

Symposium: Digital Archives: Navigating the Legal Shoals

Roundtable: Copyright Issues and Issues Beyond Copyright

Robert Clarida (Moderator): All right, thank you. What we've decided to do as our format for this presentation is: we have a number of scenarios that people have suggested of things that have actually come across their desks in the course of doing what they do. And we thought we would just go through these quickly and talk about the issues that they raise—a sort of issue-spotting exercise—and try to offer some guidance about maybe how to deal with those issues as well. We're going to start by talking about a number of things other than copyright. We've had a lot of discussion today about copyright and we may get to some more copyright here if we have time, but I'm going to start by talking about a number of noncopyright issues in the areas of privacy, defamation, things like that that very often come up in the context both of sound and audiovisual materials, but also in the case of text and photographs and so on.

So, just to start: we have a scenario in which your repository collects the papers of selected faculty in an institution, whose files often contain significant runs of letters of recommendation or comment concerning tenure decisions, student placement awards and competitions, etc. Let's just put this out to the attorneys. If a client came to you with that issue, what questions would you ask? What would strike you as interesting about that?

Elizabeth McNamara:^{*} Well, thank you. I think this would be a very difficult thing and probably not a very advisable thing to put online would be my bottom line, I suspect, but in getting there what you really want to look at are the potential libel and privacy issues that this would necessarily raise. And I think you wanted me to just spend a moment to kind of give the basic “101” of libel privacy, which I'll do in as few words as I possibly can in an area that's fraught with complications. But basically, with a libel claim what you're looking at is a publication and a lot of this is going to turn on issues of publication that I'm sure we'll get to. But in order to assert a libel claim you have to have a statement of fact, not an opinion, about a living person. Libel lawyers love dead people. And it has to be harmful to a person's reputation: defamatory.

That last category is a broad spectrum of areas—obviously crimes—and here I think, you know, tenure decisions, if it's reflecting poorly on your reputation as a professor, or something else, then that would normally be considered to be harmful to your reputation and therefore defamatory. The bar for defamatory is relatively

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low and I often tell people it's basically: if you wouldn't want it said about you, then you can assume it would largely be defamatory.

And so, with privacy, the issue is to some degree the reverse. It's even if what is being published is absolutely accurate and there's not a question as to falsity, then the claim really only arises out of the fact that it's intimate private facts that do not warrant publication. And I think the problem with this in the context of archives—and we can get into this in more detail—but when you're dealing with media publications like newspapers, magazines and the like, usually the publisher, by ipso facto, the fact that they've made the editorial decision that this should be published, it comes with the imprimatur of it being newsworthy. That an editor, or publication at least, has thought that this material has relevance to something of import even if it may be intimate or private—like someone's sexual orientation, an abortion, intimate facts like that—it often can be deemed to be newsworthy, and therefore publishable and not an invasion of privacy. But in the context of an archive where it's just the pure information being put out without context, often without commentary, the newsworthiness element of this becomes significantly more complicated and I think that you have significantly greater exposure on privacy grounds.

Hope O'Keeffe:^{**} The basic rules on privacy—there are three areas you need to keep an eye out for. And the first is really personally identifiable information. This kind of collection is likely to have things like names and addresses in it that would count as personally identifiable information. This is particularly important if you are a government entity; it's going to be a problem. The second category is children and students. There are specific protections for student records, the sort of say, grades you might find in this kind of archive. With children, the issue is particularly children under thirteen; that's not going to be a problem in this scenario, but it's the other area you need to be very careful about. And then the third category, which I suspect we'll hit on later on, is any kind of health information or medical records. Those are the sorts—doesn't mean you can't digitize it or put it up, just these should set off the flashing red lights; call your lawyer.

Michael Ryan:^{***} I, in all innocence actually, submitted this scenario for consideration simply because, having been in the business for thirty-five years, I've always been intrigued by the fact that in archives and special collections repositories we accumulate this stuff rather blithely and then provide access to it. And all of this goes under the rubric of “confidentially developed, submitted and processed information originally.” And I guess my concern was, or my question is, are we doing the right thing? Should we have been weeding this stuff out? And yet, this is the very material that of course everyone wants to see. Any comment on that?

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Kenneth W. Rose:**** Well, I think that the—my response would be that first of all, you try and figure out if there's a way you can segregate the material: the series, the record group that might be sort of the administrative files and the offending files, and make other material in the collection available, online or not. At least you're making it accessible to people. And sort of close the other material. I mean, that seems to me a common sense approach that I think we would use, in the Archives Center point of view, and then deal with the other stuff in a separate context. The other question is whether it makes a difference if we're talking about making it available online or just accessible in the archives. And I think those are—the assumption has been that things we have in the collection we can automatically make available online, and that's obviously not the case.

