

Symposium: Digital Archives: Navigating the Legal Shoals

Roundtable: How Do You Make a Decision When the Legal Answer is “Maybe”?

June M. Besek (Moderator): OK, we are going to start our final panel of the day. We wanted to conclude the day by focusing on how you move forward and make a decision when the legal answer is unclear, as it often is. We’ve touched on this throughout the day; I know that Eric talked about it a little bit on his panel and everybody alluded to it at various points. How do you make a decision? How can you move forward on some level if you’re not absolutely certain of where you stand as a legal matter?

So, we are fortunate to have with us a distinguished group of panelists with a wide range of backgrounds and perspectives. Kenny Crews should be familiar to you by now. In his capacity as head of the Copyright Advisory Office here, he handles tricky issues virtually every day. Michele Hiltzik is the Assistant Director and Head of Reference at the Rockefeller Archive Center, where she has worked since 1991. For fifteen years she has had the primary responsibility for managing the Archive Center’s collection of over 750,000 photographic images. Mary Rasenberger you know; she was one of our speakers this morning. David Rose is the archivist of the March of Dimes at the National Office in White Plains. He oversees the preservation and organization of the documents, photographs and audiovisual materials of the March of Dimes Archives. And then, last but not least, on my left and your right, is Robert Sink, who is the Chief of Archive and Library Services at the Center for Jewish History—or I really should say was, I guess, because he retired effective yesterday or today. I know your retirement party was last night; so he’s on the cusp of retirement. But fortunately he came today to share his expertise with us. Prior to working at the Center for Jewish History, he served for twenty years at the New York Public Library, where he created the New York Public Library archives; and he also teaches in the archives program in NYU’s history department.

So, I want to start by asking Kenny to sort of let me count the ways. Would you talk a little bit about the various reasons for things for which the legal answer isn’t clear? Because it also sheds some light on how you address the risk and minimize it.

Kenneth Crews: Absolutely. Thank you, June, by the way, and thanks to everybody again, this is very exciting—I know that a lot of the panelists will have a lot of different reactions on how they deal with uncertainty. But we’ve used words like “uncertainty”—“maybe” is the name of the panel—“clarity,” “absolutely sure”

and all these different expressions. There should only be one thing that's absolutely clear, and that is that nothing is absolutely clear. And that's really come through all day, all day long. And so, my thinking is: how do we define "maybe"? Because we have really seen many different types of ways that "maybe" arises in our situation as we apply the law to our different types of works.

I've identified at least seven, if my count stays firm here, and you can add more to it. But they start with something as straightforward as one: don't know the law. How do we deal with that, when we just don't know the law? Or two: the law is unclear. And we've seen many instances of that: all this talk about 1972 sound recordings. So, we haven't even addressed that yet, and when we do it will still be unclear. And three: we don't have all the facts necessary to apply the law. This is going to happen often. A simple example is: who owns the copyright? Is it mine or is it a work for hire? Well, for you to answer that you need to know my private employment status and you don't have the right to know that. And if 100 years have gone by, those records are gone anyway. And so, you flat out don't have the facts. Or four: you can't address the many layers of law. Maybe you're just exhausted. How many more layers of legal issues can we throw on? Five, I think: the holder of the legal rights is not at all clear. And we've alluded to that. How do you find somebody? How do you identify somebody? Or even when somebody says, "I have the rights; I'll gladly give you permission." Do you believe them? Do you really believe them? Because there are a lot of people out there selling the Brooklyn Bridge. Do you believe them when they say, "I have the rights; pay me money?"

And, I think, sixth: international law, as Jane talked about this morning. When we go on the Web, we inherently become—Bob's comments in the last panel almost got us to saying this—we're really international publishing houses when we go on the Web. And so, we've transformed ourselves in many ways into this new kind of entity with new kinds of obligations. And then, I think, seventh, if I'm counting correctly: uncertainty and "maybe" will also arise when our agreements—the very things that were supposed to create clarity—actually create more confusion. A lot of our agreements are a mess. The very same things that were supposed to say, "This will clarify: you have this, I have that," actually don't do a very good job. And in our field of interviews and archives and collections, a lot of the agreements that we have a chance to see maybe made sense to somebody when they were there on location in 1970 writing those words, but when we look at it decades later those words don't mean much to us anymore. And it's not clear what you meant by that. And so, a lot of our agreements are themselves a mess. So, how do we define "maybe"? How do we define the lack of clarity? There are many ways that we have lack of clarity. So, in that environment, I'll hand it over back to June and the panel to say, "Help!"

