

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

Participants

Howard Besser,
InterPARES/consortium to
preserve public television in
digital form/New York University

Kenneth Crews, Copyright
Management Center

Edward Lee Lamoureux, Bradley
University

Denise Troll Covey, Carnegie
Mellon University

Ken Frazier, Association of
Research Libraries and American
Library Association

Dwayne Buttler, University of
Louisville and MetaArchive

Janice Pilch, University of
Illinois at Urbana-Champaign

Carl Johnson, Brigham Young
University

Allan Adler, Association of
American Publishers

Paul Aiken/Jan Constantine, The
Authors Guild, Inc.

Keith Kupferschmid, Software &
Information Industry Association

Victor Perlman, American Society
of Media Photographers, Inc.

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

MS. GASAWAY: If you are ready to start and if you are at the table for Topic 3, if you would be seated.

Just to make sure, I'd like to refer all of you to the ground rules again. We've gone away to lunch, and it's easy, over the fabulous food in this building, to completely forget where you are and what you're doing.

(Laughter.)

MS. GASAWAY: Our purpose, again, is to gather information and perspectives from you. You don't really get the opportunity to ask questions; we get to ask them, really, of you.

And we will limit discussion to three minutes and try to make sure everybody gets the chance to speak at least once, and then we'll take second times around after that.

For this roundtable, it's much more important that we cover the critical issue, rather than we get to every single issue that was raised in the notice. Give specific examples to support your responses, if you can, and be clear about your terminology.

I think we've not had any problem with that. It's just so we know what we're all talking about.

We're looking for findings and information to support what we're doing, so our findings will be really important as we write the report, not only our recommendation.

If you want to submit a written statement, you can respond to any specific question or to the whole thing, between March 17th, which is tomorrow, and April 17. We will accept written comments.

Just as in the morning session, we also want you to listen to the question we're asking, and respond to that, rather than jumping ahead or back, so that we can track where we are.

There are two new people we need to introduce. Ken, do you want to start?

MR. CREWS: Yes, my name is Kenny Crews, I'm a faculty member at Indiana University, where I also direct the copyright management center.

MR. BESSER: I'm Howard Besser. I'm here both representing InterPARES, which is an international archives project exploring long-term preservation of digital material and archives, and also the group awarded a grant for public television for preserving public television.

I'm also director of the moving image archiving and preservation masters degree program at New York University and I teach a course in digital preservation.

MS. GASAWAY: To preserve our vision, we want to be sure that you turn your name plate so that Dick and I can read them. Thank you. Now we've got them. Dick?

MR. RUDICK: From remarks that were made this morning, this is probably the only group of people in Washington where you can say the words, "reproduction rights," and not have a fist fight.

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

(Laughter.)

MR. RUDICK: The perfect segue to this next topic was something that Carl Johnson said in the last session when he said, "when it's gone, it's gone." And it's perfect, because it summarizes the problem that we face today, both from the rights-holder's perspective and from the archivist's perspective.

The archivist, in the context of this next subject, when it's gone, it's gone, the last one is gone and we can't preserve it.

And, of course, to a rights-holder, my god, it's gone, it's out there on the Net; we're destroyed. So it's kind of the perfect phrase for symbolizing what we're trying to do, from all of these different angles.

Because of the ephemeral nature of digital works, we have been contemplating in our discussions, where there is a need for sort of an up-front preservation right for digital materials, as distinguished from the very specific rights that are in 108(b) and (c), specifically.

We're talking about a broad new right. Everybody knows the reasons. With analog materials, you might argue, with the double fold for the right standards, because you can tell when something is happening to your stuff; in the digital world, it's hard to tell, and, as Carl said, once it's gone, it's gone.

Many digital materials are clearly inherently unstable. I think we can all attest to that from personal experience. You need to have an active program to preserve them, it would appear.

We have to think about replicating it immediately; we have to think about migration, all of those issues. It affects not only whether something exists, but its integrity and its accuracy, which is something we care about as publishers and authors.

So, we've come up with this idea, which we want to ask you to comment on, about whether we should have this rather powerful new exception that would permit up-front reproduction of published works in libraries or archives, collections, solely -- and I emphasize solely -- for preservation services.

Without having to meet the requirement of section 108(c), it's a new exception. There's no requirement to make a reasonable search for an unused copy. You're trying to preserve something before loss is detectable.

Now, the other side of this is that there might need to be limits, different from the existing limits in the law, that would make this workable, without destroying the fabric of copyright.

Some of the things we've discussed, have been limiting the exception to works that are at risk. It could be digital-only, or we might consider whether at-risk has validity in the concept of analog materials.

We've talked about whether we need to limit or define in some ways, libraries or archives that can take advantage of this exception. That actually came up in this morning's discussion, whether there would be certain qualified or trusted institutions, which could be defined in the statute, could reference to outside existing

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

standards that are developed by industry, go through a certification process.

All sorts of things are possible, not necessarily desirable, but possible. The only possible limit would be restricting the access to the copies made for this special preservation purpose, to the custodians of the archive.

In that connection, if you evaluate the present time of that, keep in mind that we, by definition, in this situation, the library would still have in its possession, the copy from which they made the preservation copy.

What they have is a basis for replacing it when it's no longer usable or accurate or whatever it's supposed to be. I've already mentioned the squishy toy.

MS. GASAWAY: He likes it.

MR. RUDICK: I think it would be useful to read all the questions we have, but then we're going to ask you to answer them one-by-one. It will be easier for you if we just run through the list.

The first is: Should an exception be added to 108 that permits up-front reproduction of published works in a library's or archive's collection, solely for preservation, without having to meet the requirements of 108(c)?

The second question, which we know is inextricably related to the first, is, if so, how could the exception be limited and tailored to avoid abuse or risks to rights-holders? In the introduction, I ran through some ideas we've played with.

The third would be, going back to the question of whether the exception applies to at-risk analog, as well as digital materials, and I think that's all she wrote. So, let's go back to the first question, keeping in mind that we'll get to all of them.

Should an exception be added to 108 for this preservation purpose? Don't all raise your hands at once, but please raise your hands.

(Laughter.)

MR. RUDICK: Howard?

MR. BESSER: Yes, let me give some kind of background or cite some kind of cases of things that are really problematic, that are fairly well known: The 1975 Viking Mission to Mars was almost totally lost. The only material that was salvaged, was retyped from printouts from the digital material.

I actually teach a course that has archived digital material from 1993 to 1999, and I did use that for a number of years to teach. Now I use it to teach my digital preservation class, because it's not accessible. It's a real problem.