Robert Clarida: All right, well let's talk about the distinction for a second between what you collect (what you keep in your archive, what you allow researchers to come see at the archive) and what you put on the Internet because the way in which you make the material accessible can make a significant difference. Do you want to speak to that?

Elizabeth McNamara: Yeah. I mean, what I alluded to earlier with the issue of publication—this is really the operative key fact with regard to any of these claims, with specifically libel and privacy that we're focusing on now. When the material is just sitting in your archive and you allow people to look at it, that normally wouldn't be considered a publication and so would not give rise to any of these claims that we're talking about. As soon as you move that material from just sitting in your archive and put them online, I think, generally speaking, you would conclude that that constitutes a publication. And you as the publisher, regardless of the fact of whether you had anything to do with the creation of this material, you become liable for it just as if you had written the letters or the recommendations or anything else that sits in that archive. So, it really turns on publication issues, and it also turns on complicated statute of limitation issues, on how long you're going to be liable for this and what your risks are.

Now, I think there could be a public policy argument that—much as there was done in the last decade or so. I know Ed Klaris was here and we worked with him on *The New Yorker* on this and many organizations have focused on this issue. When you move from just some things being in microfiche and you just decide, "Okay, we're going to put it on a DVD because it makes it more readily available to people and who likes to deal with microfiche right now," there's an argument from a public policy perspective that that didn't constitute a new publication that starts the statute of limitations running or the like.

You can arguably make the same argument here: just moving something from an archive where people can come into your library and go in and look at it and then putting it online, provided it's done in the way with the same protections of—that you have access to your archives, that people are screened, that only, you know, appropriate people—whatever the restrictions are for that particular group of

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material. You could make an argument from a public policy perspective that that doesn't constitute a publication. However, I think that that's an undeveloped area. It hasn't really been litigated to my knowledge, and I think that generally, publication has a pretty low bar for something to be somewhat risky.

And the other reason for it to be risky to put on a lot of limitations is this: generally if you just uploaded all your archives, and you made it available on the Internet, that would constitute a mass publication. And under the single publication rule for libel or most of these torts, it would start running on that date. And usually for libel in most jurisdictions that's a one year, at most two year, sometimes three year statute of limitations. So, at a passage of time, you would move out the statute of limitations and you would be free and clear. However, if you make this a very restrictive archive that only has access to very few people, there's some case law that's been developed surrounding reports on your credit rating or situations where you have access to malpractice claims and they upload. And if you're a licensed practitioner and you can check whether someone has received malpractice claims, there's findings that this does not constitute a mass publication that starts the statute of limitations running for a mass group, but that each time it's accessed a new statute of limitations starts. So, that is not something you want.

Robert Clarida: Best to avoid.

Hope O'Keeffe: At the same time, I think we can and should draw a distinction between what we can get away with legally and what the right thing might be. There's a lot of stuff we've been making accessible for years and years, in particular in the personally identifiable information category. The congressional record up until the '80s included social security numbers for every member of the military who was promoted. So, that's sitting in a whole lot of places, but once you make those accessible online you might want to start looking at redaction. Even though there is no legal liability, sometimes it's the right thing to do.

Robert Clarida: All right. Let's turn to our next scenario: a writer whose papers are in your collection had a notorious feud with another writer, which resulted in multiple lawsuits. His papers discuss this bitter dispute at great length. Any risk to including these papers in the online collection? Anyone care to jump in on that?

Michael Ryan: Yeah. The Gore Vidal case, who fights with everyone. You know, I have to say when I read this I thought, "This really isn't a problem because you would need permissions up front to move forward, I would assume." And the people involved in the dispute, I assume, would not want all of this aired in public. So, I think in a certain sense my read of this would be: it would probably not go forward. I may be wrong.

Robert Clarida: Well, having been involved in a number of bitter disputes as a litigator, I know sometimes somebody really wants the whole world to know about it, and somebody else doesn't want the whole world to know about it. So, there might be someone who really is eager to get this out to the world. The question is: as an archive, would it be a good idea for you to help them do that?

Elizabeth McNamara: Well, I would just add I often—you always look at these situations from a risk perspective and generally, certain things have red

flashing lights. One is people who are litigious. And they tend to be lawyers often, so whenever lawyers are involved you don't really want to touch it too much because they just tend to be litigious. And then here you have a situation with a long history of litigation. So, they already are invested in this and so that raises risks.