June M. Besek: That's great. You got out of that easy. You raised the questions; everybody else has to give the answers. I have to say that when I put this question to the panel, and we were kind of talking it over by email beforehand, I got an immediate answer from Michele about what you do when the answer is "maybe," and her answer was, "It depends." And I went back to my list because I

thought, “Is Michele a lawyer?” because that’s such a lawyer’s response. So, in any case, maybe you could talk a little bit about that because, just because the answer’s “maybe” doesn’t mean you have to come to a complete standstill. So, where do you go?

Michele Hiltzik:* OK, so you took my punch line. But yeah, it depends. And as an archivist, it depends on who’s requesting the material. How will it be used? How much information do I even have about the items that are being requested? And who is requesting the material? Is it a donor? Is it a journalist? A professor? Is it a history day student? They’re, you know, fifth, fourth and sixth grade, you know? What are they going to do with it? But now our history day students are coming. They taped me interviewing them, providing them with information. That is their project. It’s not the typing; it’s not the writing; it’s actually just an interview. And what are they going to do with this? Are they going to put it out there on the Web? And is this going to be something that’s on television, DVD or in publication? You know, the archivists in the audience are like, “Yeah, I know.” Is this something that is just for personal use? Is it just a picture that they want to frame because this was somebody who meant a lot to them, for whatever their interest is, and they just want this photo for their house? And do I trust them? Is this really what they’re going to use it for? And there’s also the question of how much information—I’m thinking of photographs mainly, because that’s what I dealt with for so long—how much information do I have about it? If I have the information about a photographer, do I know where the photographer is now, where the estate is now or what the circumstances are? So, I provide them with that information, but will they actually follow through? Will they look it up? You know, I put it in there and you have to go and you have to do the search. You know, I’ll provide you with what I have, but sometimes it’s not much, and sometimes it’s firms that don’t exist anymore, that have been bought and sold multiple times. So yeah, it depends.

And then one of the things that I said in my email is that this is all risk management. And my answer is, “Can I sleep at night when I provide this stuff?” And it was sort of a line that I heard at one of my early copyright things because it was an issue. I like things black and white, and copyright is shades of gray and maybe some colors and other three dimensional things thrown in there. And how do you work with this? And at the Archive Center right now we don’t have much up on the Web. We have our website. Do we have our collections up? Not yet, but we’re really almost there. We’re *this* close. We have a digital lab; we’re about to get started and we’re about to put this stuff up there. We want to make sure that we do it right.

June Besek: I think different organizations have different ways of assessing risk and some are willing to undertake a little more risk, depending on what their missions are and what their materials are. So, I want to ask maybe if you don’t mind starting, David, on the March of Dimes and what considerations go into your

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decision about whether and how to use particular materials.

David Rose:^{**} Well, I sit in the interesting position of being aligned with strategic marketing and media relations as an archivist, which I suppose is very peculiar, but it seems that there's quite a lot of fluidity in terms of licensing and the contracts and those instruments that I use in order to license—especially photographs, but also films and other audiovisual materials. And I have normally taken the very sympathetic position of sympathy with the researcher, really. In terms of trying to put myself in his or her shoes in order to see what needs to be accomplished in terms of any of those transactions. I too, by the way, am beset by National History Day projects, and I too have been interviewed and videotaped on a number of occasions, and I assume all of those enthusiastic junior high and high school students that come to me are innocent in their intentions with the use of our material.

But in terms of the concentration on understanding publicity, I suppose one has to understand just a bit about the March of Dimes.

We're interested in—well, of course our mission now is the prevention of birth defects and prematurity, and we have a mandate to really get that information out in every public venue that we can, not just for fundraising but for publicity purposes, and hence, archives and strategic marketing. So, it comes to the point where, while I am very sympathetic with the interests of the researcher, if there are critical issues, I have a legal department at my side who is very risk averse and yet, I have a lot of latitude in terms of the usages for the photographs and the responses to requesters who come to me, whether it be for a publication, a book publication, a Web use or a National History Day project, to really try to evaluate what they're after and to satisfy their request.

June M. Besek: Thanks. And now I would like to ask Bob to talk a little bit because I know you have operated in an area where some of the issues are even more complicated, perhaps, than others. And so, talk about what things go through your mind in assessing risk and how you deal with it.

