualized as part of a fabulous online collection, or should the library keep the scan close at hand? Or should it seek another publisher who might wish
to exploit the works in a new, profit-oriented fashion, in a manner that would generate further funds for the organization? Taking up the problem, the board of this particular library might consider whether the benefit of making the knowledge broadly and freely available is more important to its mission than keeping the collection of that library accessible only to a limited set of patrons who can come to the physical location. In a future version of libraries, the special and historical collections along with the range of services offered, as opposed to the general collections that are broadly available, may be what sets libraries apart from one another.

The same general problem faces museums, universities, and public media organizations. Replace the ancient manuscripts with digital images of works of art, and the analysis is not dissimilar. The same is true for universities and certain teaching materials. If one could choose whether to keep a series of lectures only for fee-paying students, or make the videos freely available on YouTube or iTunes University, which makes more sense for the institution? If a podcast series can reach more users online, and draw people back to a public media outlet’s Web site or channel, doesn’t it make sense to offer them freely online to the world? There are wrinkles, but the core considerations are similar. Cultural institutions have to look hard at their missions, and ask what ends are served by the distribution in various ways of rare or unique materials and information,
whether their own work products or the holdings in their collections.

The movement toward open access to scholarly publications is another example of this same puzzle that is facing every major university in the world. Many parts of Harvard and MIT, for instance, have declared a policy of making their faculty’s scholarly journal articles freely available online. For most faculty members of universities, our goal is not to generate profit from our scholarship; instead, our goals are the dissemination and growth of knowledge, and perhaps increased fame for the author and their employer. Given that open-access publishing is likely to increase the number of potential readers and improve the likelihood of an article being cited by another author who comes along later, the choice to publish on this basis can be clear for many faculty members.

Open-access policies are not without controversy, on campuses and beyond. Most universities have not yet adopted such approaches, though the number is growing each year. Opponents argue that scholarly societies and university presses as well as for-profit publishers will be hurt by the decreased publication sales for journals where the work is to be made freely available online. Publishers assert that the profits they will be able to generate in an open-access world will decrease, which in turn will diminish the editorial and marketing support they can provide to scholars seeking to publish their work. Others may fear that the university
experience itself may be devalued by sharing unique scholarly materials online. MIT, however, which has made not just scholarly articles but also much of its teaching material available online through its Open CourseWare initiative, seems to have benefited from the positive glow of its decisions and the greater reach of its community’s intellectual property, not the other way around.

Universities also face a variant of this conundrum when it comes to the licensing of their scientific advancements. Big research universities tend to enter into exclusive licenses with corporate partners to bring their faculty members’ scientific innovations to market. These deals can generate large amounts in revenues for the universities involved: consider the deal between Gilead Sciences and Royalty Pharma, which paid Emory University $525 million in cash for use of the drug emtricitabine, also known as Emtriva.¹ Such deals, when made on an exclusive basis, may well be the best way to extract the largest cash payments for the universities involved. As an alternative approach, some universities might consider entering into nonexclusive arrangements that allow a greater range of private firms to innovate using universities’ intellectual property, perhaps with lower royalty rates in total. The net cash proceeds to universities might be lower in the nonexclusive context than in the exclusive one, but the benefit to society may be greater. It is utterly conceivable that a more open approach to intellectual property licensing could
lead to better research, on campus and off, if the ability to make use of the scientific advancements were more broadly and openly licensed. Universities compete fiercely for top research talent, just as for-profit corporations do. Universities might gain a leg up in the expensive and competitive labor market for researchers if they were able to attract faculty members interested in this open-licensing approach. The leadership at universities ought to weigh these various, potentially competing values in setting a general approach to intellectual property agreements.

Foundations face a similar series of choices with respect to intellectual property. In the context of federal grant making, the US government often requires grantees to make the benefits of federally funded research available broadly on an open-access basis. Increasingly, private foundations are thinking about their role in the dissemination of the research that they underwrite. Foundation executives are beginning to consider the way in which an insistence on open-licensing policies—based, for instance, on the Creative Commons model—may further their core missions.²

Many universities, libraries, museums, foundations, and public media organizations presented with these types of choices are deciding to share the information broadly online, rather than keeping information close at hand to generate a competitive advantage. If the default in the for-profit world is to generate maximum revenues from the
licensing of intellectual property, the default in the non-profit setting is probably to make intellectual property as broadly available as possible. This general inclination toward openness on the part of knowledge-disseminating nonprofits versus maintaining proprietary control is a good thing for society at large.

The notion of a broad as well as increasing range of options for how to manage and exploit intellectual property holds true in the nonprofit context as it does in the for-profit world.

Universities, libraries, museums, and many other nonprofit organizations can learn from the intellectual property practices of businesses, too. There may be cases, as in the for-profit context, where the optimal strategy for the nonprofit institution is to stick with profit maximization—to emphasize the licensing-for-cash option when it comes to intellectual property usage. In generating this extra cash flow, your nonprofit institution may be better positioned to meet your core goals in other ways. In this sense, intellectual property may be more important as a cash cow than as something to disseminate.

The fundamental idea of this book—that all types of organizations have an intellectual property portfolio and ought to have an intellectual property strategy—is equally true of nonprofits as it is of for-profits. Return to the analysis in earlier chapters and apply the same tools
to the nonprofit context. The simplest point to recognize is that all organizations, whether or not in the knowledge-dissemination business, potentially hold valuable trademarks in their names and the symbols that describe them. In the case of nonprofits, these brands often bear significant goodwill, generated through their success in driving a public-spirited mission over time. Think of the positive things that one associates with the American Red Cross, Sierra Club, Ford Foundation, or National Association for the Advancement of Colored People. This “brand-name value” of well-known institutions itself has value that can be captured in myriad ways—such as through financial arrangements—that may help you accomplish your goals. A licensing arrangement that involves the use of a nonprofit’s name, for instance, might be enormously valuable in raising awareness for a cause—a crucial goal for your organization—rather than as a direct revenue-generating matter.

These examples from the nonprofit context, repeated every day in the digital era, demonstrate how the choice of what to do with an institution’s intellectual property is rarely straightforward. The outcome of these decisions ought to be governed by looking to the organization’s mission and how it can be best served over time by various intellectual property strategies. A nonprofit might well decide that giving away intellectual property is the simplest, clearest way to serve its mission. But it is just as possible that a creative licensing arrangement—related to the
trademark in its name or a famous character, as in the case of the CTW; copyrighted materials that it holds or underwrites, as in the case of a private foundation; or the patented inventions that its researchers dream up, as in the case of universities—could do as much, if not more, than a purely open strategy to advance the organization’s mission through expanded reach, or the revenues that might come along with it. The choices that face a nonprofit in intellectual property strategy require much the same level of sophistication, and sometimes more, than in the for-profit context.