Robert Clarida: How about litigation papers per se if we've got pleadings and deposition transcripts?

Elizabeth McNamara: Oh, well those are—pleadings, deposition transcripts would be perfectly insulated because you would have a complete defense; as public records you can make those available. So that would be fine; it would just be outside of pleadings, correspondence, notes, whatever.

Robert Clarida: All right. Another scenario: an archive in Argentina offers to digitize your collection of papers and client records of a prominent Argentine-American child psychologist who died in 1985 and whose correspondence files with patients, colleagues and others freely mix the personal and the clinical. An interesting issue? And why?

Michael Ryan: Again, this is one of those almost real-life cases that we're involved with. I should add to this to make it just a little more complicated, that the donation comes with a nonexclusive license to digitize. So that makes it even doubly complicated, triply complicated. And of course the issues here are: what do you do if you have, let's say, permission? Even if you have permission to go public with, to publish material like this where correspondence files concern a well-known practitioner whose private life and professional practice intersected in happy and unhappy ways perhaps once too many times? Where there are correspondences that reveal, you know, the extent to clinical interventions in psychological situations? These raise monumental challenges for us and in all honesty, I have no answer and I turn to counsel. I would turn to many counsel.

Hope O'Keeffe: This is one—the other—the fact that it's Argentine means that you're looking both at U.S. law and foreign law. You're dealing with children. You're dealing with medical records. So, it's kind of hitting—and certainly the personal information—so this is hitting all of the highlights. Maybe if that Argentine archives gives us full indemnification, but I think even then I'd back off of it. And our policy, even in terms at the Library of Congress—I'm speaking on my own behalf not on behalf of the Library of Congress—but we have even face-to-face embargoed psychological records for a very long time. Those have been the longest access restrictions we've had.

Robert Clarida: All right. We sort of touched on this already, but your archives collects personal papers, some of which include tax records and social security numbers. Your curator proposes to provide them to researchers and, in the ideal, to digitize them and present them on the website. We touched on how social security numbers are out there—they're circulating—but I suppose if you had a new batch of documents of social security numbers you would look at them differently in an archive?

Elizabeth McNamara: I think in today's climate you would always advise to edit out social security numbers. There just wouldn't be any reason to put them in

there. You'd not only face liability, but you'd face the wrath of God knows how many people.

Robert Clarida: Well, also because we're talking about putting things out on the Web and we've touched on international issues throughout the day, would there be any particular sensitivity because of the European privacy regulations? Europe has a somewhat more stringent and well developed privacy code than we do here.

Elizabeth McNamara: Absolutely. I mean, under the European Union, you would face all sorts of roadblocks with this type of confidential information. They would have much broader and much more draconian restrictions on what constitutes private information and what can be published, but it goes far beyond social security numbers. It would be all sorts of personal data.

Robert Clarida: All right, turning to another set of issues. These basically have to do with getting permissions from intermediaries and how far you can go with permissions from intermediaries. You have a collection of field recordings or transcripts of oral histories and folk songs collected from the 1920s to the 1960s. Most of the recordings and/or transcripts have permissions from the collectors, but there are few permissions from the interviewees and performers, and in many cases there is no record of their names. Can you put the collection online?

And let me just do a second one and people can address both of these because they're sort of parallel issues. You've digitized the collection for a well known anthropologist who gave the archives full rights to disseminate it. Many of these historic photographs and films depict full or partial nudity, including some pictures of children. Some record religious ceremonies. Should you post it online? Actually two questions: can you legally and should you? Those are perhaps two different questions. Anyone care to?

Hope O' Keeffe: I only have three minutes for this, right?

Robert Clarida: Take as long as you like.

Hope O' Keeffe: The first one really should have been addressed to the last panel.¹ The issue of field recordings and particularly of music touches on the orphan works issue. These are true orphan, perhaps zombie, works that you cannot trace. One of the practices that we have followed is what we call the "friendly notice and takedown." We will put it out, we'll describe the collection and we will say, "If you know anything more about this recording, if you know anything more about this image, please let us know." And that's been extraordinarily successful. At the same time we say, "And shhh, if you know anything about the copyright, let us know that too and we'll take it down." By making it a nonlegalistic request to the people using the collection, using the archives, the response can be amazing. You get not a "This is my precious family recording. Take it down." You get a "That's my grandfather singing. I never—he died before I was born. I never knew what he sounded like." And it gives you chills. It's wonderful stuff.