Robert Sink:^{***} I guess that if the answer from the lawyers really is “Maybe,” or “It depends” or “I don't know,” I think that gives us great room for latitude. I'm not usually an advocate of macho behavior, but I've always been struck by profiles in *The New York Times* business section of aggressive business leaders for whom sort of a typical quote might be: “Well, I just act. I'd much rather ask for forgiveness after the fact than ask for permission before the fact.” And I actually would advocate that for us, when the position is maybe and the lawyers are uncertain—because I think if the lawyers are uncertain, in many cases that implies that the risk is low because lawyers are very quick to tell us if the risk is high. And I think archivists can sort out instances where the risk can be made and we can moderate the risk so it's even lower. So, I would act differently digitizing and

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^{***} Robert Sink is Chief of Archive & Library Services at the Center for Jewish History and also works as an archival educator and speaker.

posting a collection of correspondence from the 1920s maybe, because they have no commercial value and I doubt we're going to be sued. But I would not do that with a play from the 1920s, perhaps, or something that could have real commercial value because its commercial value gives lawyers and rights holders the incentives to sue. No one is going to get rich suing archives. Unfortunately, that's not our economic model.

So, I think we can moderate the risk by sorting out by type of material; and I think we can moderate the risk by trying to determine whether it's possible to identify the rights holders. In many cases in archives it's impossible, as has been talked about today. So, I think we put up something. We should want to have contact with the rights holders, and so on our digital asset management systems we should have a way for the rights holders or those who claim to hold the rights to contact us. And I think in most cases that builds a connection to the repository, with potential future donations, or monetary donations or just good will. And so, I think we've all used and heard many times today that we do a risk assessment. I think in this situation of "maybe," we should do an opportunity assessment.

June M. Besek: OK. Mary, I wonder if you could talk. I know you've done a lot of advising of libraries and archives and I wondered if you could talk about this issue of risk assessment and what kinds of things you tell them that they should be thinking about.

Mary Rasenberger: Thanks, June. Well, the risk assessment is something that, as you've heard from others, is a copyright law we do every day. As Michele said, there's really no black and white. Rarely are we able to give a client an answer "Yes" or "No," "Sure, go ahead" or "No." And I sometimes put my toes into trademark law, and I think that that's true there, too: very rarely black and white. So, there's sort of what I sometimes call a two-part analysis, but it's really a four-part analysis that I take my clients through whenever it's one of these "maybe" questions. Because the answer is never just in the legal analysis, OK? That's only the beginning of the assessment.

So, the first part is: what's the pure legal analysis, you know, under fair use? You know, obviously that's the part that I can do really well, you know; all us lawyers can. You walk through the four factors, you know all the cases, you can predict with a certain amount of certainty, though never full certainty, how a court should come out. But I always make that clarification, too. How courts *should* come out is not necessarily, for instance in fair use, how they will come out. So, you also have to look at which court and circuit you are in. I won't go into details on that, but we even know the judge when we have litigation—we get to know the judge pretty well. So, there are a lot of facts that go into that.

Then, the second analysis is—and I will also repeat something Kenny said—is that often, you don't have all the facts, you know, so you might need to get more facts. There might be a lot of assumptions that go into that legal analysis if you can't get all the facts. The second part of the analysis is: what's the chance of getting sued here, or of incurring any liability? And that's often just as important as the legal analysis, and there are a lot of different factors that go into that: how litigious—I think somebody mentioned earlier—is the rights holder? Do they want

this use widely publicized? Is it the March of Dimes? Is this something where they want you to make the use? Or, I recently had somebody who wanted to have some short stories. He wanted to call them “Barnacle Bob,” and I thought, “Ooh,” you know? They’re kids stories. I don’t think it would infringe SpongeBob given all the different facts, but it was just a little too close given that it’s SpongeBob and that it’s this huge merchandising conglomeration. It’s the type of use for which I think people have mentioned all these factors before. Is it a little use? Is anyone even going to know about it? Is it a PowerPoint that you’re showing to your fellow employees? Is there an implied license? For a lot of material that’s put out on the Internet, there’s arguably an implied license, depending on what the use says. You have to understand the owner and his or her practices. Is there even a licensing mechanism? I mean, I think that’s one thing you have to look out for: is this a use that’s regularly licensed? In which case, that tells you that the licensor, the owner, expects you to be coming in asking for permission. There’s no way to get a license if you try and no one gets back to you because they don’t even know who to refer the question to. That’s often an indication that no one’s going to take the time to come after you.

I just wanted to say that sometimes the risk of suit can be quite low.