Some of the problems are actually copyright, because the copyright releases that I got from students in my class at that time,

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

did not envision some of the transformations that are necessary in order to keep a digital work alive.

There are some other kinds of recent cases in the news. Morgan Stanley was ordered to pay a billion dollars in judgments, because they could not preserve and hand over, documents that the court requested of them, that were in digital form.

The SEC is now investigating them and thinking -- considering hitting them with another \$10 million, because they did not adequately preserve e-mail.

I could go on and on and on, if I wanted to cite these things, but part of the problem is that preserving digital requires unpacking and repacking these containers that Patrice was talking about earlier.

There's an enormous amount of time tracking, doing migration or emulation, to fix the underlying software that just doesn't work anymore, that's not viewable. Say, you had a WordStar file or something like that, you can't keep it in that format.

All of this makes the whole process incredibly difficult, and what the Inter Project says, is that virtually anything that's digital, is at risk.

MR. RUDICK: Kenny, I think you're next.

MR. CREWS: Listening to the way you described the problem or introduced it, really, I think, underscores a general observation that I have about this. I can imagine that if a proposed solution to this problem were to have anything like the large number of ramifications that you addressed about accessibility and circumstances and digital and analog and so on, we would have some complex statute addressing the question of making the preservation copy in the first place.

That probably would not dovetail neatly with the 108(b) and (c) provision, which will be the provision that says now you can bring it out of the back room and make that preservation copy available.

The more complicated it becomes, the harder it would be to fit those two statutes together, because, in practical operation, I think the statute that's the topic, that's the subject of Topic 3, would, in practice, become a precursor to deploying that copy.

Under (b) and (c), the topics that we've already addressed, maybe what we're really talking about here, is a relatively simple provision that would allow the making of a copy, subject to very few parameters, at-risk, whatever that means, just something.

Or, how about this: The making of a copy that is intended, in good faith, in anticipation of using that copy, consistent with the more complex statute of (b) and (c), therefore there are relatively few conditions on the making of the copy, and the conditions really occur on the use and accessibility of the copy.

And that, I think, too, that general proposition, I see myself drifting to more and more, as we went through the discussion this morning. Realistically, there's not much that the law can do to stop somebody from making a copy, and that's going to be increasingly a true statement.

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

There is a lot that the law can and should do about governing the use and accessibility of that. If we have a preservation copy, keep it simple, keep it generous, then put the parameters on the use.

MR. RUDICK: Victor?

MR. PERLMAN: I won't surprise anybody in the room, that I have a kind of instinctive aversion to unauthorized copying, but I think that, given the right limitation and protections, this has value for everybody, including my photographers, because, right now, we have a very difficult situation with the camera manufacturers.

Each one has a proprietary software that it uses, and they won't let anybody else take over. So, we have images that are being created, that at some point in the relatively near future, may never be able to be accessed again, and that's not a good thing.

Maybe I'm skipping ahead, but, obviously, one of the conditions that we're going to see, is among the people who would be allowed access to the preservation copies, would be the copyright holders.

MR. RUDICK: We actually have an empty queue. We actually had in mind that this would be a short session, and the next one would be longer. But, Paul?

MR. AIKEN: It's hard to talk about the first question, without leading a little bit into the second question, but one of the concerns this raises, generally, is that there would be no need to look for a copy of the market. We're not talking about that at all.

And having that sort of precursor in there, could undermine what I felt was a very helpful discussion about cooperative archive projects between publishers, archivists, and libraries.

If you get rid of that, you may get rid of the incentive to put both sides to work together to create useful archives that we all can live with.

Some of the big-picture concerns here, if we go along a simple, straightforward path of saying, generally allow it, is, what about a TPM DRM? How do we make sure this stuff isn't lost, once a copy is made, because that, of course, is a huge concern for all rights-holders.

MR. LAMOUREUX: Correct me if I'm wrong, but haven't we already acquired most of the copy? That is to say, we've already searched the marketplace and we only have a copy because we acquired a legitimate copy? I don't see the issue.

MR. AIKEN: This issue is one of making other copies, without ever having to look to an archival -- if some cooperative archival effort has been made to allow you access to a permanent archive, satisfying the preservation need.

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

MR. LAMOUREUX: But then I'd have to copy that, to be sure that the copy that I have, would be backed up, so then in my archive, I'd still have a copy.

MR. AIKEN: To you, to the user community, it's cooperatively put together.

MS. GASAWAY: Ed, was that your comment?

MR. LAMOUREUX: That was my comment.

MR. RUDICK: Denise?

MS. COVEY: Two points: One has to do with looking for another copy. If there is, indeed, another trusted repository somewhere, where I could believe my library could go there, for a reasonable price, and have access to this thing, I'd probably be comfortable, which is not to say that I don't want a preservation-only exception.

I do, by the way. What's bothering me, are the comments that here is this business about applying DRM or TPM or whatever acronym you want to use, to those technological protections on this preservation copy.

If we are truly interested in what's in the public interest in preserving these materials, requiring libraries to add technologies that are overly restrictive, are expensive to implement, and likely not every archive will have the expertise to do those things.

You are undermining the public good you're try to serve by providing the preservation-only exemption.

MR. RUDICK: Dwayne?

MR. BUTTLER: I'm interested in what Professor Crews said about that social issue. One of the things we're doing is, preserve southern American culture, and that's going to mean lots of different forms.

A lot of the folks on that are going to tell us lots more about it than I can. But, as a legal question, how can we make some of these things happen to explain to those across that group?

I think it needs to have that straightforward kind of approach that Ken is talking about. I need to communicate that with folks that don't have years and years of copyright experience and I need to be able to say to them, these are the kinds of things you can say, that there need to be certain kinds of preservation structures.

I think that could be predicated on the at-risk concept, but it's almost predictive in the sense of, how do you know what is at-risk? Is that going to be an issue?

Yes, I have lots of 5 1/4 disks and diskettes, and I thought they were going to last forever, and, all of a sudden, the standards change. If it was at-risk, I just didn't know it yet.

In that context, it's going to be hard for me to envision saying I have to protect the future, and then some software manufacturer is going to change it at this point. You really need think about if it is at-risk, then we need to have a very flexible standard that's based on

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

the technology development and the things that have happened at our library.

MR. RUDICK: Janice?

MS. PILCH: I would like to say that I think there's every compelling reason to create a provision for this, at least for materials that are at-risk, which include inherently unstable materials, and also unique items that are at risk of near-term loss through theft, mishandling, or overuse.