Robert Clarida: Have either of the practicing archivists had these issues arise with field recordings or ethnographic films or anything of that nature?

1. Kenneth Crews, et. al., *Roundtable: Sound and Video Archives*, 34 COLUM. J.L. & ARTS 63 (2010).

Michael Ryan: I actually at Columbia here work quite closely with the Oral History Office, so the issue of zombie transcripts and, you know, transcripts which lack permissions is a constant problem, a constant issue, and we're always wrestling with it.

Hope O' Keeffe: I came across—I did a presentation on oral history issues in the law—and came across the notion that at least in some circumstances, the oral history is a joint work between the interviewer and the interviewee and, because it's a joint work, if you have permission from the interviewee—or sorry—the interviewer, that's good enough. What do you think of that?

Elizabeth McNamara: I think that's true and I think that's the weight of the law at this point. I mean, in fact, I think if the rights rest farthest, they probably rest better with the interviewer than they do with the interviewee. And I think that it's because they structure the interview, they create it, they ask the questions. However, the interviewee clearly, under a joint rights—I think you also have an implied permission in these situations depending upon the circumstances on which the interview was given. I think if it was given in a context where there would an expectation by the interviewee that this was to be published in some forum or fashion, then I think you have arguably an implied permission.

Kenneth W. Rose: We have had an instance where we have not formal oral histories, but they're sort of conversations among old colleagues from one person who was commissioned to carry out these sorts of interviews. I think the agreement was that the interviewee was to have permission to review the transcript and make any corrections. The whole process wasn't followed through completely and the partial transcripts have ended up with us. I think it's been our policy not to make material available until we're sure the interviewee is deceased to sort of take care of it in that fashion. But that's been the way we've handled that instance at least.

Michael Ryan: At the risk of starting a food fight, I wonder if I could ask Kenny to comment on—come on Kenny—to comment on Elizabeth's interpretation of rights concerning oral histories.

Kenneth Crews: About the fact that—characterizing it as a joint work and therefore each party is able to make a nonexclusive license, right? Sum it up? There's a lot of validity to that and we actually went over that possibility in some conversations that we've had at the Oral History Office here. Rather than really answer it—because I think it is a legitimate question—I think there's a legitimate answer there too. The problem is that our interviews are encumbered by agreements, and the agreements say “yes,” “no,” but more often than not they say kind of messy things. You know, they are unclear about what we can do with what, even though maybe somebody really honestly thought it was a clear document at the time. So, we have a lot to unravel and I think there's a good position to take here, but we also have agreements sort of layered on top of these things.

Robert Clarida: Well, and I would also throw another wrinkle onto the joint work issue, which is that in the United States, each joint author has the right to make a nonexclusive grant. And other countries, particularly the U.K., that's not the case and all joint authors have to join in order to make a grant. So, even if you

solve the problem of is it a joint work under U.S. law, that doesn't necessarily enable you to go to the whole world with the material just on the strength of the say-so of one of the contributors.

Hope O'Keefe: I want to jump in on the anthropologist one because that was fun.

Robert Clarida: Oh yeah? Children? Religion? Nudity?

Hope O'Keefe: Exactly. You've got real issues of cultural sensitivity. You've got issues of what's appropriate for a K-12 audience. At the same time, you probably have something that's of tremendous archival interest and importance, and we've assumed away all the copyright issues in your scenario. Very clever. There may still be some privacy issues. I don't know. This is one where it's almost perfect for a passworded, researcher-only kind of setup, I think.

Robert Clarida: Right. So, this is an object lesson and you can't just go through it with your copyright checklist and say, "Oh, he owns all the copyrights. He gave us the permission. We're fine with it." There are other considerations and that's the whole point of this panel.

Elizabeth McNamara: I was just going to say you can't lose sight of the children and the nudity, and particularly the sensitivities with certain states. Years ago, I litigated a case arising out of the film *The Tin Drum*.² The state of Oklahoma was prosecuting Blockbuster for distributing a film that won the Best Foreign Film simply because they believed it contained a scene that constituted child pornography because there was some nudity or perceived or implicit nudity in it.³ So here, I think when you put up something with archives that have nude pictures of children, even if they're purely innocent and it's like totally acceptable, you really have to be concerned about certain jurisdictions where you might be prosecuted civilly or criminally for child pornography, and I suspect none of us want that.