The analyses—the legal analysis and the risk of getting sued—do not line up often, and sometimes the risk of suit is low where you may have a low chance of prevailing. But sometimes the opposite is true; the risk can be high of having someone sue you, even if you feel really comfortable with the use. And I maybe later can give you some examples of that, but let me just mention that the third analysis is the client’s stomach for risk, and we’ve heard about that from Bob, I think. You know, there are some entities that for a number of reasons don’t want to take any risk. I know from my time at the Library of Congress, they feel that, particularly having the Copyright Office and being the national library, they don’t want to seem like they’re not following copyright law. But there are other entities that want to push, and that’s something you can help walk the clients through, but you can’t make that decision for them. And then the fourth thing is risk minimization. After you’ve done all your analysis, you try to figure out how to minimize risk.

June M. Besek: I Just want to pick up on that because I, early in my practice, had a client that was very risk adverse, so whenever anything would come up the question wasn’t “Will we win if somebody sues us?” but “We don’t want to be sued at all, so we want to stay so far on one side of the line.” That’s not usually what people want to do, but in this particular situation that is what they wanted to do and that means you have to be very, very conservative. And I think in many respects this isn’t consistent with the mission that many of you all have, but as lawyers we have to be responsive to what our particular clients want at any given time.

I guess, let’s pick up on Mary’s last point. I would like to ask everybody to think about situations they’ve had where they faced particular risks and what they’ve done to minimize the risk. And if you could give examples—you may not be able to give names—but just sort of descriptive examples of the ways that you

have tried to fulfill your mission and respond to a particular scholar's needs and respond to a particular request, but done it in a way that you managed to make yourself more comfortable about doing it. I don't know, Kenny, if you might start that?

Kenneth Crews: Yeah, let me pick up on something that we've referenced all day long in a few ways: this whole notice and takedown system.¹ You know, the way that that's meant to apply is—it really is meant to apply and is being used by organizations like YouTube and Flickr, where it's the members of the public that are posting. It's not Flickr that's posting, it's not YouTube that's posting, it's the users. Then they set up a system where they designate an agent.² If somebody out there says, "Hey, that's my picture, that's my video," send a notification to that agent for YouTube, for example, and then YouTube takes it down and asks questions later. That's a very cursory form of the system.³ So, it's a notice and takedown intended to allow efforts like Flickr and YouTube to blossom and protect those organizations from liability, not to protect the users. But hey, you know, you're the million users out there. The chance of somebody going after you is pretty small. You don't have the deep pockets; there are a million more behind you, wherever you came from, and so on. So, it's created this sort of very different equilibrium of "post and takedown and ask questions later." And frankly, it's worked pretty well, better than I ever expected going into the law.

And so, what I've seen—and you can find examples: HathiTrust, The Library of Congress, the Internet Archive. They don't qualify for this for most of their work because they are the ones doing the posting. And yet, they're imitating the structure. They're saying—they may or may not be saying this, but it's kind of like they're saying it—"Let's just pretend like the law applies to us; let's act as if it does. Let's create an agent; let's create a set of instructions and if you see something notify us and we'll investigate and remove as appropriate." And so, it's pretending like the law applies and creating a way for rather efficiently removing the stuff that is problematic. And so, we're seeing a pretty good system that's meant to apply in one arena being borrowed in another arena and being used to create another kind of working equilibrium. And the problems so far seem to just be going away at that stage.

Mary Rasenberger: Just to respond first to something Kenny said about the notice and takedown. I helped draft the policy for the Web preservation at the Library, which was the notice and takedown. And you know it wasn't modeled on § 512—what you're referring to—the law.⁴ But really, it was really just a risk-minimization tool and in part it was from that we learn from experience and namely from the experience of the Internet Archive. When did the Internet Archive start?

1. See 17 U.S.C. § 512(c) (2006) (requiring a service provider to remove or block access to materials posted on its system when it receives notice of copyright infringement).

2. See 17 U.S.C. § 512(c)(2) ("The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement.").

3. See *id.* § 512(c).

4. *Id.*

Way back? Maybe '95, '96?

Kenneth Crews: It feels like forever ago.

Mary Rasenberger: Yeah, they started way back and this was Brewster Kahle's idea. He thought:

Well, I think no one's going to care. Most people aren't going to care if I'm preserving their websites because they're not—nobody else is. So, most of them are going to thank me. So I'll just do it, but I'll make sure they know that I'll take it down if they want me to.