One of the most common dilemmas in the library, is what to do if you have one copy of something that you know no other library owns? And the chances of it being stolen in the near future, are very high.

It seems like it is just not a harm or threat at all to the rights of copyright holders, to make a master copy, a preservation copy, however you want to call it. It doesn't hurt anyone's rights to do that.

You're just ensuring that the content stays alive. I can't imagine why we wouldn't want to do this, actually.

Finally, I will just add that it's not unheard of, it's not unprecedented, internationally, to have a clause like this in national copyright laws. Clauses like this provision, do exist in other laws.

The U.S. wouldn't be acting on its own here, or doing it for the first time.

MR. RUDICK: May I ask for an example?

MS. PILCH: I have a very funny example, which is that Estonia's law is the one to quote here. This is a translation: Work included in the fonts or the collection of a library or museum, may be produced as a single copy, without the authorization of its author and without payment of remuneration, in order to replace a work or copy thereof that has been lost, destroyed, or rendered unusable or in the likelihood of such danger; make a copy to ensure the preservation of the work.

There is a likelihood of danger if a work or copy thereof is the only one in the library, archives, or museum, and the termination of its lending or display is contrary to the functions under the articles of association of the library, archives, and museums.

In other words, the library needs it; it's a single copy and the library needs to keep it.

MR. RUDICK: That's very helpful, thank you. Howard, followed by Ken.

MR. BESSER: I'd just like to address this question of library preservation copy having to be DRM-encrypted. If you talk to anyone who works with a digital preservation archive, they would be almost unanimous in saying that makes that piece of material in their preservation archive, at-risk.

That's the surest thing to make at-risk in your preservation archive, is to have it encrypted. Because of the things that I was

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

saying earlier about how these things work, they're constantly packing and unpacking them into different packages in different formats.

That's how a preservation archive works. You cannot have encrypted, copy-protected information in the archive. You could, when you send it out of the archive; you cannot do it in the archive, or you won't be able to preserve it.

MR. RUDICK: Next, I think we've got --

MR. FRAZIER: It's a quick point. If we were to poll the Association of Research Libraries members at this time to determine how many of them were engaged in digital preservation activities, we would all be surprised at how small those enterprises are.

They're in many ways the most likely institutions to be doing that for the benefit of their own home institutions. I can say with some real authority, that for state governments -- and state governments often have copyright-protected works-- and for universities, which also often have copyright-protected works, we're unable to digitally preserve content, even when the law requires us to do it.

So, the enterprise is so challenging and so difficult, that there's actually need for incentives for preservation, digitization. That activity aligns very well with the interests of providers.

We're much more likely to be able to provide the photographer with a backup copy, if we have more institutions engaged in an up-front preservation and digitization archiving.

MR. RUDICK: Paul, you've been very patient, thank you.

MR. AIKEN: I wanted to comment that our concern about copy protection measures, TPM, DRM, whatever, is diminished if we have a cooperative effort to build an archive, to make my pitch one more time for that, that we be careful that we don't do things that will diminish the likelihood that publishers and authors and libraries and archives will work together.

MR. RUDICK: Carl was next, then Ken.

MR. JOHNSON: I'd like to speak in support of what was said about the need for preservation, automatic and up front.

I like what Kenny said about the straightforward, simple, easily-understood definition. Let's apply it, let's get it done, let's put the preservation to rest.

Then let's address, in separate sections, or wherever, the use and the access and so forth. Because of all the things that have been said, it should be obvious to us that we need the preservation copies, for the reasons that have already been stated.

MR. RUDICK: Alan, you haven't spoken yet.

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

MR. ADLER: I apologize for being late. On this issue, the publishers were just concerned about the phrasing of at-risk works, in the sense that the literary work isn't at risk when we're talking about copies that happen to be held.

We're discussing a situation where the ability of people to ever be able to use the words, at-risk, because generally, the work is at risk, is very different than every institution being able to essentially make the same determination, that the particular medium in which they have the work, is inherently an unstable one.

I think that in some instances, you don't find that cost-efficiencies in manufacturing are going to encourage people to use what others may consider to be inherently unstable media in terms of general distribution of copies.

I'm not sure that that is necessarily a good standard by which to make the determination that people can automatically make front-end copies when they have to --

As several people have said, preservation is usually not spoken of as an end in itself; it's always preservation to a particular purpose, which means access and use.

If you're truly talking about an at-risk basis for creating a preservation-only copy, then I assume that you are really talking about a dark archive, and, on that basis, I think we probably have fewer concerns.

But those key concepts are the ones that are going to be at play here. You're essentially creating an archival copy, while we're contemplating that there will be media capability for access and use with respect to those copies.

That is not justified. Again, I think the issue of whether everyone who happens to have a copy of the work in the same medium, is able to determine that that medium is unstable, simply for the purposes of being able to create an archival copy, is probably not a justifiable doctrine under this provision.

MR. RUDICK: I have a sense from the way the conversation is going -- and I'll ask you to correct me, if it's the wrong sense -- that we might be ready to go to the second question. Would anybody like to continue with the first?

MS. RASENBERGER: The second question being, what kind of limits would be placed on it?

MR. RUDICK: From the way you're talking, I sense that you're ready to go there. This is like seniority of the pilot's union; if you had your hand up, you're still in the queue.

I guess, Kenny -- maybe I should read the question.

MS. GASAWAY: We're talking about whether now, if you allow a preservation-only exception for born digital works, how should the exception be limited or tailored? What kinds of institutions should be allowed to do it?

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

Should it be limited to institutions that are already engaged in digital preservation, or are at some point? If so, how? Should the copies be restricted to dark archives, until replacement copies are awarded under 108(c), meaning that they would be accessible only to the custodians of the archive?

Bear in mind that the library already has the copy in its collection and that the copy is made for preservation when it enters the library. But it is a preservation-only copy, and then we can talk about at-risk, also.

Some of you have been talking about that, whether you like it or not, that terminology. How would we restrict that, if we could?

MS. COVEY: My first comment was, when they answered that question, in part by saying to put as few restrictions as possible on the provision about making the copy, and then preserve the more complex conditions for the accessibility of that copy.

Wherever those restrictions appear, there really isn't opportunity to do what we're hearing from many of us around the table, an opportunity to craft -- I hesitate to use the word, "restriction," because it's a negative word -- but to craft conditions that have the possibility of creating some degree of cooperation.

A couple of them, I'd pull out of our recent discussion. One is simply the prospect of checking the market, whether it shows up in (b) or (c) or shows up in the new provision; checking the market, because checking the market is a strong gesture of cooperation by the library user.

