

Transcription
Section 108 Study Group, Public Roundtable #1
March 8, 2006, UCLA School of Law, Los Angeles, California

Topic 3: New Preservation-Only Exception

Participants

Liza Posas, Autry National Center
Grover Crisp, Sony Pictures Entertainment
Gordon Theil, Music Library Association
Mimi Calter, Stanford University Libraries
Sherrie Schmidt, Association of Research Libraries and
American Library Association
Patricia Cruse, California Digital Library
Richard Pearce-Moses, Society of American Archivists
Brewster Kahle/Michele Kimpton, Internet Archive
Kathleen Bursley, Reed-Elsevier, Inc.
Janice Simpson/Michael Pogorzelski, Association of Moving
Image Archivists

Dick Rudick: There are a couple of new people at the table, so if you could just go around and introduce yourselves...

Michael Pogorzelski: My name is Michael Pogorzelski, I'm the Director of the Academy of Motion Picture Arts and Sciences Film Archive, and I'm here as a representative of the Association of Moving Image Archivists, I am a member of their board.

Janice Simpson: My name is Janice Simpson, I am here representing the AMIA as well, I'm on their Board of Directors.

Dick Rudick: I guess there is one new ground rule, which is no talking with your mouth full. The next topic is an interesting one, and it started from a discussion we had in the Study Group about what we are dealing with. Everyone at this table has had the experience of having had something precious slip through your hands to be irretrievably lost. In the context of copyright, people who loan content, librarians, archivists, content owners, things out there on the web, once it's gone it's gone, it's not coming back for the rest of my life. If you're an archivist, you're a librarian, you say I've got a social responsibility to preserve the past and the culture, and if this thing is gone, I'm not doing my job. It's something that affects everyone. We in the Study Group have a sensitivity to the fact that we are dealing with digital material, by which we mean primarily material that was born

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digital and its full functionality exists only in digital form. They are inherently unstable platforms, cease to exist, are no longer supported by the manufacturer, the software developer, and it's not like a piece of paper that's getting a little worn at the edges and you start to think about replacing it; it's harder to deal with that in the digital world; it's a problem that needs to be dealt with. And with that in mind, we have a question.

Before I ask the question, I want to mention something that we alluded to this morning, because I don't think we've been thinking about it enough, and that is the squishy toy concept, the idea that you press here and something comes out there. There may be tradeoffs between rights, privileges we think are important, and some irksome limitations and controls that might be a condition; one can have more of one if one is willing to forego something else. And I hope that in our discussions we can talk about some of those tradeoffs and get your thoughts in that regard.

And remember we are talking about preservation; that is the focus of this question: Should an exception be added to section 108 that permits up-front reproduction of published work, not necessarily a replacement, but an up-front reproduction for a library, for an archives collection solely for preservation purposes, without having to meet the requirements of section 108? And, if so, how could the exception be limited, or tailored to avoid abuse or risks to the rights-holders which would vitiate the whole concept and purpose of copyright? That's the question, and you're off.

Mimi Calter: We're very much of the opinion that it absolutely makes sense to preserve up front. Our thinking is that it applies both in the digital and in the analog versions, but, there certainly are situations where you know something is at risk before the damage comes, but there are many situations where you do not have advance notice. There's out of the blue situations where materials are destroyed and preservation is important. And I think a lot of this goes back to the discussions we were having this morning and the distinction between preservation and distribution, that the right to copy something for preservation purposes and to retain it is not the same

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thing as the right to make it publicly available. So we're very strongly advocating for the ability to preserve up front and make copies, recognizing that there are needs for restrictions to ensure that the material is secure, that it is not easily accessible in some format.

Dick Rudick: OK, Gordon, and then Brewster.

Gordon Theil: Specifically two kinds of pre-1972 issues with sound recordings, I was mentioning analog sound recordings, including cylinders, discs, 78 rpm, 45 rpm, and tapes, and open-reel cassette recordings. These require preservation copies much sooner than is currently suggested by the language of the subsequent subsection (c). Each time such recordings are played there is degradation of content through heat and force, either from the contact of the stylus and the groove or the tape rubbing against the playback head. Repeated playing of the disc within a short period of time, as by a student who is listening over and over, increases deterioration. Unlike a printed book, it is not possible to reconstruct with a copy the full content once it's degraded. Because each play of an analog recording represents a deterioration of that recording, it is appropriate to consider recordings on these formats for immediate digital preservation, and additionally, recordings that were created on inherently unstable materials, like tapes on cellulose, acetate, or acetate base, or paper tape, etc. should definitely be considered for immediate reformatting, as should audio cassette tapes. None of these formats are acceptable for long-term storage or repeated use.

Brewster Kahle: The first part of this talks about published materials, in the background, and I would suggest that it be changed to "publicly available materials," because I believe that there is an ever-constricting set of what is a published material, or at least I learned by talking to too many lawyers. So, publicly available materials I think would be what you're intending. The idea of allowing libraries and archives - and museums - to perform their preservation duty I think is societally a good thing, so preemptively going and making preservation copies absolutely makes sense.

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But I'd like to speak a little bit about our experience on two things: one is dark archive, and the other is trusted digital repository, both of which are sort of, then what do you do with it? The idea of a dark archive is kind of tempting, you make something and you encrypt it and you put it in a vault for a while and then you pull it out later and ta-da! You can have it, it was saved, somebody saved it. That mystical sort of somebody stashed it under their bed and suddenly it's still there. Our experience with this dark archive idea is negative. It does not achieve what you'd kind of imagine it to. And I'm a computer guy, so the idea of cryptographically encoding it in such a way that - and it just turns out to not work very well. Let me give you a couple of examples: If things are not in constant circulation or constantly being used, and especially in the digital form, they go away. I mean, how many of us have experienced trying to back up our own hard drives, thinking that we've backed things up, and then when you go back later, when you actually need it, and it's not there. And this happens a lot, 30 percent of the time, 50 percent of the time. Jim Gray, of Microsoft did a study, he asked a couple of these supercomputer centers that store these astronomical materials, and they say, "Oh, yeah, we've never lost a bit". So he went and asked for some of these things that he knew were in those collections; 30 percent of them were not retrievable. That's not untypical of IT departments trying to back up their own stuff, if you actually get people to answer honestly. Keeping things in circulation is critical, to basically make sure that things are available. Another aspect is that preservation is driven by access, so preservation alone, I would suggest, is not going to work very well. We went through thirty thousand dollars worth of lawyer's fees to try and get an archive - to allow us to archive software. But we weren't able to make it available, at least our lawyer said, except on campus and nobody comes on campus, so it was kind of pointless, we couldn't motivate the people very well to do the preservation, which was very difficult preservation of breaking down, one by one, copy protections on games and CDs and things. So, without having access, we had a very difficult time motivating the preservation. So, two problems with it, preservation is motivated by access, the

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other is, if you think you're preserving it, and it's in digital form, and you haven't accessed it recently, don't count on it.