By the time we were formulating a policy for the Library, he'd been doing it a long time with very, very few problems. So, the Library conservatively adopted—you know, wasn't putting most stuff online, although some certain collections had made an analysis for that. But that idea was that, you know—and this was I should say after one of the first Web archiving projects that they'd done. They spent something like 1,600 hours clearing just one project with a fifty percent response rate. So, clearly trying to get clearances was not the way to go. So, you know it's basically not even a takedown policy; it's a "do not crawl." They sent out a crawler with a note saying, "We're going to crawl you. We're the Library of Congress. Let us know if you don't want us to." They've gotten a lot of responses of "Yay! This is great; someone's saving my website." So, I think that's very, very good. It's been a very, very useful tool that's been used in a lot of places online.

June M. Besek: Let me go back to my earlier question and ask you, Bob, have there been instances where you have made some changes to how you were going to use something in order to minimize the risk, but still make it available?

Robert Sink: To change it—you mean the look of it or the way we present it?

June M. Besek: In any way or the scope of the use. I mean, there are a lot of ways you could confront the risk and try to minimize it.

Robert Sink: Scope of use. I'm leery of an approach that judges—that gives too much weight to judging the use of the material. I think that's very common. Peter was pointing out this morning how the *Code of Ethics* of the Society of American Archivists sometimes makes our response to copyright issues over-rigid, but the *Code of Ethics* also says that we should not discriminate among users.⁵ If it's out there, it's out there. So, I think that's something we have to consider. And I think I would put myself in an awkward position if I say, "Well, I'll copy it for you and not for you." So, that's something I would try to avoid. Also, I would—if I want to advocate being aggressive putting things up, I would be aggressive in taking things down. Anytime anybody complains on a copyright issue that sounds legitimate and not extortion, I would take it down and try to settle it out. So yeah, I think take those kinds of approaches. Somebody just mentioned Flickr also, and we've been contributing images to Flickr and the Center was just accepted for the Commons. And we had 5,000 hits, I think, the first day, which was twenty times more than we'd ever had before. I can't think of many things the Center's ever done that's attracted 5,000 people. So that's an opportunity risk that was worth it.

5. SAA Council Handbook: *Code of Ethics for Archivists*, SOC'Y OF AM. ARCHIVISTS, http://www.archivists.org/governance/handbook/app_ethics.asp (last visited Sept. 20, 2010).

June M. Besek: David, I want to ask you, I guess, kind of a compound question. One, that same question, which is: are there specific examples you could give where you have altered what you were going to make available or how you made it available in order to minimize the risk? And I guess the other related question is: when you're assessing risk are there some things that are kind of big red flashing lights that you definitely wouldn't do and some things that you're willing to absorb some risk?

David Rose: That's an interesting question in terms of risk management of the legacy of iconic images of Hollywood stars, for instance. The March of Dimes archives is fascinating to me because it's not only a repository of science and medicine but of a lot of very famous people in the entertainment industry and American history, from Louis Armstrong to Frank Sinatra to every U.S. President since FDR. And I'll give you two cases actually that are contrasting in this way. One of the iconic images that I deal with constantly is the image of Jonas Salk looking at a rack of test tubes at the virus research lab at the University of Pennsylvania. And it's a much-requested image of the hundreds of images that we have of Jonas Salk, who of course developed the first vaccine against polio. We've worked quite closely with the Salk family in recent years just in terms of trying to come to grips with not the issue of copyright so much but the issue of publicity rights. The Salk family does not want Jonas Salk's image to appear on T-shirts and birthday cakes and we respect that and agree with that. It was really not that difficult of a problem to deal with because we integrate our efforts both from the corporate side (or the foundation side) to license this particular image carefully, and the interest of the Salk family. So, we coordinate our efforts on that, and as a matter of fact our licensing instrument was changed simply to include notification to any user about the need to inquire about publicity rights. And that's something that we felt—our legal department felt—that it wasn't necessary for us to pursue that and track that down to the last dot over the "i." But as long as we're notifying people of the need to do that when they request images that are March of Dimes copyright, we're living up to a certain responsibility with regard to those particular rights.

Contrast that with another popular image of a star that will remain nameless, but we've used it for many years, reproduced it in many different scenarios, licensed it without problem and the estate of this particular individual contacted us to register a complaint that they hadn't been notified that a national use of this particular image was about to occur. They had no quarrel with our holding the copyright over the image; they simply wanted notification. Well, when I relayed that information to our legal department that set it into a paroxysm really, and unfortunately the image was embargoed, which cut down slightly on our revenue of that particular image. But at the same time, even though I have to respond to a requester who is interested in that image of that particular star that it's embargoed and I'm sorry we can't license it, I use it regularly when the March of Dimes chapters all over the United States call me for this particular iconic photograph. And we see no problem with that, even if it's going to be used in a fundraising scenario in a local fundraiser in a community somewhere in the United States. And that's really kind of an

exercise or an illustration in contrasting ways in which these iconic photos and their licensing plays out.