But it also has the other benefit of encouraging the copyright owner to enter the market, to be in the markets, to make your materials available, and, by golly, we'll buy them.

And that's a good thing for everybody, so there's a lot of potential for cooperation that could come out of that.

Another one is, I like the reference -- Victor, I think it was yours -- to allowing the copyright owner to have access to this content. If I'm a small library and I get 20,000 requests for 50,000 photographs, it could get out of control, but maybe in there somewhere, is a formula that, in spirit, is a condition of cooperation.

Another one that Carl referred to this morning, is the reference to the model of Section 110(4) about music performances. That's, in effect, an opt-out provision. I know opt-out comes up later this afternoon, but that's an example that is tremendously simpler than the section 512 notice and take-down set of provisions. It's like four lines in the statute, of somebody being able to opt out.

If opting out is a good idea, there's a simple cooperative way to do it. So, again, keep the conditions simple, and conditions that have benefits associated with the ultimate objective. That's preservation and access.

MR. JOHNSON: Quickly, one 110 provision allows for notification, if they object.

MS. GASAWAY: Paul and then Ed.

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

MR. AIKEN: If I can refer to the squishy toy up there, I guess, the idea of allowing rather free copying, as Kenny suggests, would necessarily mean that we'd have to really restrict the institutions that can do this.

How we choose to do that? There are a number of ways to do it, but this would have to be the most restrictive list of institutions of any of these in the 108 scenario.

I think it should be in certification, be certified as an archive-made preservation copy, and in part of that process, you let the world know how you're going to make sure that this dark archive is truly dark, that it's not somehow slipping out the back door and onto the Internet. We have to have our most trusted institutions handling this sort of thing.

MS. GASAWAY: Ed?

MR. LAMOUREUX: I would argue that those shouldn't be established through procedural mechanisms, as opposed to trusted friends, certification; that is to say, listed on 16 and 17, a number of issues that a library would have or an archive would have to come up to its strength, meaning that it would be fair if any institution of that nature came up to those standards, they would be certified, as opposed to some other sort of way of working out who could be certified, and then they would get to try.

I'm also a little bit concerned, again, in this area. I don't want to beat the dead horse, but I have to, I'm sorry.

In this area, there are universities, at least, and media centers, which would seek disqualification, I believe, quite outside what the library might do. At this point, I don't see quite how they would go about doing it.

So I would be concerned about that, as well. I'm really mixed on this. I like the Vanderbilt Archive and the way it works for television, and I can imagine -- I hate to say this -- a single entity, in some ways, that might do it, this kind of function, then, on the other side of it, if it's going to be multiple entities, I would like to see the criteria be behavioral.

If they come up to the standards, they get certified.

MS. GASAWAY: Okay, Howard, then Ken, the Janice.

MR. BESSER: Let me address certification. There is a digital library certification project going on right now, sponsored by the Research Library of the National Archives. That's an important step in defining good practice for preservation repositories.

But that's going to continue to be a moving target for a number of years, and to kind of force something tightly into that, is a little premature for doing that. What's going to come out of that project, is important for large repositories handling general, wide bodies of content.

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

But there are always going to be differing needs for repositories that are trying to preserve a more niche-type of material.

Those niches might be by subject, like electronic literature, old weather reports, stories about bears; it could be by format, by blogs or advertisements.

How could anyone save them, now that people know what those are like?

(Laughter.)

MR. RUDICK: We're only talking about preserving culture.

(Laughter.)

MR. BESSER: All this kind of ephemeral type material, in fact, people have been preserving from previous times. One of the things I'm thinking of is, if we really have to certify some of these from the past, I'm thinking of Rick Prelinger's collection, which the Library of Congress recently acquired.

He's not a professional archivist, but he collected advertisements; he collected how to be a good homemaker, the kinds of things that are real insights into what life was like in the '50s and how the culture developed.

Yet he probably wouldn't have qualified for this, because he's collecting in a very little niche. He's not a professional, so there's all those kinds of questions.

InterPARES says that what's even more important than a trusted repository, is a trusted custodian. That is the person who is thinking about all these things, is skilled and knowledgeable about everything from the technical issues to the cultural issues, to the policy and rights of rights-holders' issues.

That's really the key, according to InterPARES.

MS. GASAWAY: Thanks. Ken?

MR. FRAZIER: I can't believe I'm about to make a point about technology, which is not my strong suit. You have to begin with the understanding, I think, that preserving digital content is hard to do, depending on what format it's in.

So, if we were to set out to identify those few institutions that would be allowed to do the up-front preservation, we would likely get it wrong, because the particular kinds of digital content often require partnerships that would make that preservation activity successful.

I would be very concerned on the pure preservation archive task of trying to identify before the enterprise got underway, those few institutions that would be permitted to do this important work.

One last point: It's worth repeating that we're losing a tremendous amount of digital content right now. We have very few players engaged in the activity of trying to preserve them. We need some encouragement for that work.

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

MS. GASAWAY: Janice?

MS. PILCH: I'd like to say that the preservation-only possibility poses even less of a risk to the rights of copyright holders than 108(b) and (c) do. It would seem unusual to want to impose a restriction of only certified libraries and archives on that particular activity.

As I say, it's less of a risk, even than (b) and (c) already. This brings us to the business of the structure of a law. It would seem to me that any library or archive satisfying the criteria in 108(a), should be allowed to do this type of activity. That would seem natural, and there shouldn't be any further restrictions.

Finally, I'll just say that the concept of at-risk -- and I think we've been talking about at-risk here -- should be as broad as possible, to encompass as any criteria as possible.

They would all be at risk. This would not just be a haphazard activity, but any library should be allowed to do this. Otherwise, we will be working against the preservation needs of many libraries, if we restrict or qualify the kinds of institutions who can take advantage of this kind of discussion.

MS. GASAWAY: Could you tell us why you think it's less of a concern or less risky for the content community, than 108 (b) or (c)?

MS. PILCH: Because the copies aren't being distributed, unless something else kicks in. Until or unless the copy is actually destroyed and another library or your library doesn't own it anymore, until it happens, you're not distributing a copy.

All of the issues of Internet, public access, people snatching copies and putting them on the Web, assuming that these institutions are responsible, which they are, the risk is minimal; the risk is no greater than it is today, I think.

MS. GASAWAY: Kenny?

MR. CREWS: I'm pondering this subject of the qualified institutions. Paul, I'm glad you brought up again, certification. That subject has always bothered me very seriously, but I think that just in the last several minutes, I'm seeing it a little bit differently.