Robert Clarida: All right. Milder version of the same set of facts: you receive a request that you take down online WPA photographs profiling a poor family in the 1930s from a grandchild who finds the photographs embarrassing.

Elizabeth McNamara: Well, from a legal perspective, there's no issue. Most of these rights are not descendible and as much as the grandchild may not like it, he or she would not have a claim arising out of the depictions of their grandparent. There might be sensitivity issues you want to address.

Robert Clarida: Well—and for the archivists—if you received a complaint like that, whether there was a legal basis for it or not, how would you address that?

Michael Ryan: It's a really good question and it's not a matter of law. It's a matter of custom, convention, fairness, equity, ethics and I guess a lot would depend on who the grandchild was, what his relationship was to the institution. That's a narrow, self-serving way of looking at it. But then there's the other issue of the extent to which the grandchild could become a public nuisance, and you

2. Oklahoma *ex rel.* Macy v. Blockbuster Videos, Inc., No. CIV-97-1281-T, 1998 U.S. Dist. LEXIS 22096 (W.D. Okla. Oct. 20, 1998).

3. *Id.* at *6-7.

don't want to call attention and its only one photograph. It might be the wiser thing in that case to take it down. My instincts would probably be to leave it up.

Hope O'Keeffe: At the same time, another solution and this is—I assume everyone knows “Migrant Mother,” which is a WPA photograph, and there's a whole backstory to it.⁴ What we did at the Library of Congress was link to that backstory and provide—it's the solution to speech problems being more speech—provide more background about the image and about how she felt about becoming the face of poverty in the Great Depression.⁵

Robert Clarida: Ken, did you have a comment about that issue?

Kenneth W. Rose: Well, I'm assuming this WPA picture's not going to be of a Rockefeller so it wouldn't be much of a problem. But we do have a lot of photographs in our collection that deal with outhouses, for example, in the South, and they're identified on certain farms and certain buildings and that kind of thing. And a lot of public health material that might be in the same thing. And if I think we would want to take a second look at the picture and see what we might feel on a second glance, we'd be willing to review the issue but not make any promises offhand.

Robert Clarida: OK, moving to some contract scenarios. Your archives have a collection of the unpublished papers of a prominent writer who died in 1965. The gift instrument gives you broad rights to serve them within the reading room, but is understandably silent on Web rights—it's an old agreement, it just doesn't deal with the Web issues. Can you digitize them? Can you post them on your website? If no—if you decide that there's not a problem—how broadly can you go out with them? If you decide that there is a problem, do you go back for consent to try to fix it or do you just forge ahead and say, “Well, this is an acceptable risk?” A silent gift instrument, that's the problem.

Elizabeth McNamara: This really presents, I think, the issue that book publishers first started grappling with when electronic books started to become a viable option. And they had decades and decades of publishing agreements, most of which were silent on the issue of whether there'd be electronic rights. And it was much litigated within the last decade, and unfortunately the law as it stands now under the *Rosetta Books* case is that you really can't imply under these agreements that there would be electronic rights granted.⁶ Although I know that a number of publishers are kind of biting to kind of go back to that issue and have it re-litigated in the current form because I think when the *Rosetta Books* case was litigated, I don't think that electronic books really had the same vibrancy that they do now.⁷ And I think that there may be a different result now.

Robert Clarida: All right, following up on that. Your librarian has decided as a matter of policy all agreements to acquire by gift and purchase the papers of

4. *Dorothy Lange's "Migrant Mother" Photographs in the Farm Security Administration Collection: An Overview*, LIBR. CONGRESS, http://www.loc.gov/tr/print/list/128_migm.html (last visited Sept. 22, 2010).

5. *Id.*

6. *Random House, Inc. v. Rosetta Books*, 283 F.3d 490 (2d Cir. 2002).

7. *Id.*

individuals and the records organizations must include permission to digitize. How do you respond? And let's say you decided we do have to require permission to digitize, what would that say? What would that language be like?

Michael Ryan: I mean, at Columbia we have a standard formula that we've been using and it's been quite successful. And it's simply to ask for a nonexclusive license to disseminate and exploit material to which the owner is a donor or the seller has copyright. And that seems to have worked well in, I would say, five cases out of six.

Hope O'Keefe: It's an interesting question because a lot of times, the curators who are looking to make the collection are very reluctant to ask for these rights, and to have the institution's policy be "you gotta at least ask" becomes a step in the right direction. And frankly, the next step in the right direction is we're pretty good about asking for rights for ourselves—"Hey, are you willing to dedicate more public rights or put it under Creative Commons license?"—and looking at that as part of the policy for what you ask for. But it's also going to get to the point where someone says, "No," and you're going to have to decide whether or not you accept this important collection that they're retaining all rights to. And nine times out of ten the answer's going to be, "Uh-huh, we'll take it anyway."