May I add a third? There's a family of another very illustrious star of days gone by who has contacted us to let us know that we don't use his image enough, but there's nothing illegal with that, so that's just an irritation.

June M. Besek: One of the things I want to go back to, because it really brought it to my mind when you were talking, is: when I was talking about use earlier, I was really thinking of use by the archives. And I wondered if—basically how you make things available and what your risk assessment might suggest about these various things. On one level, you might make it available to a researcher at the location of your archives. On another level, you might make it available to a researcher remotely but in a one-to-one sort of situation where you might fax or send them a copy or make it available on a website, but only one where they had a particular I.D. to get in and you just put it up there like that. You might make something available on a website that is available to registered researchers, so there's a bunch of material that's available but you have to register. And then the broadest would be making things available to anyone who might come to your site and see it that way. Obviously, all of these things have various levels of risk, and I wondered if at this point: how are you making things available on any of those levels and how does the risk assessment affect your plans for the future to make things available? Maybe, Michele, you mentioned starting off thinking about digitizing things. And I know that's just the first step.

Michele Hiltzik: Right now we are used to use the phrase “qualified researcher,” but like I said in my little introductory thing, we take anybody as a qualified researcher from the history day students to genealogists, to historians and journalists. And so, in the reading room, yes, they have access to it; they have access to see the material. For a duplicate copy, if they're requesting that, then I provide the information of who the photographer is, if I have that information. We have some collections where there are restrictions that if it's an image of a living Rockefeller family member then there's some hoops that I have to jump through before they can actually get a print of the image. That's something that's in our agreement with the family. But for outside researchers if it's a one-to-one it's basically the same rules, but then it also comes into play. We would like to set up, and we're starting plans for setting up, something like a greatest hits, at least for the beginning—sort of that boutique collection of greatest hits; maybe give some background information. But these are the images from—we have many collections at the Archive Center, and try to hit them up and get the images. At first we would say, “Oh, 100 images.” And it's like, well, I could do 100 images from almost every collection and we'll still have thousands left, or hundreds of thousands left for some of them. So, we're trying to get it out there and get people to use the stuff. Now, are there times when we say, “Take a step back”? And are there some uses where we've said no? Yes, but that's usually—there was some restriction with the image itself when it first came in and we just passed that information along. We try to work with the researcher—or at least that's the way I look at it. I want to help them as much, but I also want to protect the donor too.

So, you put on both hats and you juggle back and forth.

June M. Besek: I want to ask our lawyers here, because this came up in an earlier panel and I'd like to get your views too. But I hear a lot of concern from archives about their liability for downstream uses. So, somebody comes into your reading room and they want a copy of something. What do you do, what do you have to do, to protect yourself at that moment and in the future?

Mary Rasenberger: I want to make sure I understand the scenario. The user comes in and what do they say they want it for? Or they just say, "I want it"?

June M. Besek: What might they say they want it for?

Michele Hiltzik: It could be for—you know they're just using it for a PowerPoint; or they're just using it for this journal article; or it's a newspaper that's just using it this one time for a newspaper article. And then, lo and behold, you find that image in that newspaper a different time and they never ask permission—they signed an agreement for one-time use and it was for that specific purpose for the original time.

Mary Rasenberger: So, in that latter scenario: well, first for the library or the archives to be liable for the downstream use, we're talking about contributory liability here. They're not making the use—the library archives is not making the use itself, so it wouldn't be responsible for direct infringement. So I think, Bob, somebody mentioned earlier, maybe it was Eric, what are the factors for contributory liability? There wouldn't be vicarious here, assuming there's not financial benefit. Contributory: you have to be materially contributing towards the infringement or inducing it with knowledge and intent. I think the material contribution is there because you're providing it to the user. But there has to be knowledge of what the use ultimately is going to be. If you have them sign an agreement saying they're only going to make this one use, obviously I think that fully protects you. If you—you know, they don't tell you they're going to be posting it on the Internet but you know, or should know or there's some circumstances—

June M. Besek: The last five times you—

Mary Rasenberger: Yeah, they've done it before, or you know they're a big blog or something. There may be reasons for you to know that they are going to be using it for infringing purposes in which case there might be—yeah, there's a risk of contributory liability.