So that's the dark archive problem, and specifically with the software archive example, because we're trying out these different things. Another question you had, and I assume that we can answer question (b), the sort of, is it a qualified institution that's allowed to do this? This seems to mimic some of the things that are in discussion in our field, which is around trusted digital repositories. And there's a committee, and we're on that, to try to figure out what is a trusted digital repository? What's the good, state-of-the-art way of doing it? It sort of makes blind sense that you should just be able to -- let's certify somebody as a good player. We've been at this business for ten years now, trying to keep this stuff alive, it's incredibly hard. And the idea of coming up with a formula as to what a qualified institution is, I would say, not yet, let's not cast it in law, it's not time. I think that you have two issues here that you're trying to do, one is to sort of limit the number of players that might be able to do this, because I think that everybody wants to record this stuff, but not have it be that controversial. The other is do you stipulate certain things that these organizations do. And I would say that in a practical sense it is not time to cast practice into law, on how you do digital preservation. The other aspect of it is who is allowed to. We're finding that in the software area, gaming area, PROMs, if you're trying to reconstruct Atari machines, the best people that are doing the best preservation are small-scale museums and archives that are a lot less formal than even ours, not to speak of the University of California that's been around for a hundred years, but we've only been around for ten years. But these are small-scale museums and archives that are doing the work of the gods, so I would suggest that we not try to constrain some of the preservation work. Really limit the access, but . . .

Dick Rudick: Mr. Kahle, please, I would like to ask a clarifying question, are you saying you think we should wait on this?

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Brewster Kahle: No, I think you should wait on the idea of specifying is there a technical best practices for digital preservation? Should you limit this to qualifying digital preservation libraries and archives that perform to a particular set of best practices? We don't know what those are yet.

Dick Rudick: What would you do, if I may ask, if you didn't have the concept of a trusted repository, you didn't have the dark archive? What else would you do instead?

Brewster Kahle: I think that we would do what we kind of do now, with things like donated papers to our archives and libraries. There are certain restrictions we place on ourselves to not provide lots and lots of access. Some access, sure. But, is it under lock and key and cryptographically, etc? Which are all sort of things that are going to be asked for in the digital domain, no. So for instance, the Television Archive is an institution separate from the Internet Archive that has board members from Vanderbilt, a commercial archive, and the Internet Archive - that's who runs the thing - and it's been recording television off-air for the last five years. Very little of it has ever been made available. Would it be a qualifying institution under digital preservation rules? No, probably not, because it often doesn't keep two or three copies of things because it couldn't afford to, to be able to do that much television. It was a new institution that was set up around some frustration that we had that LC was supposed to be recording more television, and wasn't. So these are examples, concrete examples of where we tried the dark archive approach, sort of hit the record button and it hasn't caused any problems in the publisher area. I stood in front of the Moving Images Archivists and given keynotes to everyone and said, "this is what we're doing, we're recording all of your television, and we're preserving it," and in general the answer has been, "Thank you"! Because we haven't been, not all of the different programs, not the ads, not the off-air experience, not the cultural materials around television.

Richard Pearce-Moses: One of the things that I did over the last four years is revise the Society of American

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Archivists glossary of archives and records terminology, and one thing that came out that is the realization that there are two distinct senses of the word "preservation," and I think that may be something that we need to keep in the back of our mind. And what I'm hearing here, in many ways, is the sense of protecting something from degradation, long-term fall-apart; but there is also the sense of "per preserves," taking something fresh and doing something to them so that they can be consumed in the future, and I think that is extremely important for us to consider in the digital era. We are taking something while it is fresh and not even intending it for immediate consumption, but we are doing something to make sure that it can be consumed in the future.

During my work at the State Library my life has simplified somewhat because I'm working with materials that we have rights to, but thinking of other archives, as I hear this, we receive materials in dozens of formats, and there is some desire on our part, given our limited ability to work, to migrate things from .doc, .ppt, Excel, or whatever to a single preservation format. That would be one of the up-front things, while it's fresh put it into a format so that we only have to migrate one format into the future rather than find the resources to migrate dozens of formats.

And, finally, in the notion of limiting this activity to certain repositories, given the enormous quantity of information that's out there, I think we need all hands on deck. We need the little museums and libraries, and George Needham was speaking in Arizona just the other night and he talked about when they got Montana's libraries, with paper materials, online for ILL the first time, there was a tiny library that would have fit easily in this room, and in its first item request was from the Smithsonian Institution. The same thing happens, some little historical society maybe capturing some document, and they wind up being the only ones that have it.

Dick Rudick: Anyone else? This first question deals with digital material, born digital material. We have another question coming up, Sherrie?

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Sherrie Schmidt: I just wanted to thank all of the others who have suggested that we take some proactive steps on preservation, and I think printed materials still remain at high risk and should be considered for preservation treatment prior to any use. We shouldn't be held to a specific definition such as "at risk," because both defining "at risk" and making determinations of "at risk" versus "safe" materials would be administratively difficult and possibly prohibitively expensive. I think that institutions should make the decisions about preserving based on their own missions, rather on . . .

Lolly Gasaway: I want to make sure I heard what you said. Did you say that you thought print materials should be preserved up front?

Sherrie Schmidt: Sometimes they are at high risk and they should be proactively preserved, but then I went into the whole distinction about high risk.

Lolly Gasaway: Yes, I go that part, that first part I didn't quite get.

Dick Rudick: All right, I think Janice and Kathleen.

Janice Simpson: The Association of Moving Image Archivists is made up of about 730 members with very diverse backgrounds, so it's often difficult for anyone to take particular positions because we have such a diverse constituency. One thing that's become really clear is that most of our members are now digitizing their collections, and they're also planning born digital materials, and what's become clear to everyone is that digital files obviously are inherently unstable, and this has created a significant problem. With analog materials, if you wait for signs of deterioration you end up copying in the deterioration, but you'll only lose a portion of the document. If you wait to do anything with a digital file you will experience a catastrophic loss, which means the whole file is gone. So, this is the reason why I would say pretty much all of our membership is in favor of developing a preservation plan for their holdings immediately after the material is created. I also have comments specifically

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about "at risk" and "qualifying institutions" but, would you like to hear them now or should I wait?

Dick Rudick: Sure, go ahead.