Robert Clarida: Some collections at your archive are on deposit so that the archive is not the owner of the collection. Nearly all of those agreements stipulate that the archive can make the material available to "qualified researchers" and that the head of the archive or his designee will interview each researcher. How do you meet that requirement if you want to post online material from these collections?

Michael Ryan: Well, I guess, you know the operative word here is "deposit." If something is on deposit with me, I don't own it and I don't have any rights to do anything with it. So, I think in a sense that's a moot issue, right?

Hope O'Keefe: Well, the deposit agreement may include some rights to it as well. I mean, the deposit agreement may include some licensing. If you've done your deposit agreement right, it does.

Robert Clarida: Or here we have a slight variation on the scenario, which says, "A notable literary agency agrees to donate its files to you, but only on condition that it screen access to all files from 1965 and later."

Michael Ryan: I mean, this is, I think, a legacy issue that a lot of us have to deal with, you know, on a day-to-day basis where agreements were negotiated a long time ago that still give donors of material the right to screen. This is not copyright. This is access, bad access. And that's clearly a situation that you want to renegotiate if you can, or red flag for counsel to reverse because that's an untenable position in an institution for which access to one is access to all.

Hope O'Keefe: Now, what do you do in a situation where you have some of these donor permission set-ups and you've lost contact with the donor?

Michael Ryan: Yeah, I would go to counsel.

Kenneth W. Rose: Yeah, the first part of the scenario was one that I suggested because we do have exactly that kind of agreement. A lot of the material when the Archive Center was first set up—it was really sort of an experiment. There was some reluctance to creating a Rockefeller Archive Center in general, in some ways,

and so it was set up as an experiment that a lot of the initial collections came to us on deposit for fifteen years. And so, we're in the process of trying to renegotiate some of these agreements and see how that goes. So, that's one of those things that we're taking, but the whole question of "qualified researchers" is sort of out the door when you start to put things online. I mean, it's open to everybody and sometimes I wonder if the people who created the Archive Center would've done so in today's environment where the general expectation is for more open access.

Robert Clarida: Let me just ask a factual question about that because I don't know how this operates. When you make materials available online, is it always the case that they're freely accessible to anyone with a browser? Or do you have to get a password through your university department, or how does that work?

Kenneth W. Rose: We're among those three percent of the respondents to the survey who don't yet have materials online. We have a very limited amount of material, and it's precisely for some of these kinds of questions that we're grappling with. So, I'll let Michael respond to that.

Michael Ryan: Well, I mean, yes, we have the ability to restrict to, say, a university-only IP. That's not our desired path, however, and in every instance we'll fight for broad public access.

Hope O'Keefe: At the same time, we certainly make everything available—we do no passwording—but we do some things like streaming versus downloading restrictions and restrictions on bulk downloading as well.

Robert Clarida: And I think we have time for one more scenario before we get to some questions. This sort of ties in with the previous panel:⁸ can your archive crawl and collect public websites relating to areas in your collection? I think this really falls in a sort of a contract area.

Elizabeth McNamara: It is. Although, I wouldn't have a problem with—again, it does depend upon where you're going because certain websites have restrictions on whether you can do that and access and crawl that way. However, assuming those restrictions don't exist, as long as you're linking to these sites you're probably OK, and you're not going to assume liability for the content that appears on those sites. If you, however, upload and take actual content from those sites and post them onto your archive of your site, then you're assuming risk vis-à-vis copyright, libel, privacy and the whole panoply of claims that could arise out of it. So, I think the answer would be to link if you're going to go that route.

Hope O'Keefe: And I guess the problem with linking is the fact that websites on average last forty-five days, and that's not even counting, you know, the changes in websites and the archiving of websites. So, if you're not crawling and keeping it, it's gone. Does that change the calculus?

Elizabeth McNamara: Well, I think it does, but the real question is what the purpose is and why you're crawling and trying to maintain this. If there's really an educational purpose for why you are posting and putting this information and there's a context to it, so that it's rationalized and protected, I think there's ways—

8. Kenneth Crews, et. al., *Roundtable: Sound and Video Archives*, 34 COLUM. J.L. & ARTS 63 (2010).

there's ways I could think about it and conceive of it in a way that would not create that significant of legal exposure. But if you're just, you know, crawling the Web and glomming on to, you know, any website and any content on any website, and putting it on your site because it happens to fit some demarked category that you're searching for, the exposure is immeasurable.

