

SHERWOOD ARCHIVE PROJECT: PRESERVING THE PRIVATE RECORDS OF PUBLIC INTEREST

David A. Kirsch & Sam Meister

Digital Archive of the Birth of the
Dot Com Era Project
4556 Van Munching Hall
University of Maryland
College Park, MD 20742

ABSTRACT

Digital business records are more at risk now than ever before. The dynamics of entrepreneurial business, the fear of litigation and e-discovery, and the narrowing demands of shareholder capitalism compound the technological threats to the record of business. The Sherwood Archive Project, a project of the Digital Archive of the Birth of the Dot Com Era, seeks to mitigate the risks to business records by partnering with Sherwood Partners, Inc to develop strategies and workflows to preserve the records of failed business firms

1. INTRODUCTION

The following paper outlines current efforts of the Digital Archive of the Birth of the Dot Com Era project to preserve the digital records of business. A brief description of the nature of risk in relation to the record of business is given to portray the immediacy of the need for preservation efforts in this realm. The Sherwood Archive Project is outlined, including a description of work completed, future project stages, and illustration of the complexity of challenges inherent in attempting to preserve private records that are of public interest.

2. THE RECORD OF BUSINESS AT RISK

Why are business records more at risk now than in the past? This section summarizes ideas set forth more fully in Kirsch (2009) [1]. Information technology is implicated at every step, but technological change is not the only cause of the threat. The sources of the problem include entrepreneurship, litigiousness, and shareholder capitalism itself, each of which are indirectly affected by changes in the underlying technological landscape.

In the early growth stages of a typical entrepreneurial venture the focus is on searching for financing, customers, suppliers, employees, and above all, profit. Developing a records management program tends to be far down the list of priorities, and only if a venture survives and reaches maturity is a firm likely to create and implement policies in this area. This scenario is likely to persist into the near future and as entrepreneurship increases the allocation of resources for preservation of records will remain minimal.

The nature of shareholder capitalism also does not bode well for the survival of business records. In the traditional model of business archives, such as the Hagley Museum in Delaware or the Baker Library at Harvard, paper records were inadvertently or accidentally saved by the producing organization and then donated to an external archival institution when the private value of the records became lower than the public interest in those documents. The mandate of the shareholder context confronts the traditional business archive model by asserting that if a proposed action does not directly benefit shareholders, then that action should not be supported by responsible management. In such an environment, where the private benefits of contributing to an archive are questionable, it is expected that such donations will continue to decrease.

Lastly, the culture of litigiousness has direct repercussions that increasingly put the record of business at risk. The costs of legal discovery are unknown and therefore especially frightening to corporate entities attempting to predict and control every aspect of economic activity taking place within the boundaries of the firm. While statistics show that liability risk of a given record is low, the perceived threat of the cost of discovery has led to the development of strict record retention policies. Created to be in compliance with contemporary legislation the purpose of these policies is clear: every record produced within the boundaries of the organization should be saved until a certain date and then destroyed. These policies do not envision any records surviving beyond the organization.

Digital technology has produced the tools and mechanisms that allow information to be managed, tracked, and destroyed with increasing efficiency. Companies can monitor the value of their digital assets, and in turn, swiftly delete these same assets when their value has decreased beyond the point of continued retention. No longer are records haphazardly kept and rediscovered later in an archival collection. The digital revolution, consistent with changes in the structure of the economy and the clearest dictates of shareholder capitalism, will destroy the Record of Business not by accident, but on purpose by making it manageable and valuable for a discrete, but limited period of time beyond which its value to the corporation falls below the cost to maintain it.

3. SHERWOOD ARCHIVE PROJECT

Against this background, the Sherwood Archive Project (SAP) represents an attempt to save the records of business by investigating the potential to preserve the “abandoned” records of failed companies. The SAP is one of the current efforts of the Digital Archive of the Birth of the Dot Com Era (DCA). Since 2002, the DCA has sought to identify, collect, and preserve a representative collection of born-digital records and related digital ephemera from companies that sought to exploit the commercialization of the Internet during the 1990s. Through previous projects and the resulting collections of the Business Plan Archive, the Dot Com Archive, and the Brobeck Closed Archive, the DCA has explored the complex privacy and confidentiality concerns that are associated with attempting to preserve digital business records. The SAP continues the efforts of these previous projects in confronting these challenges.