Kenneth Crews: And I would say we're honestly a little bit—and I mean "we" in the most generic sense, probably all of us—we're all a little bit mixed up about this because, you know, part of our ethics says, "No discrimination," part of our ethics will say, "Don't ask people why they want this material, maybe for some private personal use, you just don't even ask." And then the law—at least for § 108, which allows the library to make the copy for the user—if we're the ones making the copy, then part of it is it's this obtuse language about how we would have no knowledge that it's for reasons other than private studying research, which means not knowing is a good thing.⁶ It's the "don't ask, don't tell" provision of the

6. 17 U.S.C. § 108 (2006).

Copyright Act.⁷ But sometimes you do know, and then how are you supposed to respond? And maybe, unless you think there's something really wrong with what they're doing, you don't respond at all. And then how do you know it's wrong? That's a legal question. How do you know it's wrong? Are we supposed to be—if you're the archivist, are you supposed to be in the business of assessing the rightness and wrongness of your user's activities? I'm worried about that.

David Rose: There's also the simple element of trust. I have—I'm in charge of a small archive and I'm a solo archivist, so I'm dealing with everything from 300 boxes being pulled off site to add to my backlog, and impending digitization. But the request that I handle can either usually be dealt with by a legal instrument of a letter of agreement for licensing a photo, or if it's a researcher that's coming to visit me, I may actually—that element of trust I think comes into play more often than not. So, I think it's important to take that into consideration as a human being, as an archivist, and not dwell on the legal niceties of every case and all of the downstream dangers that could happen.

There's actually another contrasting example that I'll give here that doesn't originate from my service as an archivist, to what's out there on the Web. One day a volunteer, or perhaps it was an employee of the March of Dimes in another chapter of a western state, called me and said that there was a volunteer who gave a talk saying that John Bartleby was the founder of the March of Dimes, or the National Foundation of Infantile Paralysis as it was then called. How did he possibly make that mistake and get that information, because it was Franklin Delano Roosevelt who founded the foundation? He found it on Wikipedia.⁸ And we found that our website on Wikipedia was being systematically and periodically sabotaged.⁹ So, now we have to be aware of that kind of defamation in a certain way that doesn't stem from any usage of the archives or even any contact of the archives, but simply a deliberate misrepresentation of our history, and that's suddenly on my plate to monitor.

June M. Besek: There are a few minutes left and I wondered if the audience has questions. I have more questions for the group here, but if any of you have questions, I'd like to give you a chance before we close to ask questions about how you assess risk and how you respond to risk. So, any questions from the audience?

Question: Something that has not been mentioned at all today is the way you allow a user within the reading room to take his own, his or her own photograph of something that he or she is looking at. Of course, if you don't allow photography there's no issue. But I'd like to hear something about the way you do allow photography and how you feel you need to protect yourself or not protect yourself at all.

June M. Besek: Let me just repeat because you didn't have the mic on and we're taping it. So, the question is: what do you do in a situation where you allow the user to take his or her own photograph, or they have their own photographic

7. *Id.*

8. WIKIPEDIA, <http://www.wikipedia.org> (last visited Oct. 8, 2010).

9. *Id.*

equipment, and what do you need to do to protect yourself in that circumstance?

Mary Rasenberger: This was actually an issue that we discussed quite a bit in the Section 108 Study Group.¹⁰ This is the unsupervised reproduction equipment. In the old days it was photocopiers, and the rule in § 108 is that you're not liable—I think it's in (f)—the library's not liable for photocopying by users as long as it posts a notice with language that was provided by the Registrar basically explaining that users have to follow copyright law.¹¹

Now, what one of the things that the study group looked at: well, of course, now people aren't just going to use photocopiers. They're using their cell phones to take pictures. They've got handheld scanners. There's all different ways they can copy. Some of that copying's going to be fair use, you know. So, it doesn't make sense to have a rule saying you can't let—or it may fall under other exceptions—you can't have a blanket rule that they can't do that. I think, you know, one of the proposals that was introduced at one point was, you know, you police people when they come in, you make sure they don't bring any scanners in and that got booed down pretty quickly. But, you know, so one of the proposals was that, you just put a notice up someplace visibly in the reading room that says—that basically is the same as the notice that you'd put on a photocopier, just giving the users a warning that copyright laws do apply to these materials, and use them in a proper fashion.

Question: You're not saying that you can't prohibit it?

Mary Rasenberger: Well, you could prohibit it, sure. Museums do that all the time. They don't let you take pictures of the artworks in the rooms because they want to be able to be the only ones that have the right to license the rights, even though they don't own the copyright in the works. So, that is a practice that is done and you could do it, but it's a contractual, not a copyright, issue.