Janice Simpson: We've talked about the definition of "at risk," defining some material as "at risk," but as I said earlier I think that immediately after a document is created it begins to deteriorate. Some materials are more at risk than others, but essentially we need to address these issues immediately after it is created.

We have some issues on how we would create this new exception, if it were to be created, how we would define it. One of the issues surrounds the idea of certifying institutions, specific institutions. We can't see how we could leave this kind of a responsibility to major archives. The national collections held by hundreds of collections accept responsibility for their holdings, and all of these holdings are unique. All AMIA members follow standards set by standards bodies for preservation storage, they know if they don't their collections will deteriorate even faster. So, we're not sure how certain preservation institutions would be permitted to take advantage of an exemption and you could say that others are not.

In terms of the dark archives I tend to agree with Brewster. I've been talking to our copyright interest group and they have issues with that too. It's hard to define an archives as a repository that only stores materials and does not provide access.

Kathleen Bursley: This is really, a little alarming. What I'm hearing is basically, every library and archive copies everything they get as soon as they get it. There's no centralization, nobody knows what's copied, nobody is able to determine whether libraries and archives are in fact adhering to whatever limitations are attached to this exception, and it's all good. I think this is a place where maybe the commercially available thing may give us some help. I just, I'm having trouble with Reed-Elsevier's participation, along with various other scientific/technical/medical publishers, and the University of Edinburgh, Indiana University, The New York Public Library, Rice, Stanford, and the University of Virginia in

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a dark archive program for electronic journals, and I think that there are probably a lot of types of publications out there that have their own preservation strategies in place, in mind, and under development, and I'm not sure that - it seems like a lot of duplication of effort to have every academic library in the country engaged also in creating a preservation version, particularly if you think that probably, the one that's sort of the standard in the industry that's creating these materials is probably likely to be more accessible and kept track of perhaps better. I take your point that use is what impels people to preservation. I'm reminded of an insane attempt to scan all of Harcourt's contract files, and what that meant was taking apart these huge paper folders and one-by-one copying the pages, and of course the people who would want to use such a thing were not the people who were supposed to be doing the copying. The people who were supposed to be doing the copying on an ongoing basis were the ones who filed the papers in the paper file, but frankly their motivation was not high. I mean, they're not the ones who are going to find out that, hey, we missed a page, gosh that was the page with the royalties on it. So, I do take your point that preservation for the sake of preservation is often a difficult thing to achieve, but I think that in instances such as journals that are published electronically, you're already a good part of the way there, and I don't see the need for an exception that would be wide enough to drive that truck through, really. I perfectly understand the need to preserve things such as museum collections, old historical documents, things that of course in many cases are no longer or never were in copyright, but I'd have to feel that there's some way you could distinguish between that kind of preservation, the preservation of things that are commercial but the creators are not being taken care of and those that are being taken care of, and treat those in different ways.

Patricia Cruse: One that the California Digital Library -- we really feel that it's very important to engage in preemptive preservation for a variety of reasons, and also to be able to, not maintain a dark archive because I agree with what's been said. If you have a dark archive and you don't exercise that archive you don't know that the content

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is lost until you try to use it. We had an opportunity to experience that first-hand - and I'm calling it an opportunity right now simply because it's faded in my memory - we had an enormous collection of content that we thought was very important to the University of California and I think beyond the University of California, and we worked with two people within the preservation community to hold that content, two separate sites, enormous amount of information, they both simultaneously lost that information. Preservation is new, people are still understanding what it means to preserve things, so I think that having multiple strategies, multiple places where that content exists, and also multiple people looking at it and making sure that it's healthy and alive.

Mimi Calter: I wanted to sort of second what Patricia said and respond a little bit to Kathleen. To take the analogy from print into digital, if you're talking about print journals, part of what has historically gone on is a lot of duplication of effort. You've always had multiple libraries that had a physical copy of the journal and were storing it, and multiple archives had it. So, when you move into a digital version, it doesn't seem like a major change. Certainly it is a duplication of effort to have multiple people storing it, creating preservation copies, but that's what we've always done, and it's been pretty effective. Yes, you do need to have multiple people doing this and multiple people looking at it. There are problems with dark archives, having more people taking a shot at this, taking different approaches is an effective way of dealing with that problem.

Dick Rudick: I want to ask a follow-up question at this point, because I don't feel we're getting at something that we need to understand better in the group. Let's assume, just for the purposes of the discussion, that there's a lot of sympathy with the idea of up-front preservation, but, following up on what Kathleen said, if there's no definition of "at risk," if there's no certification process, if all archives have the sunshine streaming in, how do you get confidence and trust in the rights-holders' community - in a way that you can live with - that gives people whose livelihood depends on copyright and who create

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the materials you're trying to preserve, because we don't want culture just to stop right now, how do you build that confidence? What would you do to alleviate the concerns that Kathleen expressed? Start from the assumption that we're going to have to do something to alleviate those concerns, what would you do?

Mimi Calter: From my perspective, I think that we're talking here about preservation and not access. This is a little more of a personal perspective than speaking for Stanford, but there's got to be a way to find a gray area between making this publicly available and widely distributed and having a dark archive where nobody ever goes and touches it and looks at it again. Kathleen mentioned that the dark archive project, that there has to be a middle ground where someone is going in there and looking at it, there is some kind of check and verification process, but it's not something that is being publicly distributed outside of the copyright restriction issue.

Liza Posas: I think that when Sherrie said that defining "at risk" could be difficult depending on so many factors, that when she said, you know, look at the mission of the organization, I think that's something that maybe needs highlighted a little bit more. I mean, how we decide to access something, we look at our mission, we look at our responsibility, and who we are, and sometimes it's something old, and something that is in public domain,, and sometimes it's something old that isn't in the public domain, and it's really murky, it's not - as Kathleen might have alluded to - that it's black and white, saying this is old and this is public domain and we can digitize it without any problems, there's always that middle ground where we don't know. But if we stay true to our mission, our accountability, then I think that it makes the decision a little bit easier if it's worth it to preserve it for why we're here and what we want to do.

Dick Rudick: When you said "mission", I want to understand, are you suggesting that the type of institution is relevant, or did I misunderstand?

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Liza Posas: The way that I hear these conversations, I apply it to my type of institution, and it makes it really relevant because of the sensitive cultural issues that we deal with with the Native American groups. So, even though a feather headdress may be public domain and it's not particularly owned by someone, I'm still not going to put it on the Web if it's a ceremonial thing, right? So I think that's where I really relate to Sherrie's comment in regards to the mission and your institution. And whether that can be resolved through section 108, that's another thing, I'm not sure that it can be.

