

Book Reviews



Navigating Legal Issues in Archives. MENZI L. BEHRND-KLODT. Chicago: Society of American Archivists, 2008. 329 p. ISBN 1-931666-28-8.

Navigating Legal Issues in Archives is a useful book – for American archivists. To be sure, it is unlikely that the publisher or the author intended it to cover anything more than American law; however, the book would have been more appropriately titled “Navigating Legal Issues in *American* Archives.” From the perspective of an archivist working anywhere else in the world, its value is questionable because it is so rooted in the details of the range of American law pertaining to recordkeeping and archives, and the litigious culture of American society. That said, however, American archivists will undoubtedly find the volume useful. It is a long-overdue successor to Gary Peterson and Trudy Huskamp Peterson’s *Archives and Manuscripts: Law*, published in 1985 as part of the Basic Manual Series of the Society of American Archivists.

The author, Menzi L. Behrnd-Klodt, is both an archivist and a lawyer. In addition to her duties as corporate counsel for American Girl Brands, LLC (a children’s book publisher and toy company associated with Mattel), she oversees their corporate archives and records programs. Before assuming her current duties, she worked in a number of other archival programs and in private legal practice. She also provides consulting services to cultural heritage institutions regarding legal issues related to archives and records.

The volume examines a range of legal issues that American archivists may face in their day-to-day work. The book is organized in four sections: the first presents the legal context by noting the role of policies and procedures in establishing the legal framework for the operation of an institution, how to work with legal counsel, and the civil litigation process in the United States; the remaining three sections discuss particular issues relating to acquisition and ownership, access and administration, and copyright and intellectual property. The section on acquisition and ownership includes: acquiring ownership and rights in holdings; archival appraisal, reappraisal, and deaccessioning; loans and loan

agreements; abandoned and unclaimed materials; tax considerations; and risks, risk management, and insurance considerations. The volume's longest section, "Access and Administration," deals mainly with access and privacy issues; it contains chapters on access to particular types of records (lawyers' papers, student records, medical records, presidential records, public records) before dealing with replevin (a type of legal action to recover personal property (including records) taken or unlawfully held by someone else), legal considerations relating to records and information management (with a separate chapter on the implications of the *Sarbanes-Oxley Act*), and cultural property. The final section deals with intellectual property matters in two chapters on copyright and one on trademarks, patents, and related Intellectual Property (IP) issues. Some chapters include sample forms, some of which are already familiar to many archivists (e.g., loan agreements, donor agreements, rights releases), others less so (e.g., subpoenas).

The text is supplemented by forty-three pages of lengthy endnotes that include, in addition to the citations of sources quoted or referred to, actual wording of specific provisions of statutes and regulations, and further elaboration on the main text. While the placement of such detailed supplementary information in endnotes contributes to the readability of the main text, the notes are numerous, and the flow is disrupted as the reader's eye frequently moves to the bottom of the page in search of explanation. The use of footnotes would have made the information more accessible and less distracting, and the reader would not have to flip back and forth from text to endnotes. A bibliography of sources cited (and a list of further reading) would also have been a useful addition; as it is, the reader must sort through the endnotes to locate specific references for further reading.

Although ambitious in scope, the coverage of different topics is uneven. For example, intellectual property issues (mostly copyright) are covered by an entire section (three chapters) that includes discussion of the case law related to the judicial interpretation of fair use (pp. 230–37) and recounts "in mind-numbing detail" (p. 241) the termination provisions, i.e., the right of copyright holders to end previous transfers of rights and recapture copyright for themselves (pp. 241–44). In contrast, the discussion of the complexities of access and privacy issues in archives barely scratches the surface. Even though the "Access and Administration" section is the volume's longest, most of it is devoted to access issues pertaining to specific types of records. The chapter that introduces this section provides an overview that mainly discusses privacy, while barely addressing the intersection of privacy and access. Furthermore, it fails to focus on the ways that privacy issues are of concern to archives (i.e., privacy in relation to records is largely focused on the protection of recorded personal information, as opposed to entering one's house without permission) (pp. 107–10). Nearly half the chapter is dedicated to a list (accompanied by brief descriptions) of selected federal statutes concerning access and privacy (pp. 114–23). An archivist interested in