What's worrying me about it, is that we don't license libraries to be libraries; we don't license bookstores to be bookstores; we don't license newspapers. We do license TV and radio, because there's a bandwidth that they have to work with, and that's a limited commodity and they might put Janet Jackson on the air, so you've got to license them.

(Laughter.)

MR. CREWS: But aside from that, we just don't license these other information organizations, not-for-profit or for-profit, either way. There are important policy reasons, I think you appreciate, and First Amendment issues, et cetera, et cetera.

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

But, maybe, as Howard was suggesting, maybe a certification or qualification standard is viable, if it's more industry self-regulated. It may be not ideal, not my favorite subject, but it's a big step away from government regulation and government standards for certification.

We do have that in other parts of the law. We have certain privileges that go to accredited, nonprofit educational institutions. What does "accredited" mean? It means they've been certified by an accreditation agency. It's self-regulation.

Or maybe we want to define it conceptually. Howard, again, we were referring to things like a trusted custodian having certain policies and procedures in place. We've had concerns about that, but maybe something in that direction could address some of this.

So, I think we need to be very, very careful about setting these standards. And the last point I wanted to make about all this is, you've given me the example of somebody at home in his or her own enterprise, creating a digital library.

Maybe we don't need to bother about something like that in this context where, if we can look around the room and say, well, maybe at least half the people in the room, that's all you'll ever get who would agree that maybe that's fair use. And if you can get half the people in the room to agree that maybe that's fair use, then we probably don't need to bother with the specific statute, because half the people in the room, that's a pretty hefty percentage on a fair-use question.

So, we just wouldn't want to bother with a statute on that. Leave the person at home to fair use. The large-scale systematic approach may be there when you need a specific statute.

MS. GASAWAY: It occurred to me, Kenny, where we have another section of the Act that deals with that 512, and they need some steps in order to qualify for the online service provider, so maybe there are several places we can look to. Paul?

MR. AIKEN: First, Kenny, really it depends on the room you're in, whether you're going to get a 50-percent agreement. Certainly, I would not propose certifying libraries, generally. What we're certifying is a particular activity, and that activity is the otherwise unlicensed reproduction of copyright-protected materials, so it's really that narrow band.

The reason you can't open this up to any library or archive in the country, is that libraries are large and small, sophisticated and not. Some will be able to adequately protect this, but some are proposing unprotected materials, and some will not know how to do that.

Some will allow the backup tape to go out the back door, and wind up on the Internet, and without some sort of certification and some sort of licensing provision, there's no way to keep control over that. It has to be handled in a responsible manner.

MS. GASAWAY: Howard?

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

MR. BESSER: First of all, I just have to keep on coming back -- this is really hard to do; trying to do digital preservation is hard to do; it's also really, really expensive, really, really expensive.

I don't see a lot of organizations coming out of the woodwork, wanting to get involved in that.

Second, these are the things that are really protecting the rights-holders and making sure that, say, a writer, has access to some material that was created in the past, that they can use for their new writing. When you talk about from the publisher's standpoint, that there's a difference between the encoding of something in a particular format and the original material, well, of course, but that original material was at risk.

Libraries, generally, the special collections libraries, get early drafts of an author's works, except now, when they get them, they're missing major drafts, because Version 1 or, rather, Version 2 writes over Version 1.

Those things are on the disk, they're in WordStar, and you can't read them. There's all of this real backing up, all the way to the beginning.

This is like a tough kind of thing, and it's really important that not too many dampers be put on it. We're in an urgent situation; we're in a very urgent situation with things disappearing all the time.

The longer time goes before we can try to deal with these, the more we'll lose them.

MS. GASAWAY: Let me just point out, though, that this is for published works. This preservation-only exception was looking at published works.

MS. RASENBERGER: That's because 108(b) right now allows you to make copies for the collection for preservation.

MS. GASAWAY: Without having to look, Dwayne?

MR. BUTTLER: I'll pass.

(Laughter.)

MS. GASAWAY: Denise?

MS. COVEY: Let me reiterate Howard's point about the urgency of this. My concern about the certification business is, it's not in place. How long is that going to take? What are we going to lose in the meantime?

I'm also concerned about what hurdles the certification would have and how much it would cost, and the fact that there's lots of really small niche libraries and archives that have really rich, valuable material, and if we make this certification process some sort of expensive hurdle or whatnot, that only the big institutions can do, those precious materials are at even greater risk.

MS. GASAWAY: Paul?

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

MR. AIKEN: It may not be even overly burdensome or even expensive, but something like this has to be faced. I just want to say that authors, of course, know that publication is important.

We use libraries and archives, and it's a vitally important activity. We just have to make sure that we get it right, so that that activity doesn't erode the market, which is also vitally important to authors.

MS. GASAWAY: Anyone else?

MR. FRAZIER: At this point, let me say that it wouldn't be as attractive an idea, if government would actually identify and sponsor preservation agencies to get to work on this. Speaking to the issue of urgency, here, it might be very reasonable, in my view, to speed this work up.

MS. GASAWAY: You mean the preservation or the certification?

MR. FRAZIER: The preservation.

MS. GASAWAY: Howard?

MR. BESSER: I want to return to the idea of dark archives. There are certain problems with dark archives, due to the kind of complexity of digital preservation.

One of the problems is, when you discover a problem, it may be too late. Even within the dark archive, the viewing or rendering software, may not be available or it may not work or may occur in an operating system; links can be corrupted, files themselves may have lost sub-pieces to the file.

A recent Center for Research Libraries study showed that 40 percent of the materials requested from the dark archives, had become inaccessible while the archive was unused. There needs to be some kind of activity to alert the digital archivist to failures, while it's still possible to correct them.

I don't at all mean to say that the archive has to be open to everyone, but there has to be some kind of activity hitting up against it. It can't be completely dark; there has to be some kind of use of it.

One could even envision the kind of use where rights-holders are using it, but, with a lot of this digital material, who is the rights-holder, is a very a complicated thing, because there may be multiple rights-holders, and some small amount of local traffic within a circumscribed building or some kind of limitations.

But there really has to be activity; it can't be totally dark; it just won't work.

MS. GASAWAY: Just to make sure I understand what you're saying, unlike in the analog world where, when something starts deteriorating, you can watch it over a period of years, you're saying that if it's digital and

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

in a dark archive, once that starts, it's gone; is that what you're saying?