Robert Clarida: All right. Well, I think we're—we've hit the point where I'm supposed to open the floor to questions, and I think probably we've touched on so many areas there are probably some questions out there. So yes, please.

Question: You've thrown out a lot of different scenarios, many of which would force the archives to go back and renegotiate—try to renegotiate agreements that were already set. And I'm wondering how you would differentiate between an archival institution that was privately funded and one that was government funded? And I'm looking at examples of—I worked for both private and public, and when I worked for a publicly funded institution, once the materials were given to the archives, they became property of the state. And so, we were much more restricted in terms of going back and talking to a donor or reframing any kinds of restrictions. And I'm wondering how the type of institution would, therefore—the ownership of the material and who owns the material—would factor into some of the scenarios?

Hope O'Keefe: Well, we're—The Library of Congress—is the federal government, so I've never thought about it from that perspective. What our rights are under the donor agreements is to the physical property, and what we're talking about with digitization is what our rights are to the intellectual property, and what you're doing from there. So, we are perfectly comfortable going back and renegotiating what the intellectual property rights are in the materials.

Elizabeth McNamara: And picking up on that, I mean, I think in private institutions—picking up on something I think Hope alluded to earlier: I found in many contexts, not just online, that often if you do things with notice to people, we've made our effort to get rights or to contact people concerning this. "Please let us know if you have any information." People usually respond very positively to that, and you don't get lawsuits. You get just inquiries, and that opens the door to renegotiation or contact because often the problem with going back to renegotiate these things is you never can find these people. And that's usually the biggest hurdle to it. It isn't the renegotiation; it's locating them.

Kenneth W. Rose: We have—in terms of renegotiating some of our agreements—we have, fortunately, good relationships with most of our donating organizations. With the few that have deposited materials, we've gone back to sort of renegotiate with them. Their response usually has been: "You have our stuff?" The institutional memory in a lot of these places—there's turnover at the top; nobody remembers that they've given stuff to the Archive Center in the past. And so, it's been an interesting process in that regard.

Michael Ryan: Yes, a footnote to that: I met a vice president from Random House who was absolutely shocked that we had their records. He hadn't a clue.

Hope O'Keefe: But I have to say we've been pretty successful in renegotiating, particularly some of these really old, old agreements where you can say, "Renegotiate or you are lost to history." And really, we have been very successful

increasing access and increasing digital access. It's been surprising, I think.

Robert Clarida: Another question?

Question: []⁹

Elizabeth McNamara: I'm not aware—and many here may be—but I'm not aware of litigation that's really arisen out of people just going into libraries and looking at material that sits there. If you don't take it out, if you don't print it, if you don't publish it, if you don't do something with it, I think that normally that wouldn't be considered a publication. And the underlying premise to all of these claims is a publication, whether it be copyright, libel, privacy or anything. And so, it's really when you move it to the Internet, then it constitutes a publication.

Hope O'Keefe: And I guess I'm not aware of litigation, but I am aware of some very cranky donors. And you have to keep an eye out, you know, for that as well, partly because if you don't respect donor restrictions on access, you stop getting donations. And that's true in reading room access, as it is online.

Elizabeth McNamara: If there are agreements and you're not respecting them, then you're subject to breach of contract claims.

Hope O'Keefe: But no one brings the litigation.

Elizabeth McNamara: Yeah.

Question: []¹⁰

Robert Clarida: Well, I'll just chip in here. There is one case in the Fourth Circuit called *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, which finds that a work on the shelf in a library was a publication.¹¹ And it's a fluky case.¹² There's been a lot of controversy about it, but there is the one case.¹³ And I think the facts of that were really unusual.¹⁴ But the court in that case said the library has done everything that it can do to make the work accessible to the public, and whether anybody actually takes it off the shelf and reads it is not an issue.¹⁵ The library has made it available, and it's the making available of the work that constitutes publication.¹⁶

This has been applied in the Internet context in some of the music file sharing cases, where people have hard drives full of music that they're putting up on the Internet and saying, "Please come, you know, check out my music files." Even if nobody checks them out, the argument has run: well, there's still a distribution of that music. Some courts have accepted that; some courts have not accepted that. But that's the one case I'm aware of where there's actually been litigation over material on the physical premises of a library. And I think those facts are so unusual that it's not something that is likely to recur. And also, even if you apply

9. The brackets denote portions of the recording that are inaudible or cannot otherwise be transcribed.

10. *Id.*

11. *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 201 (4th Cir. 1997).