the legal implications of access and privacy will have to do some legwork to locate and study the provisions of the statutes listed, and find others (e.g., at the state level) that also apply. Obviously, privacy, access, and their inter-relationships are extremely complex, and it may not be possible to do justice to this topic in a book of this length. Nonetheless, the topic could have been better addressed, even within the space constraints of this particular volume.

Cultural property matters are dealt with in a similar, unsatisfactory fashion; in a very short chapter, the author discusses only the *Native American Graves Protection and Repatriation Act* (pp. 196–98). The chapter concludes with a list and brief description of selected cultural property statutes. The discussion of risk management and insurance is also somewhat cursory.

The organization of the book is odd; many of the chapters are very short and could have been combined; for example, the chapter on *Sarbanes-Oxley* could easily have been integrated into the chapter on records management. The organization of the chapters in the section on access and administration is also curious; as noted, there are a number of chapters on access to specific types of records, starting with lawyers' papers. It would have been logical perhaps, to start with the group of records of relevance to the greatest number of institutions (i.e., public records), before moving on to discuss records of narrower interest. That, however, assumes that the reader is going to read this book from start to finish; it may be that readers will instead dip into it selectively in search of specific information. If that is the case, the organization of the chapters does not really matter.

In addition to the table of contents, the book includes an extensive and detailed index, which will assist the user in locating relevant information, regardless of how it is organized.

Behrnd-Klodt favours bulleted lists; however, this layout is occasionally misleading. For example, the author lists several ways of protecting the interests of third parties (pp. 50–51) but in the subsequent narrative advises *against* such practices as being too time-consuming and difficult to administer. Similarly, she lists ways of disposing of deaccessioned material (including sale) (p. 66); but the subsequent text and related endnote caution against such a means of disposal. Someone reading quickly may take the bulleted lists as a checklist or advice to be followed (as indeed most of them are) without taking time to read the caveats or contrary advice in the surrounding text.

Despite the relatively detailed coverage of copyright matters, there are some gaps. While the chapter on transferring ownership and rights at the time of acquisition includes a brief discussion of the desirability of transferring copyright from the donor, the discussion assumes that the donor is in fact the rights holder, and thus is entitled to transfer copyright (p. 47). This is not always the case (although many donors may mistakenly believe that they own the copyright in the acquisition), and this particular situation should have been addressed. The chapter on copyright contains the following surprising statement: "Archivists

may seldom need to secure copyright permission for their own uses, but many of the researchers they assist will” (p. 250). In fact, while embracing the opportunities provided by digital and communication technologies to digitize their holdings in order to make them available online, archival repositories – except in cases where they are the rights holder – are not exempt from obtaining the necessary authorizations required to make their holdings available electronically.

The author says in the introduction that she hopes that the book will provide “useful information for another 20 years” (p. v). However, she goes on to note that it is in the very nature of law to change as statutes are amended, and as courts interpret the statutes and the body of case law grows. Furthermore, she notes particular areas in which the law is in a state of flux, such as copyright generally (particularly orphan works legislation) (pp. 244–48) and presidential records (p. 154).¹ While the volume is a welcome addition to the American archivist’s bookshelf, in that it replaces the outdated Peterson volume, it does not stand alone. Weaknesses or gaps in its coverage, as well as the dynamic nature of law itself, will require the archivist to seek supplementary information from other resources.

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1 On his first full day in office, President Obama revoked Executive Order 13233, which restricted access to the records of former United States presidents (*Executive Order no. 13489, Presidential Records*, 74 Federal Register 4669 [21 January 2009]).