MR. BESSER: Pretty much. Again, it comes to what the Committee pointed out about up-front kinds of activities that have to be done early on. In some ways, we're using the best knowledge that we have to figure out what those activities are, but we will not think of everything, so running some kind of low-level use against them, kind of brings to the surface, some of those kinds of problems that we didn't foresee early on, hopefully at a time when we can still address it.

MS. GASAWAY: Could the use just be staff use?

MR. BESSER: I wouldn't say what the use is. It has to be more than just the one archivist. There has to be some kind of hitting up against material in their different sorts. Again, what I was suggesting, is maybe use within a building or some circumscribed use, when it gets to a variety of use, because, obviously, use by a digital archivist would be impractical.

That wouldn't make sense, because the digital archivist has already anticipated all the problems that might come up. Its use from an angle that was not anticipated.

MS. GASAWAY: Alan?

MR. ADLER: I find that kind of curious. I would think that would be part of the custodial responsibility. It's not that the custodian sees that not only the copies are made and sees that the copies are filed and then walks away from them; the point of the dark archives is that the custodian is supposed to make sure they remain idle. They are for a time when use is appropriate.

While I hesitate to support what Howard is arguing, in the first place, the idea of replacing things that were deteriorating, depended upon some observation and evidence that they were, in fact, deteriorating. Now, we're talking about coming up with a definition of at-risk works, inherently based on the notion of instability in the media.

That is used, and we go from saying, based on that judgment, we go ahead and decide that these should be reproduced and safely tucked into a dark archive. Going back and saying, the only way to know whether or not these materials are in serious danger of not surviving, is if we allow them to be accessed and used.

It sort of takes you full circle back to the idea that that's why the original standard was done, based on what happens when you're using the material, at least with respect to published works.

With respect to unpublished works, preservation is something that is done with the knowledge that, because the works weren't published to begin with, you don't have that kind of general usage of the works to give you the evidence to inform you of when there is a danger.

I would think that if you're talking about something that's seriously based on an at-risk assessment, based on the instability of

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

the medium that's used, that should be part of the custodial responsibility and not be part of the separate basis of testing of access and use.

MS. RASENBERGER: Dwayne and then Howard.

MR. BUTTLER: I'm not sure that that's solely based on the way that the media that it's contained in -- I think it might just be because it's ephemeral. In other words, it could be in some form, but it's just not going to be there. That's what gives you that risk. It's not because it's on a CD that the funny little silver stuff is going to come apart from it, but because the website is going to disappear and it will be in a different form, so, at- risk can have multiple meanings.

I want to make sure that we're talking about the possibilities in that context.

MR. BESSER: Let me be concrete in responding to some of Alan's comments. Somebody's running a digital preservation archive; it has a number of tools.

What general libraries generally do not have, is the ability to define that you will only accept these three formats and nothing else. If we could do that, which is completely impractical, because the world isn't like that, but if we could do that, we could be spending a lot of time running each of those formats against viewers of those formats, against running new operating systems to see if those work.

The problem is, we have to accept things in a much wider variety of formats, and our ability to be able to tell whether one little tweak and an operating system that comes down, the next Microsoft operating system, that suddenly renders a certain type of application program to not be able to render a PDF file or some other type of file, that becomes problematic.

A lot of the job of the digital archivist is testing all of those things, but when the numbers get large and all the permutations and combinations of the file formats and the application software and the underlying operating systems. That becomes really difficult, having the help of running stuff up against it and seeing if there's some kind of corruption or some kind of delivery thing.

I'm worried about our level of responsibility. Really, it's not just what you think in your head and you plan out for what's there; you've got to have some safeguards to try to keep changes that happen and you didn't anticipate them.

MR. ADLER: What I've heard from you, is that this is a highly specialized activity that should not be engaged in by amateurs; it should not be something where resources are wasted.

MS. GASAWAY: Do not try this at home.

MR. ADLER: Works that are to be preserved, should be not be produced by people who don't know how to preserve them or attempt to preserve them.

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

This isn't impinging upon the core responsibilities of libraries and archives, by saying that in talking about this type of preservation, this should be left to those who have that kind of expertise, who, by definition, are people who have the kind of responsibility they may need to employ people who will be able to do the kinds of accesses necessary to cover a wide variety of formats.

I do understand that is a problem, but the point is to realize that this is a kind of specialized function that is really separate and apart from the other kinds of privileges that you're talking about updating or revising in 108.

It seems to me that it should be approached in that manner.

MS. GASAWAY: Kenny?

MR. CREWS: Howard, what I think I'm hearing from you, is that you're describing accessing the content, not for the purpose of having the content, but accessing the content for purposes of making sure that the digital preservation enterprise is functioning and continues to function.

In that regard, tell me if I'm oversimplifying it, but if the statutory language limited access for the broader right of activation, but narrower access, squishy toy model, that the access would be limited here, described in terms as simple as access is limited to the administrative needs and processes of operating and maintaining and sustaining the archive.

A lot of people with specialized skills can make that happen and that's great. If somebody's at home at the kitchen table who can get all that done, that's great, too, but it still allows administrative access, and, you're right, you made very clear that this is a very expensive process, the way you described it.

If it's not the technology that's expensive, it's the staff time that's expensive. That takes us to another issue: Where is this money going to come from? But I don't think that's a topic for today.

MR. PERLMAN: I was with Kenny, until we got to the kitchen table. You've got to be careful as to who is the babysitter.

(Laughter.)

MS. GASAWAY: No kitchen table, but okay up to the end. Anyone else on this topic?

(No response.)

MR. RUDICK: Before we move to the next one, do you, Mary, or Chris, have any questions or observations?

MR. SIGALL: I had a practical question, maybe, for Howard or someone who's involved in preservation, can answer. As part of the effort to preserve digital material, are there activities or plans to actually

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

take some digital material and put it back into some analog format that might be more permanent, durable, or accessible?

You mentioned, Howard, that for the Viking Mission stuff, part of the preservation was that they took some printouts, so those printouts, at least, survived and were useful to a certain extent.

Is it just impractical, too expensive, or are space considerations so onerous that no one is even trying to take digital material, put it back into some analog format, that is maybe, in some cases, more easily preserved or accessible or durable than the pure digital format?

MR. BESSER: In 1998, we had a conference at the Getty, that brought together some of the top technology people in the country to get at the question of digital preservation of digital art-type material and more general artistic material in digital format.

The conclusion by these top computer scientists, was that for any work, we should engrave things in titanium.

(Laughter.)

MR. BESSER: In a readable form in titanium and put it somewhere in New Mexico or Arizona in a dry environment.