Kathleen Bursley: I was going to ask a clarification question but you clarified at the end that it's the mission of the particular institution, and so there might be things - just asking now - there might be things that you have possession of, or in your collection, somehow, that are good to have, I mean, say like some kind of reference book, something like that, that are good to have, and people do want to just consult these, but they're not particular to your mission, they're not the headdress, or the writing or the song or the chant, or whatever. I'm thinking about your case, with an institution with a relatively very narrow mission, as opposed to, let's say, the UCLA Library, which there is probably no limit on the mission it has because it is just so immense. So, I think maybe the mission might work for smaller, more narrowly focused institutions, but I don't think it's going to be enough. And I tend to agree that as the discussion goes on, that 108 may not be the vehicle. I don't know. I'm still trying to understand the concept of "make a copy of everything when you get it, just in case." Not when you're getting in a unique item, I mean, obviously if you're getting in the hand-written manuscript of Emily Dickenson's poem, of course, but if you're getting in something that's commercially available in vast quantities from many sources, then first of all is it worth your time, money, and digital storage space? Second, is that really the mission?

Dick Rudick: OK, I have in the queue, not necessarily in the proper order, but Michael, Brewster, Sherrie, and Richard, and Liza.

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Michael Pogorzelski: I don't want to go out of order, because I agree with a lot of what Kathleen is saying, but didn't you focus the question to 108(c) and born digital? Because in that case, I just wanted to sort of steer us back, and state that born digital material is not that much of an onus on institutions, even smaller archives, whether you're talking about a web page or even what a lot of our member archives deal with in terms of moving images, which can be much larger files. They are still sometimes easy to be duplicated and can be stored in a variety of means. So, I just wanted to make sure we were focusing on an exception in 108(c) for our institutions which may be receiving the same academic journal or the same streaming video or the same whatever born-digital material, and we're backing it up because we feel that it will be important at a later date and we want to make sure that our online or near-line access copies can be retrieved easily through work, or back up, or preservation copy if you'd like to call it that, that we have made, that the institution ha made.

Lolly Gasaway: I want to add something that I feel we have to understand: And it's not licensed.

Michael Pogorzelski: Correct.

Kathleen Bursley: But there is no reason, other than the license, that that changes anything. If you're not relying on the provider of the digital material to preserve it, then you have to preserve it, licensed or not.

Lolly Gasaway: I think the license would control whether you could do that or not.

Dick Rudick: Just as a clarification to something that Michael said. We're talking about, not 108(c), but the question is what if something is fragile, its fragility inherent in the fact that it's born digitally or for functionality is accessible only in digital form? And 108(c) doesn't take us where we need to go. So it's a whole new exception, it is very broad and powerful, the question is: Is it something we need? And clearly we're hearing that it's something you want, but the second

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question is, if it is something you need, how do you square it with the concept of copyright and the purposes of copyright, and Kathleen has pointed out the problems, but - somebody stop me if I'm going someplace I shouldn't go - but what I'm not hearing is, if this is essential to have, how do we make it work in the context of an effective copyright law that promotes creativity? What would be the carve-outs? Maybe there's things you don't like, but what would you be willing to give to get this powerful tool, does that help?

Mary Rasenberger: Can I make one other clarification? I think our first question was asking about making digital copies of digital, but we will have another question which relates to analog copies, so we're not excluding that altogether, we're just not bringing it up just yet. And the examples that we gave in the notice and the background were like dark archives that would protect rights holders, and should we limit it to certain types of institutions that are actually doing preservation and not just providing access. You might have technological protection measures; these are just some examples of the ways to this.

Dick Rudick: OK, so we have Brewster, Grover, Sherrie, Liza, Richard, and Patricia.

Brewster Kahle: So you're asking how do we give comfort to the copyright holders, right? That's kind of the basic premise. And given that this is coming from the Copyright Office I kind of expect that, but I think we're also coming from the library world, so I think you might also want to make sure that we're giving comfort to libraries and archives, and I'm not just being funny here.

It's got to be pretty straightforward, otherwise very conservative institutions, which most of us are, won't do a thing, we'll just hold back. How many times I've been in conversations where the concept of endowments of universities is at stake. Let's say that we're trying to find a balance here, a comfortable line that we can walk down. I don't know that there's really an issue where libraries are rampantly going out and doing too much preservation. I'm unaware that there is this sort of runaway problem there; I may be missing it - that was a

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sarcastic remark, so I'll back away off of that. So, I would suggest a couple of things here that would make the copyright holders happy, and allow we libraries to know what we're supposed to do.

On the copyrights holders side, there is something that they've already gotten that I think should be generally acknowledged: The copyright penalties are really scary. They're criminal, they seem to go on forever, you can wipe out whole countries, it's pretty amazing, but that's not quite what you were looking for, so here's another possibility, just made up, just now: We've worked pretty well at the Internet Archive on the web collection with an opt-out system. And, you know, there are types of folks that have mouse ears, or particular groups that are very insistent, the Scientologists, that are really good at asking to be not included. They hire a lot of people, they hire a lot of lawyers, they're very well represented. So the opt-out system, we just went through one of them, let's say, like 1201 meetings, where you have to go through your case. You go and you say "I don't need to be archived by those guys because I'm doing a good enough job," and every three years, you could make it five years, it would be nicer on them, you have to go and demonstrate your case that you're taking care of your own. I bet you there'd be high-priced lawyers at that meeting going and opting out. That would maybe take care of a lot of your case. That's on giving comfort to the copyright holders' side.

The thing on the libraries and archives, is a simple - except for those who have been opted out of some list - we libraries and archives preserve the materials that are in our collections. Just let us do our job; we're preservation and access. So, a simple statement that I think this morning somebody said, make it so that someone without a lawyer at their side would be able to understand if they're allowed to do something would be really helpful in this area.

Grover Crisp: I think that, getting back to the original issue of a preservation plan for an archive, for this type of material, born digital; you defined this question in a very narrow way, because there are very few born digital works, that I'm aware of. My studio has produced none, for example, entirely. There is always an analog component to

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it. I'm not aware, for example, of any moving image archive in the world that has a digital copy or representation of any of our productions. So, I think that one of the reasons that we're having a problem in getting a handle around this question is lack of definitions. And the fact of the matter is, there is no clearly defined process or program for digital preservation, whether it's born digital or not. That's one of the reasons that a certification, as Brewster mentioned, would be difficult, because there are no standards by which to judge how an archive would qualify or not qualify. There are standard-setting bodies all over the world, including the Science & Technology Council at The Academy, who are grappling with this issue right now. And that is, how do we preserve our digital material, whether it's a product on the back end of a partial or complete analog process, or it's digital from the very beginning, captured all the way through distribution? So far, that model, that digital platform has not existed. So I think that until we can clearly define what we mean by "digital preservation" and also what we mean by "digital materials" that may be at risk, that need "digital preservation," I think that we're going to have a very difficult time getting to an agreement. We grapple with these issues everyday, you know, and we're not sure exactly in terms of what we need to do, but we as the owners of the material, we're working on that plan, just like an archive should be working on a plan to preserve their holdings - after all, that is one of the missions of an archive, whether it's a public archive or a private archive, like a studio. And, in terms of the copyright holder being comfortable with this, copyright penalties are severe, but as everybody in this room knows, copyright infringement by virtue of Internet distribution or copying of DVDs is rampant worldwide, so the copyright penalties, we like them, but they don't exactly make us confident that that's not going to happen.