3.1. Background

In 2008, the DCA began a partnership with Sherwood Partners, Inc., a consulting firm located in Mountain View, California. Sherwood Partners provides a highly specialized service to the venture ecosystem. As the population of venture capital-backed startups expanded in the course of the 1990s, so too did the number of failed ventures, requiring venture investors to spend valuable time winding down old companies when they (and their LPs) would have rather focused on investing in new ones. Sherwood helped solve this problem by developing a novel “workout” mechanism. They have taken advantage of a legal code “Assignments for the Benefit of Creditors” – a state-based alternative to Chapter 7 Bankruptcy filing – that is available in many of the major states that venture capital backed companies either work in or have incorporated in. Sherwood has developed the Operating Assignment for Benefit of Creditors or ABC to better work in the venture capital community. Venture capitalists holding controlling stakes in failing startups “assign” all of the assets of the failing company to Sherwood, and in exchange Sherwood receives a fixed fee and/or a share of the total assets recovered in liquidation. In this way, venture investors outsource responsibility for the workout and winding down process to specialized professionals, simultaneously maximizing financial recovery, freeing the investors to look forward, and limiting the risk of potential entanglements resulting from public bankruptcy filings. Over the course of the past decade, Sherwood has served as the Assignee for several hundred failed firms, in the process returning tens of millions of dollars to creditors and investors. The records of these assignments contain distillations of billions of dollars spent in pursuit of uncertain opportunities, and their preservation promises to yield answers to many questions of immediate and historic interest. Functionally “abandoned” by their previous creators and owners, the records collected by Sherwood represent a

valuable opportunity to both preserve these specific at risk business records of historic interest, as well as to determine the feasibility of developing preservation solutions for at risk business records in other similar contexts.

The Operating ABC is an elegant legal solution to the problem of how to efficiently liberate scarce financial, IP and human resources entangled in failing technology ventures so that they can be redeployed elsewhere in the entrepreneurial economy. However, the day-to-day workings of this process are more complicated. Different stakeholders hold differing views about the desirability and timing of initiating an Operating ABC. As a result, the transfer of control from the failing firm to the workout partner, in this case Sherwood Partners, is uncertain and tumultuous and presents unique preservation challenges.

3.2. Objectives and Methodology

The main objective of the SAP is to develop and implement a records management workflow for the paper and digital records collected as part of Sherwood’s business processes. The end goal of this workflow is the transfer of selected records to an external repository for long-term preservation. In relation to the digital preservation lifecycle in OAIS [2] terms, the SAP is focused on investigating and producing solutions to challenges encountered during the pre-ingest time period. The conceptual nature of OAIS model does not specify the potential complexity that may be encountered during the pre-ingest stage, while in reality we see that many challenges arise. This context may be unique in the extent of the problem of business records, but may be that this problem is underappreciated in other contexts as well.

Early stages of the SAP focused on seeking understanding of the context for capturing records within the Sherwood workout process. A qualitative methodology for collecting data was employed during these stages that included surveys, interviews, and field observations. A survey of the paper record collections previously collected by Sherwood was conducted to better understand the existing selection criteria for records being implemented during the ABC process. Interviews with key Sherwood staff members were conducted to gather data on the existing workflows carried out during ABC process, with specific attention paid to records selection, collection, storage, and disposal. Field observations, in the form of site visits to the facilities of failed firms undergoing workouts are ongoing and have provided valuable insight into the timeframe and context for records capture within a typical workout. During a field observation project staff accompany Sherwood staff to the former company facility soon after the ABC process has begun. Project staff will observe and record details on the site itself as

well as the work being carried by Sherwood staff and associates.

Two main outcomes resulted from the data collected during the initial stages. First, a Selection Criteria for Paper Records was produced based on understanding of the existing Sherwood record selection criteria as well as the results of a review of the literature from the archives and records management fields focusing on the selection and preservation of business records. Second, a set of Policies and Procedures for Paper Records was developed to integrate the existing Sherwood staff workflows with the new Selection Criteria and additional steps for managing records. These two documents will assist Sherwood staff in selecting and managing records during their retention and use by Sherwood in the ABC process.