(Laughter.)

MR. BESSER: That is obviously very expensive, but this was 1998. Now, that's eight years ago and things have changed quite a bit.

One of those technologists was Brewster Kahle. I think the thinking is somewhat different now than it was then.

Moving it back to analog within the public television community, right now, we are doing that, but we don't expect to be doing that much longer.

MS. GASAWAY: I thought you were putting it on titanium.

MR. BESSER: No, we're going back to analog, but a lot of that has to do with the kind of weird things between PBS and file formats. Things are created digitally to big stations. They may be digital, but they have to be sent in analog form for PBS, who then digitizes them again and puts them out on the satellite.

A lot of that has to do with agreements on standards, as to what the digital file should look like in going from place to place. That's going to stop in about six months.

We keep those analog copies. PBS keeps those analog copies. They're supposed to give them to the Library of Congress, but they don't.

The Library of Congress doesn't want them until the Culpepper facility opens, so we're in a hybrid state. But the faith of most of the communities out there, is that we will be able to keep these things in digital form, and, of course, the more complex the material is, the harder putting it back out into analog is.

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

How do you do a website? I mean, you lose a lot. You can print out every web page, but you don't have the links between them.

When you get to more complex media, analog equivalents are almost impossible to do, and we're seeing more and more things like that. That said, a lot of archives print out websites on paper and file them away, do various things in analog form, and they do do that, but you still are losing something.

MR. RUDICK: Okay, before we move to the next question, just as a point of information, I think, Kenny, that you were the only person at the table, aside from us at this end, who is in Los Angeles. For those of you who are interested in sound recordings and moving images, there, we did focus to a greater degree on those things, than we are today, so we haven't forgotten about them.

The next question -- we'll see how long we should spend on it. You have been talking, either because we asked you to, or because it's the most serious problem, about digital preserving of materials, and that full functionality is only available in digital form.

We realize that a lot of materials are born both ways at once. We did ask you to consider whether this idea of a preservation-only exception should or should not apply to analog materials, or whether analog materials are adequately covered by the kinds of rules we have in 108(c) today.

We can talk about that for awhile, if you wish to.

MS. RASENBERGER: Specifically, though, there are certain types of at-risk analog materials we need to consider.

MR. BESSER: I run a Master's degree program in moving image and sound preservation. We handle the digital, as well as the analog.

MR. RUDICK: But we're talking about analog here.

MR. BESSER: Right. Clearly, videotape has much of the same risk factors that digital does. It faces deterioration of base materials, technological obsolescence. There have been over 50 different major formats of video over the last 50 years. We're just at the 50th anniversary of videotape this year.

So, these deteriorate quickly, although you have deterioration on a less quick basis, and now a good part of the audio is moving over into the digital realm, and I guess I would say, in crafting an exception, it really should include, because the copyright law doesn't kick in until you fix it in some format.

If the format that it's fixed in, has a short lifetime -- and maybe this may sound controversial to people -- but I think it's really appropriate. If the life expectancy of that format is less than the life of the copyright, then --

MS. GASAWAY: And everything is.

(Laughter.)

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

MR. BESSER: Yes.

MR. RUDICK: Everyone in this room has a life expectancy less than that of copyright.

(Laughter.)

MR. BESSER: But we're talking about the time to preserve things. If we're talking about trying to preserve things, then it doesn't preserve long enough to become part of the public domain, then I think that's a possible benchmark to use.

But, certainly, something like videotape has a life of 15 years, roughly; in terms of technological obsolescence, maybe 20 years to 25 years of the material that it's on, and you have the added problem with videotape that you don't have with digital material, in that every copy is much worse than the previous copy. By the time you get to the third generation, it's often unplayable.

MR. PERLMAN: Obviously, photographs have a real problem with archival preservation, and the problem of trying to key any finite period, is that the practical duration of any object is going to vary so much from the storage conditions.

MR. BESSER: Yes and no. Obviously, I'm thinking of under ideal circumstances, and under ideal circumstances, videotape does not last very long. It's nothing compared to a negative or a print.

Even some of those quick prints that aren't fixed enough, probably have a longer shelf life, under regular conditions, than videotape.

MR. RUDICK: Kenny?

MR. CREWS: I'm going to give Howard full credit, but I'm going to underscore something he said in passing, to make sure it gets in the record. And I would urge the Committee to consider such language in a final report.

As you address the purposes of preservation activities, and why they should be pursued at all, Howard, you added something that rarely gets entered into the discussion. If one reason is to protect the public domain, is to protect those works to make sure they still exist, or when the copyright expires, so that the public can have the benefit of that public domain that is so important to researchers, to scholars, to average readers, and to Disney.

They are one of the greatest beneficiaries of the public domain. We should all be encouraging it.

MR. PERLMAN: I don't understand.

(Laughter.)

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

MR. RUDICK: The queue is empty. That's never happened before, actually. We can move on to other things, or --

MS. GASAWAY: I was going to ask about whether there were other at-risk analog formats. We talked about media, but are there at-risk formats that are text that we need to be thinking about, that are inherently at risk when they come in? Are there others that we've overlooked?

Some people are nodding yes. Tell us what they are.

MR. ADLER: If something is produced on non-acid-free paper, that would inherently be at risk.

MS. GASAWAY: That was what we were all asking you. Is it?

MR. CREWS: I would add, too, that the list here is very, very long. Sometimes you're only trying to preserve the words, the images, the music, but sometimes you're trying to preserve that particular example and the way it looked, the book as it came out in that odd issue in October of 1942, if we want to see that particular work.

I want to see the valuable, restored, expensive film of Lawrence of Arabia, but the film studies period also wants to see the pan-and-scan, chopped up version that came out on VHS one year, ten or 15 years ago. We want to preserve that particular copy for its own sake.

We know there are people who love music and love that it's gone to digital CD, et cetera, but then there are people who just love to hear that needle drop and hear the crackle.

MS. GASAWAY: The hi-fi folks.

MR. CREWS: We need, for certain reasons, to preserve these different versions of the same content.

MR. RUDICK: Carl, you haven't talked on this yet. Would you like to go next?

MR. JOHNSON: I just want to make a comment about the process here. It seems to be evident that the Committee or the process may need more preservationists to comment, and while your invitation is open, the comment section is certainly open, I don't know if your process calls for focus groups or specialists to come in.

I would urge the panel to consider that because -- it's no reflection, because I have the same questions, but I'm going back to my preservation office and urging them to comment on this specific issue in the preservation context, because it's evident to me that this is a specialized function in our society, and we need the specialists to speak.