Liza Posas: Well, kind of back to the whole mission thing, really quickly: I think overarching as librarians and archivists, we do have within our mission, within our profession, a sense of integrity which will keep us law-abiding, and we don't want to lose our freedom, I guess, to preserve the collections that we have. So I guess that's

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why I'm not as concerned with it being abused or misused because of where we stand in the community and in our profession. Secondly, I deal every day with digital media, and I don't know - I agree with Mr. Crisp that we don't have digitally-born things coming to us, but we create digital files, so whenever that's created, the idea of not preserving that makes everybody scared knowing that it can be lost within a simple network crash. So, it's almost instantaneous, that we have to preserve out of fear of losing some of the things that we made digitally.

Dick Rudick: Richard, Patricia and Kathleen in the queue now.

Richard Pearce-Moses: I think, to try to get to your question about can we maybe look at different kinds of materials to see if there are different issues involved, so let me address specifically archival collections, and I can't speak to libraries, serial collections, things like that, but an archival collection, and let me use my own records as president of the American Society of Archivists, which are almost all born digital. They include Word documents, emails, PowerPoints, there's probably a podcast in there, so we'll talk about that as an example. The collection has thousands of items and hundreds, if not thousands, of individuals who have sent me emails and documents, so I think there is a qualitative difference in the need to get permission to copy all of that material with its many many copyright holders, from - and I'll pick on Ms. Bursley a little bit - a serial publisher, where you're talking about a massive amount of material with a single intellectual-property owner. So I think there are somewhat different problems that archives face, and I hope that we can find something that is reasonable for a manuscript repository or corporate archives with these kinds of received materials, where you may literally be looking at a large corporation's - with hundreds of thousands of people you might need to get permission from. And so I think there is a qualitative difference there, and I'd like to comment on Mr. Crisp's comment about rampant distribution of copyrighted materials -- and I agree with you, it's all over the place -- but I think, what I have seen, from members of the Society of American Archivists,

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because we often have deep pockets, we are very concerned about any kind of violation because we could be subject to that. I would say it's not worth most IP owners' time to go after John Q. Public because he has a \$1.95 in his savings account, so I would hope we can be very careful as we talk about illicit usage, which I agree is entirely inappropriate, that we are talking about, within the context of libraries and archives, that are at much greater risk, and because of that, in this area and many other areas, do not meet the public good of providing information for fear of litigation; and having taught photographic workshops, where again, you have a collection that has thousands of unidentified photographers, they won't do stuff with it because they are afraid of being sued.

Grover Crisp: Right. A quick response to that is that I narrowed my response on that to Mr. Kahle's statement that copyright holders should be comfortable with it.

Brewster Kahle: With libraries and archives doing preservation.

Grover Crisp: You can explain that to me later.

Brewster Kahle: Just to clarify my point, it was not that copyright infringement is not happening, it's just that libraries and archives tend to be a fairly conservative bunch.

Grover Crisp: Well, I wasn't implying that they're the culprits.

Patricia Cruse: I just want to get back a little bit to the access issue. I understand that folks like Reed-Elsevier want to be very comfortable with, when we do have something, who has access to it. And I do agree with my colleague from Stanford that there is preservation, and there is access, and perhaps there is some in-between, controlled access or something like that, that really helps to ensure the long term health of content; there is a new initiative on the horizon, Portico, that I'm sure many of you have heard of, that are preserving journals on behalf of the publishers and then libraries like us buy a

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subscription to that. Part of that package is access to the content. Not everybody gets access, certain folks do to go in there to peek and say "OK, it's there, I feel good about it." And so it seems like the publishers are OK with that and have agreed to that type of service, so I think that maybe there is a middle ground; we're not sure if the Portico model will work, it's new, and so maybe now is not a good time to say it's an alternative, but I think it's something worth thinking about.

Kathleen Bursley: This would be sort of a - I was going to say, a scattershot, but I guess probably Mr. Cheney wouldn't like that idea; taking these in somewhat random order, I think you point about the Portico system or something like it is absolutely key, because the reason there's a comfort level with that is that there is a Portico, there's not a thousand Porticos, or 10,000 Porticos; there's Portico. The publishers can look to them, to impose whatever restrictions are to be imposed, and so if something goes awry, they have someone to go to that's not their customer. The problem with the draconian fees and draconian penalties for copyright infringement is like the nuclear bomb: Sometimes penalties are just too big to be used. It doesn't make sense if you're just looking for the penalty, to go after John Q. Public who's downloading one song. But what you want him to do is stop. And so, this gets to two points: One is, going back to what I said this morning, that maybe there's some way of managing this or overseeing this that doesn't get to the point of suing people - lawyers, and all that stuff that takes a hundred years to do; maybe there's some other mechanism that can be thought of that could allow, sort of questionable practices to be looked at in a more informal and useful way. I would also say that it's not the rouge archivist that we're worried about here; we're really concerned, back to Patricia's point, about the access being controlled enough so that whatever it is is not going from the preservation place, wherever that is, to general distribution without the blink of an eye. So I don't think it's so much a concern about what libraries and archives might do unless we end up with a definition of libraries that is going to encompass the guy with a Star Trek collection. I think it's

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more that it be done in a way that helps to assure security and limited access and so on.

One issue that is specific to - is State University libraries and other state institutions, which as you know, are not at the moment amenable to suit for attorneys fees and for damages, but only for injunctions; yeah, I know, I know . . . first of all, the penalties are irrelevant because they're not subject to them, but I think it also highlights that we just don't want to sue our customers if we can really avoid it; I think anyone can sympathize with that. You'd rather not expel the student who didn't return a book; we'd rather not sue our libraries.

Dick Rudick: Unlikely as it may seem, the queue is empty at the moment; ah, not for long: Gordon.