The current focus of the project is utilizing the same qualitative mechanisms to collect data on the existing digital records collections and the workflows carried out by Sherwood staff in capturing digital records during the ABC process. Outcomes of these current stages will include:

- Selection Criteria for Digital Records
- Recommendations for a workflow for the selection, capture, and transfer of digital records to external repository

3.3. Initial Results

Initial results of the early and ongoing stages of the project include increased understanding of the environment for potentially capturing records during the Sherwood workout process. This environment can be characterized as highly variable in relation to at least two important factors: time and access. First, the length of time that Sherwood staff will have to close down a client's former facility can vary from a few days to multiple months. This ever-changing window of opportunity to locate, identify, select, and capture digital records creates a challenging setting for digital preservation efforts. Second, the ability to begin the process of location, identification, selection, and capture may be impeded by multiple access obstacles. Digital records may reside on hardware that is no longer operational, on proprietary networks, or behind levels of password-protected encryption. Former staff with relevant information technology knowledge may be unwilling to assist in accessing digital records.

These factors are not necessarily new to those familiar with digital preservation efforts. Data located on encrypted devices or outdated media is a familiar challenge. Time is a well-known enemy to digital data. Through the process investigating the context for capturing records at the end of a company's lifespan we have discovered an additional important factor: people. Companies are organizations made of people, people

who have the knowledge to assist in locating and capturing digital records. As the SAP moves forward, any new workflows for capturing the records of failed companies will likely need to incorporate agreements for cooperation with key personnel from those companies.

3.4. Challenges

The Sherwood Archive Project presents a distinct set of challenges related to the management and preservation of digital records.

In particular the issue of rights management in the digital preservation process presents a key area of concern in the SAP. In addition to the technical obstacles that must be confronted in any digital preservation scenario, such as file formats, complex digital objects, and encryption, the issue of rights management compounds the complexity of preserving digital records in the SAP. The ambiguous nature of this rights setting for digital business records engages multiple stakeholders with competing interests. Venture capital investors, who originally provide the funding to start firms, have a desire to maintain control over those firms and limit the potential of lawsuits resulting from discovery. Managers and founders of firms may be concerned about being tied to responsibility for the failure of companies and may seek to retain control of records. Employees are likely to have privacy and confidentiality concerns related to personal information embedded within corporate records.

Many of these potential concerns will be dealt with through the development of legal agreements with Sherwood and any external repositories. In these agreements we will incorporate the recommendations of previous projects [3] that have investigated the rights management challenges inherent in digital preservation. While determining the details of the legal agreements may be a lengthy and challenging process, the nature of the ABC process in assigning the assets of failed companies to Sherwood provides a fairly clear understanding of Sherwood as legal rights owners. However, a clear legal framework does not necessarily resolve underlying ethical issues involved in selecting, preserving, and making available for access the private records of failed companies. In other projects the DCA is currently working on access protocols and mechanisms to assist in mitigating the risk of individual private data being improperly accessed and used.

As the project moves forward in developing and implementing a workflow for the capture and transfer of digital records to an external repository issues of maintaining the authenticity and reliability of records will be confronted. Previous efforts of NDIIPP [4][5] and other digital preservation efforts have provided many tools and technical solutions to potentially carry out the capture and transfer process. In

the next stages project staff will be determining which of these tools can be implemented and operated in collaboration with Sherwood Partners.

4. CONCLUSION

Producing solutions to these challenges and successfully implementing a system to select, manage, and preserve the records of failed businesses would not only meet the objectives of the project, but such an outcome could also function as a model of methods and systems to be utilized in contexts with similar issues related to the selection and preservation of the records of private organizations. In this way the project also functions as a demonstration of the potential to preserve certain types of “at risk” records and assists in describing the process required in negotiating issues at the border between public and private digital records.

The partnership between Sherwood Partners and the DCA provides a unique opportunity to collect and preserve the “abandoned” records of failed companies that would otherwise be destroyed or unavailable for scholarly research. The collaboration between a private entity and a cultural heritage institution is itself significant and illustrates the potential of such mutually beneficial relationships to increase the preservation of important historical records. This partnership is a key element in developing a process to continually capture the records of failed companies. By seeking to increase understanding of context for actively capturing business records we hope to contribute to digital preservation research by illustrating the importance of interactions between people, organizations, and data in the laying the foundation for the processes that will collect and preserve digital records in the future.

5. REFERENCES

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