We've learned a great deal from Howard, and I think the panel would learn a lot. I'm just talking about the process of engaging, not to suggest that -- whatever, overbalancing of looking at particular specialties, but this specialty, I would urge the panel to perhaps look at.

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

MS. RASENBERGER: We have had guest speakers come and speak to the group. We haven't spoken much today about NDIIP, which, as I mentioned in my opening remarks, is the sponsor of the Section 108 group and these roundtables, and, from our NDIIP partners, we have certainly learned a lot.

We actually have a subgroup within our NDIIP partners. I won't go into a lot of detail today, but there's a lot of information on the website, digitalpreservation.gov. That material can be found on our website, which is loc.gov/section108. A few of our partners, Howard has referred to and others have -- Dwayne.

They are both involved in these partnerships. We have what is called an affinity group that is looking at rights issues, and we learned a tremendous amount from them.

We have experts within the Library of Congress, whom we've been speaking to, so, yes, we have heard from digital preservationists, absolutely.

But the purpose of having these roundtables and the written comments, is to broaden the number of people that we're hearing from.

MS. PILCH: I'd just like to say that when we were talking about the definition of at-risk, and we were looking at format, I think, again, we should include the possibility for conditions under which a work can be defined as at-risk. That is, again, something that is likely to be stolen, mishandled, overused in such a way that it would be at risk, to consider not just formats, but also conditions that might define what is at risk.

MR. RUDICK: Paul?

MR. AIKEN: The non-acid-free paper was raised earlier. The best solution there, it would seem to me, is an analog-to-analog preservation, taking it onto acid-free paper, rather than moving that into digital format, with all those problems we've discussed earlier.

MR. RUDICK: As I have been listening to this, I found myself thinking that if Nicholson Baker were in the room, we would know it by now.

(Laughter.)

MR. RUDICK: Because, of course, there is the business about not preserving, about preserving the original, which, of course, has a unique and special value.

We're pretty close to 3:00, which is our scheduled break. If nobody else want to jump in the queue --

MR. ADLER: Could I just ask a question? It's sort of an indulgence. It's not really on behalf of my association, but is there any consideration or appreciation here of works that were intended by their creators to be evanescent, to essentially be ephemeral, impermanent, and how that's going to be dealt with?

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

MR. RUDICK: Not yet.

MS. GASAWAY: There will be now.

(Laughter.)

MR. ADLER: I watched this guy who has this incredible art of blowing different colored bubbles and filling them with smoke, and he absolutely prohibited any pictures, not because -- he said, not because he was concerned that they might exploit him in that sense, but just because his art was the bubbles and the smoke, not pictures.

I don't know if there are that many situations where this might arise, but is that built into this consideration?

MR. RUDICK: Ken, I think, had his hand up first, then Howard, and then I think we go to Joel before we wrap up.

MR. FRAZIER: It's a fun topic and I'm glad you brought it up. I believe that when you publish, when you make it public, it's over. You don't have -- there is no right to withdraw your published work from the public.

I don't believe authors have that right. I don't believe that copyright law covers that point, but we have many writers here who could address that.

MR. RUDICK: Howard?

MR. BESSER: We've had some really interesting experiences in trying to preserve digital art and all types of conceptual works. There's something called the Variable Media Project, which is an attempt to try to get at the artists' intentions, and for a number of those artists, their intention is that they should have a finite life and they should go away.

For others, they want it set. What's interesting is that over the course of several years, many of those artists who said their intention was for it to go away, changed their minds.

(Laughter.)

MR. BESSER: Which is quite interesting, and from a preservation standpoint, what do you do? One of the things that we've had to go through with that, with the museum conservation departments, is this kind of notion of is it only the artist or is it also the curator who is, in a sense, kind of the arbiter of taste, if you will?

Do you favor the artist about when it should be allowed to go away, or do you favor the curators. Some curators have the attitude that it's out there, it's been displayed in the museum, and it should be preserved, so it's shifting sands, and I don't think that there's any -- I think that cultural institutions, be they libraries or museums, are very concerned with what the creator wanted, but they're

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

also concerned with the public having some right of access to some form, maybe to an article about it, or something else.

MR. RUDICK: I think that unless you don't want to take a break --

MR. SIGALL: My observation, except on a couple of things we've just been talking about, first of all, I'd point out, Howard, the experience of artists changing their minds, is not unlike what we find on Capitol Hill among Congressmen --

(Laughter.)

MR. SIGALL: -- who vote a plan for term limits, and they change their minds again. But the question of preservation, after hearing all the discussion, I find, is a lot more complicated than I thought.

I had taken -- when I heard "preservation," I thought relatively long-term, in the sense of the idea of preservation was that 2,500 years from now, the historians don't look back and say, in the early 21st Century, why did these people stop keeping records.

It's because we started typing in WordStar and Microsoft Word, and it was much too expensive to change formats every five years for the next 2,500 years.

Then, as I think about it, especially hearing comments from people about incentives to preserve, in fact, it's very difficult to do that, in many respects, and it's very costly, it occurred to me that preservation -- there's a lot of different purposes for preservation.

The local library wants to preserve its collections, mostly so it can serve its patrons in the short term. It just maintains its collections and makes them accessible to the people who normally go there, or access those collections.

There are people in archives who are preserving for much longer-term purposes. Copyright owners are interested in preserving for mostly the economic life and maybe beyond that, of the work.

So, it makes, I think -- it complicates things a great deal, but the ideal would be that in any invention that you're crafting, you're trying to account for exactly what the purpose of the preservation is and the incentives that are necessary to bring that preservation about.

I think most people would agree that preservation, in each of those circumstances, is a laudable goal. The question then becomes, how do you incentivize the right people to bring that about?

In some cases, it may very well be the copyright owners who are in the best position to do that; there are other cases where that fails, and then the question is, who is next, and are you incentivizing too many people to do it? Do you really need to have every local library in the country preserve a particular copy of a work, when it's accessible, either from a more centralized location or otherwise?

Or, is it better to have all those folks preserving it just for redundancy and backup purposes? To me, it really comes down to a question of exactly what the goals are in terms of preservation and what timeframe the preserver has in mind.

Transcription
Section 108 Study Group, Public Roundtable #2
March 16, 2006, Rayburn House Office Building, Washington, D.C.

Topic 3: New Preservation-Only Exception

That sort of guides what sort of restrictions or other limitations or permissions do you provide in the law to do that kind of activity?

MR. RUDICK: We're running three minutes late. We'll take a 15-minute break.