Gordon Theil: I don't think we are talking about a personal Star Trek collection here, unless, of course, it has been donated to an institution. And I don't think that libraries and librarians up to this point are the culprits of misuse or abuse of copyright material. And I think we had a discussion earlier, in the first session, that there is no sense that there has been any major abuse of section 108, and what I am concerned about is that we not in effect throw out the baby with the bath water, that we not worry so much about general abuse that is going on in copyright, that we overly restrict the libraries' ability to preserve and provide access to material that otherwise wouldn't be available, because we are talking about (b) and (c) of section 108 here. We're not talking about the whole world of information, and we need to keep that in mind.

Liza Posas: This is my favorite quote of the day, by Ms. Shelton, I believe: "Preservation is the key to access." The way that I see access is at different levels, there's access internally, the people who are doing the restoring, and access to the patrons, and within those two things there's control. So without us being able to preserve the way that we want to preserve, we also, on the other hand, can't control some of the things we want to preserve. So I guess to put it as an example, when something gets digitized in our institution it's put on an intranet so we can look and put restrictions on and put information about,

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and that is a part of control that assures that a patron or whoever that comes in, can't get this or could get a particular thing, and that's just something I wanted to throw out.

Dick Rudick: I would just like to say that we have always assumed that the dark archive did not preclude people maintaining it; what you're saying is that that's critical.

Liza Posas: Yeah.

Dick Rudick: Anybody else before we have some clarifying questions? If not . . .

Mary Rasenberger: This is really just a follow-up question: I haven't heard a lot of support here today for limiting this type of exceptions to certain types of institutions, but we also don't have a lot of rights-holders at the table. I want to start from the premise that we were going to limit it to certain institutions; this is a hypothetical situation. Institutions engaged in real preservation. This has come up in our discussions in the group, and the fact is there are a lot of libraries that simply provide access, they don't do any preservation. Should they be allowed to have this kind of ability, to use this kind of exception? And if they did, what would that mean? It might mean they are just a dark archive exception, they're just making additional copies so they don't have to purchase them. So let's say we were going to limit it to institutions that did preservation; my question to you is, how would you do that? If you look at the background paper, the information paper that is in the notice, we say that, for instance, you might say in the statute that you have to comply with certain best practices. Maybe you can't define what those best practices are today, but we may be able to do it by reference, and I think we have a general, broad understanding of what best practices are, if not in a technical sense. And we list some of them in the paper. Now it could be done through self-qualification, the institution could just read the statute like they do with 108(a), and say "well, do I qualify or not"? and if you think you qualify then you take it in and shelve it. You

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could leave it up to litigation to decide when to put rights-holders to enforce it; or, to follow up on something Kathleen said, maybe on the other hand going to a full certification or accreditation process. You could have some kind of body in between, like a set body that would help resolve disputes, so you wouldn't have to go to litigation. I just want to put that on the table and see if any of you have any response to how we might do that if we were to do so.

Mimi Calter: Coming at it from the university's perspective, there's something very appealing about laying out the specific criteria for qualifying, because then you can go down the list and say "OK, XYZ, we meet this," and you're covered there, but it's also really difficult to do that right now. We've discussed at times the lack of a full set of standards and it's really hard to get to that right now. This is probably not getting to a complete answer to your question, but there's an upside either way, and coming up with guidelines that would let someone say "yes, I do meet that," that would let you self-qualify, would seem to be good for now, rather than a full set of restrictions like an outside licensing body. While that idea of knowing you've been certified by an outside body - it just doesn't feel like we're there yet. And some general guidelines that would allow for some sort of self-qualification would seem to be a good sort of middle ground.

Kathleen Bursley: First, let me correct any inadvertent omission I may have made of a strong agreement with a limited, somehow defined, set of institutions rather than everybody and his cat; so if I didn't say that loudly enough, I'm sorry. I think, certainly in terms of a comfort level, that's something. Self-certifying does have, if you could come up with a reasonable set of standards, of course, the appeal of simplicity and the lack of bureaucracy. I think, though, that somehow, in there, there would have to be inserted a concomitant right of audit, some kind of ability on the part of the rights-holder to find out what's being done and what use is being made of the material, and see if it's actually in accordance with the exception; and I'm here thinking

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actually not so much of a big, huge conglomerate publisher like Reed-Elsevier, but for example, the photographer. We know from various previous copyright interactions that photographers take millions of pictures, and don't register them normally except under some blanket provision, and they don't have the wherewithal necessarily to hire a lawyer, or something like that, and I think this would be particularly important if someone thinks that their donated collection, with conditions, is not being handled properly, and very often those won't be people who have a lot of money to bring suit, and it seems that there should be some sort of a mechanism that is the price you pay for self-certifying, that helps people be sure that things are being done correctly.

Richard Pearce-Moses: I think the Society of American Archivists, and certainly I personally, would be very concerned about any sort of effort to limit the institutions, and I'll go back to my original statement which is we need all hands on deck right now. There are many organizations that would be considered primarily collecting archives; they often may be run by one or two staff members, they may have volunteers, and most of their energy goes in one particular area and they don't address preservation until it becomes a crisis, in some ways. I would be concerned that we may lose lots of cultural heritage materials in smaller organizations if they are somehow not able to keep electronic copy materials for preservation purposes.

Gordon Theil: I just want to support that. The Online Archive of California lists approximately 6,000 archival collections in over 150 libraries, and 72 separate California institutions including historical societies, public libraries, universities, colleges, research centers, and other public institutions. How many of these archives would not be worthy of preservation because they are not in the appropriate repository or one that's considered eligible for this? I think that institutions having valuable materials requiring preservation should not be discouraged from taking advantage of the preservation subsection.

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And I support the idea of self-certification. I suppose one thing that could also be required would be for institutions that are doing preservation to publicly disclose on their websites or other places what the criteria are that they are using for their preservation activities.

Dick Rudick: Kathleen, Grover and Michael.

Kathleen Bursley: To go to Gordon's idea first, I think the idea of transparency is extremely helpful. One of the difficulties one has in determining if one's materials are being misused is that it's often very difficult to get that information, at least in a legitimate way, and you're not even sure, if you've got the information, that it's the right information. I would strongly agree that the disclosure of the standards and conceivably even general categories of work that would be preserved, in what order, I don't know, but that would be extremely helpful.