12. *Id.*

13. *Id.*

14. *Id.* at 201–02.

15. *Id.* at 203.

16. *Id.*

Hotaling, the risk level is so much dramatically lower if it's not on the Web.¹⁷ The Web just makes everything so much more easily findable and gives people who have an objection a very easy opportunity to make that objection. Another question? I think we have a few more minutes. Eric?

Question: Just wanted to mention something on the question of interviews. I think Elizabeth correctly stated what the law is. They're just—they're few and far between. There's a district court case, I think in Georgia, of a prisoner being interviewed and everything else—but not to forget registration practice. A couple of years ago, we were representing an interview subject, and knowing that the interviewers were going to object to its incorporation into a documentary film, we checked and it hadn't been registered, and registered on behalf of the interview subject, at least for the purposes of § 410(c) presumptions of ownership.¹⁸ They're rebuttable, but at least to start off on the right foot, we were co-owners and therefore could license a nonexclusive license to the documentary filmmakers to use the material. We never got a letter of objection from the other side.

Hope O'Keefe: Although, if I can respond to that—I don't know if Maria is still here. It's my understanding that there is a copyright office manual saying that if you get an oral history coming in for registration, you're supposed to look for both.

Question: Yeah, and that we weren't queried. I mean, I also represented the Lomax Collection, but that's a whole other story for a whole other day.

Robert Clarida: Any further questions? Back here—yes, Jackie.

Question: Yeah, hi. I'm wondering, in the case of defamation: it raises a lot interesting issues in an online environment where withdrawal means “no longer available” versus defamation in a print environment where you print a correction but the underlying statements might still be somehow available. And sometimes, the very nature of these disputes is of a scholarly interest. And I'm wondering if any thought has been given to some kind of limited availability for scholarly purposes of that original statement in a way that wouldn't involve ongoing violations and ongoing defamation, so that it's not completely erased, but somebody with an interest in a particular area can actually exhume that original statement?

Elizabeth McNamara: Generally, I mean, I think that you can republish a statement. You see it all the time when a statement's the subject of litigation. And in news reports about it, there will be a republication of the statement. If it's done in a context where you're actually making it clear that this is a subject of great dispute, that the person disputes the accuracy of it, if it's a situation where it's already been found, in fact, to have been inaccurate—if the context in which you publish it, that is made clear—that it's not an accurate statement, it's a false statement, but it was the statement that gave rise to this dispute. I think you would be on perfectly firm ground with republishing that.

Question: What about if there's a settlement that says, “This needs to come out,” and you're not a party to the settlement—you're the archive—and you're told

17. *Id.* at 199.

18. 17 U.S.C. § 410(c) (2006).

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that.

Elizabeth McNamara: Well, only if you are arguably considered to be a third party beneficiary of that would I think you'd be subject to the terms of that settlement. So, if you're not a party to the settlement and couldn't arguably be a third party beneficiary, but you somehow got access to this confidential settlement and/or got access to the statement that was at issue or the underlying facts. As long as it's published in a defensible manner, so that you're not republishing the libel in a way that could be found to be a restatement of the statement at issue, I think it would be defensible.

Kenneth W. Rose: There are plenty of archivists in the room that could take issue with this, but I mean, my response is that it's our job, I think, to provide access to materials, rather than interpret materials. So, all the discussions about putting things up in context leave me a little leery and a little weary about those kinds of things. So, how much responsibility does an archive have for downstream uses of things? There are plenty of ways I could go with that, but I'm just throwing that question out in terms of defamation issues.

Elizabeth McNamara: Well, I think that if you're on notice—I mean, there's always going to be, with any libel claim, there's a fault element. And when I was talking about libel I didn't focus on the fault analysis, but you always have a fault, at least in the United States; you don't in other countries. But in the U.S. you have a fault analysis. If you just publish something without any, you know, and you have no reason to believe that it's not accurate—you're just posting material and you had no kind of intentionality regarding it or negligence surrounding it, then you're not going to be found ultimately liable concerning that from a defamation perspective. However, if you're clearly on notice that this particular letter contains a highly litigious statement that was in fact found to be defamatory and actionable, to simply repost it without context or something, I think you have liability.

Robert Clarida: All right, I think we have run out time for questions. We've hit the witching hour, so are we going to have a break now. Thank you.