I think what I'm hearing, though, there seems to be a big disconnect between, like, us who publish things, we want to get them out there, the idea is to get people to have them, we want people to read the books or the journals or whatever, and one-of-a-kind or few-of-a-kind things that are either historical, or by their nature they're one of a kind, are held by the institution for the purposes of either exhibiting them or studying them, and with those -- it's easy for me to say because they're not our stuff -- but it seems to me that the non-commercially available things, in general, there's a very easy way to make case for allowing that on the sort of no harm, no foul idea that if it's not being commercially exploited anyway, and it's unique or not available commercially, then, yeah. But I think the discussion is maybe not well served by having electronic journal collection in the same discussion with Native American ceremonial headdresses; they're so different, these things don't seem to have, in terms of their value, their use, who wants to access them, their uniqueness, you know. Obviously, the whole idea is that the article has to be the same every time you read it. So, I wonder if one of the difficulties is just that a lot of different things are being thrown in together.

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Dick Rudick: OK, we have Grover, Michael, Patricia, and then I want to save time for a couple of follow-up questions, and then I think we're going to be out of time, so, Grover?

Grover Crisp: I guess I'll connect to some of what Kathleen was saying, because it seemed to me that the discussion was drifting off into some other areas than what I thought was the focus, which has to do with (b) and (c), primarily (c). But, to reconfirm, though, we're still talking in this section with your question about strictly born digital works.

Dick Rudick: Yes. We'd like to focus on that.

Grover Crisp: Then again, I would get back to certification, or self-certification, or some sort of body certification. The difficulty in that, whether it's self-certification or not, is what are the parameters? What is the criteria by which you're setting those standards for certification? Or non-certification? Speaking for our studio, and our born digital works, we are grappling and spending millions to try to determine how we properly preserve the data we're talking about. It's not the digital copy of a movie we're talking about, as I understand your definition of born digital in this conversation. So, with that in mind, I would kind of agree with Kathleen, that we're mixing Word documents or is this a digitally-created motion picture? It's a bit confusing here as to how we come to a decision because we seem to be all over the map.

Dick Rudick: But your comment is, in some way, a segue into one of the follow-up questions, and this being a classroom I can't resist giving you a hypothetical: Let's suppose, to make this thing work, we had to go to some sort of a certification process. Two questions, and maybe the people coming up can address: Can you imagine a process whereby well-meaning people get together and develop a process, with input from the libraries? And second: Taking Richard's point about needing this privilege being available to smaller distributed institutions, is there a way for the certifying entities to help the smaller ones?

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If you could, in your remaining comments, address that, that would be great. I guess the next person up was Michael.

Michael Pogorzelski: In terms of your hypothetical, Brewster made the sarcastic but well-intentioned point that there isn't a preservation runaway train going through the United States right now. And I agree with Richard's mantra throughout the day that we need all hands on deck to keep the preservation movement going forward. I think that answering questions like who would be responsible for determining eligibility into this club of preserving libraries and archives, or how would compliance be monitored, what would happen to the preservation copies of an institution that no longer complied, the time it would take to create that body, to draft those rules, to get the membership set up, would be precious time lost to preserving born digital. It would have a ripple effect that would be difficult to recover from. And I guess I'll just leave it at that.

Patricia Cruse: I just want to comment on my colleague from Reed-Elsevier, and say that journals are one end of the spectrum and I think when you look at journals, there's a variety of different kinds of journals, and our concern is not so much with Reed-Elsevier, we all watch what you guys are doing, it's more with the small associations which are creating journals on a shoestring, and they're very important to our mission, those are the kinds of things we need to say up front. And so, I think you're right, there's a myriad of types of information that are at risk, and defining "at risk" would be impossible to do, because what's at risk for me is going to be different for another institution, so . . .

Lolly Gasaway: This actually works out very well with what Patricia has just said. We do want to point out that we're very short on rights-holders at the table right now, but this has been clear for the study group, as we have tried to work on this, I think it was my colleague Peter Givler at another forum who said that copyright owners may have to give up some things, but that means that librarians are going to have to assume some responsibilities and some

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restrictions which we haven't had before, if we come to that kind of work. And that's one of the reasons we've used the term "at risk." Now, you've all said we shouldn't try to define it, but that is one way of limiting -- although some of you have said you maybe would like to preserve everything and not worry about that -- but one limitation is "at risk," which deals with not commercially available to replace. Can you live with an at risk kind of thing in a statute that allows for preservation of material, but only if material is at risk, however you define it?

Grover Crisp: The criteria laid out in the document for at risk works, I think most of these work out very well; in fact, the first one and the fifth one are the very definition of "at risk." In the analog world, if I can go there for just a second, that would be defined as UCLA's Film and Television Archive, for example. It is a unique nitrate film material that is beginning to deteriorate. That is at risk and they need to preserve it. But when you do begin to get into the area of, the work is not commercially available, commercially available has to be very carefully defined, because, what would that necessarily mean? That you can't rent it from Blockbuster? That you can't see it on TV? In this country? OK, maybe a title is licensed to another country exclusively, that means it's not commercially available here, but it doesn't mean it's not commercially available. So, I think that, of the criteria that are laid out here, that is the one that I would find most difficult to define and clarify.

Mimi Calter: The issue with limiting preservation to materials that are at risk is in defining "at risk." You sort of said, "however you define it," but there is almost nothing out there that isn't at risk in some way. The point is well taken that there are copyright holders who are protecting their stuff very carefully, but again, the journal example is very valid here. Reed-Elsevier is being very cautious about the material that is being put out there, but there are small organizations out there that are putting out very interesting journals; and even if we're only talking about born digital content, there are interesting things being done on the web in born digital

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journals that are being done on a shoestring, that we absolutely want to preserve. And maybe it just came out today, and they've still got their subscription model out there, but that doesn't mean they won't be gone tomorrow. The definition of "at risk" is the real problem there.

Dick Rudick: Patricia, Richard and Brewster, then...

Patricia Cruse: I agree that it's just too hard to define "at risk"; looking at this list here, I agree that there are some very nice things laid out here, that really focus on the physicality of a digital object, but then there are things to also think about: The financial health of the institution holding that object, for example. They just filed for Chapter 11; are you going to be able to get that digital content back? Or the preservation strategy that that institution is engaged in, are they putting all their content on CD-ROM, we all know that CD-ROMs don't last, so, I think there's risky things all over the place. Also, the behavior of the object itself: Let's say something that's on the web, and whoever puts in on the web, every single day changes that object, so you can never really grab it, so I think there's a lot of other things in here to think about, other than just the physicality.

Richard Pearce-Moses: I think that one of the aspects Patricia has talked about is that there are qualitative differences between Reed-Elsevier and some of the smaller publishers. She talked about financial risk, and one of the things we heard this morning was, "why are you preserving it if we're doing it ourselves," and so I would even turn this around a bit and not only look for certified repositories, whether it's self-certified or some other, but ask the publishers to put up something that says "we are preserving it using these criteria, this is what will happen to the material in case of a Chapter 11, for increased access." If I know that that material survives - - and I'm thinking out loud here, some of my colleagues might kill me -- but if we have good reason to believe that this is a trustworthy company, that they're doing the right thing, that we have an agreement, that frees up resources that I can be using for other things.

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Brewster Kahle: To counter the hypotheticals I always run down my list of, "OK, we've done this before, what have been the issues"? Let me take three collections and what we've actually ended up with: web, software and television.

Web: we've collected a little more than 50,000 websites, we're going to talk a little bit more about it, but we generally don't run into a problem on the preservation side, people aren't upset at things being preserved, in fact, they're very thankful. The thing they get upset about is access, in this particular domain.

Software: Almost all those companies are gone, there's just nobody to be upset.

TV and broadcast: Is this born digital? I don't know, it's coming off a satellite. And are they at risk? Well, maybe some programs are, some programs aren't. If you're trying to do some sort of a cultural collection of what was television like in the year 2000, 2001, just trying to get these determinations, "Seinfeld was OK, but the ad in the middle of Seinfeld wasn't," is a little bit more difficult. So I would say preservation isn't where most of the real rankles come up. In our experience, it's on the access.

Lolly Gasaway: Well. We have two choices, we can either take our break now and come back and do 15 minutes on at risk analog-to-digital preservation, or we can do that first, before the break. But in any event, it's going to come out of the web pie.

Mary Rasenberger: I think we should do 5 minutes and then break, if people have anything that hasn't already been said.

Lolly Gasaway: OK, what we want to ask is, should this preservation- only exception, which would be a new exception, apply to at-risk analog as well as digital materials? And if so, can you give us some examples of what kinds of analog materials this might apply to? It's new, we've already heard about nitrate film, so what else is new?

Gordon Theil: Well, first of all, I want to apologize, because you've already heard about sound recordings. And I want to apologize because I brought up the subject of

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analog into the discussion of born digital because I personally have a hard time making the distinction, simply because what I'm most concerned about, especially in terms of sections 108(b) and (c), is the preservation of content, and making sure that it's available, and I just personally don't necessarily see a distinction between born digital, digitized, etc. I just wanted to get that across.

Grover Crisp: There's been a lot of talk today about preservation and digital preservation, and a lot of different examples have been used to indicate what we mean by that. However, with the exception of some of the born digital discussion, I haven't heard anything that represents preservation in the traditional sense, the way we know it. For example, if an archive has a copy of a DVD of a film that is no longer available on DVD, i.e., out of print, and they make a copy of that, that's not preservation. Neither is taking a print that may be deteriorating and "digitizing" it in the archive for "preservation"; it's simply making a copy of whatever the artifact is. It has absolutely nothing to do with preservation. And there's not a moving image archivist in the world that would be willing to stand up in front of their colleagues, and Mike can correct me if I'm wrong, and say "I've preserved *Gone with the Wind* because I digitized it." So the definition of preservation in this context doesn't fit. And this is kind of the thing I've been wanting to jump into all day here, because we deal with this issue all the time within our own company and in dealing with archives, and that is: What does it mean to preserve the work? There are clearly defined processes that we who are preservationists know about. But just to make a digital copy of anything is not necessarily preserving it. It's making a copy.

Liza Posas: I've thought about that too, and I've never thought of digitizing as a preservation tactic. But sometimes, at least for us, that's all we have. We can't take our wax-only recordings, or our cassettes, or our videos and make a pristine preservation copy on reel or what Sony does in regards as to how they preserve. So, for me, preservation is maybe not necessarily that digital copy, but the action of it. So it's making a surrogate

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copy, let's say, but I'm preserving the original content by having another copy available for viewing or for use. So for me, I see preservation more as not linked to the digital material but rather the whole action.

Richard Pearce-Moses: I respectfully disagree, Mr. Crisp, because archives currently make microfilm copies of paper materials so that we can store that copy off-site as a part of preservation planning and preservation, to protect it from theft, from wear and tear, and at the rate we're going - let me put it this way: I cannot point to a specific example but I can't believe that somebody has stopped microfilming and started digitizing instead. And I would say we are on the cusp, if we are not already there, of where we won't be doing microfilming. In fact, we are finding it harder and harder in the State of Arizona to find microfilming product, vendors and equipment. I think the notion of creating a copy for disaster preparedness - and I want to also underscore these two folks' points - that it does get complicated mixing apples and oranges, thinking about archival collections and *Star Wars* - *Star Wars* isn't Sony, is it, I'm sorry - at the same time is really complicating this conversation.

Grover Crisp: It is, and I would say that my comments about digitizing motion pictures, I'm limited to that aspect. I represent a motion picture company here, that's what I'm talking about. I agree with you, there is digital preservation of other media, including digital media that is in an analog form, or a physical form, so my comments are strictly related to all the comments earlier in the day about films that need to be preserved digitally, because either the DVD is deteriorating or my print is deteriorating; and my point here is that it is not preservation, it is making a copy, a digital copy. And by the way, what a digital thing is, that is created, is also not defined anywhere. Because we can make a videotape of a film that is a digital copy, but it still sits on a shelf. Or you can create a file that sits on a server someplace, and that's also digital. But they're not the same thing.

Mary Rasenberger: Just to back up, and for the purposes of the comments, I want to make sure we know what the

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questions are here. What we're talking about is, when you go into the digital media, you can't necessarily wait for 108(c) triggers to occur before you preserve. Best practices, we've understood, usually mean you do up-front preservation. So does that mean we need a special exception for digital materials, to preserve them, up front, not wait until you see the destruction happening or the loss? Because as somebody said, that would be a catastrophic loss. That's where the idea for this up-front preservation exception came from, and that's why we focused on born digital, because that's where this discussion came up.

And the second question is, as we've had these discussions we've also heard there are analog materials that similarly pose the same kind of at-risk situations that might require up-front preservation. I just want to make sure everybody is clear that this would be a new exception that goes beyond 108(c).

Lolly Gasaway: Thirty seconds, because we've got to take a break.

Brewster Kahle: An example of analog material might be videotape. I'm going to separate restoration from preservation copies. Preservation copy might be a useful term in our field, because it doesn't imply distribution right beyond the original material. So if you have a preservation copy, it's kind of a substitution copy. I understand that it's not the preservation in the classic sense of our field.

Grover Crisp: That is the definition, by making a copy you have made a preservation copy, that's the definition.

Brewster Kahle: OK.

Lolly Gasaway: How about you guys argue about it over the break? We have to be back by 5 to 3. At 5 to 3 we'll start on Topic 4.