Kenneth Crews: And let me add to that. Let me take a little bit of a different point of view on this. You can have a policy that prohibits it, but it probably won't work. You know, we're in a YouTube generation. You know, I can bring in a camera that's this small and snap pictures of that content. And what we're finding more and more and more is that the museums that have traditionally been some of the most rigorous about no cameras and no photography, they're just saying, "Fine, use your cameras." You know, we're really in an era of rapid change where I think as you walk down the street you have to assume you're being videotaped, as you're in the archive you have to assume people are taking pictures and when I'm teaching my class I have to assume I'm being recorded. I can say, "No recording," but every

10. 17 U.S.C. § 108. "The purpose of the Section 108 Study Group is to conduct a reexamination of the exceptions and limitations applicable to libraries and archives under the Copyright Act, specifically in light of digital technologies. The group will study how section 108 of the Copyright Act may need to be amended to address the relevant issues and concerns of libraries and archives, as well as creators and other copyright holders. The group will provide findings and recommendations on how to revise the copyright law in order to ensure an appropriate balance among the interests of creators and other copyright holders, libraries and archives in a manner that best serves the national interest." SECTION 108 STUDY GROUP, THE SECTION 108 STUDY GROUP REPORT, at ii (2008), *available at* <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>.

11. 17 U.S.C. § 108(f)(1).

laptop has a recorder on it. And so, you just have to assume it. You can make all the policy you want but you probably can't enforce it.

June M. Besek: Other questions? Please.

Question: Well, I just wanted to add on this that the good folks at OCLC just had a Blue-ribbon panel that—it has published a report on the use of cameras in reading rooms that discusses all of the issues and examines the practice in the archival profession and it's a really terrific place to start with these discussions, to see what makes sense now.¹²

Question: Can you talk a little bit about the knowledge standard under the DMCA?¹³ We talked about, sort of, archives sometimes piggy backing off of that provision and relying on this "takedown notice" idea. But there's also a knowledge element. So, if you do everything you're supposed to do, you have your terms and conditions that tell people they're not allowed to post. Let's say you have an archive and you're letting people post onto the archive also, in addition to your own materials. So, you've got your terms and conditions of use. You agree to takedown. And at some point, when you start seeing a certain type of content being posted on your site, or you get enough takedown notices, at some point do you have knowledge because you should have had knowledge?

Mary Rasenberger: There's a couple of different issues that you just raised. Let me try to untangle them. We were talking about a couple of different things with takedown. One is the DMCA provisions in § 512, which are safe harbors for ISPs from liability.¹⁴ OK, and there are a number of different conditions that the ISP has to fulfill.¹⁵ Those are for those—different definitions of those, (a) through (d); they're different types of ISPs.¹⁶ One of them is storing information, or hosting.¹⁷ Typically, an archives website is not going to be considered an ISP in that sense because they're not hosting third-party content. Now you talked about what other people are posting on your site, so it's possible that you're talking about the kind of site that might qualify as an ISP, at least under § 512(c).¹⁸ But let me take those separately.

Then there's the practice we were talking about, which a lot of archives are starting to use, which is—this is usually stuff that's in that low risk category. You don't think anyone's going to mind if you post it. There's usually been an assessment made about that. But in case somebody does mind, you give them the opportunity to tell you, and you take it down. OK, that is—that's not under the law; that's a matter of practice to reduce your risk, OK? And, you know, ninety-nine percent of the time, that's the result. They don't see you; they're happy if you just take it down.

12. LISA MILLER & STEVEN K. GALBRAITH, OCLC RESEARCH, "CAPTURE AND RELEASE": DIGITAL CAMERAS IN THE READING ROOM (2010).

13. Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512(c)(1)(A).

14. *Id.* § 512.

15. *See id.*

16. *See id.* § 512(a)–(d).

17. *Id.* § 512(c).

18. *Id.*

So, knowledge there doesn't really come into play. Under § 512, knowledge is one of the factors, OK?¹⁹ So you can—as an ISP you cannot avail yourself of the safe harbor if you have knowledge of the infringing activity, or if there are facts from which the infringement is apparent. So, you can't put your head in the sand. As someone said earlier, you know, the terminology used in the cases is that if there are red flags that there's infringement; you're not off the hook. But the *YouTube* case—*Viacom, YouTube* case—that is one of the issues pending in the Second Circuit, is what actually constitutes, not actual knowledge, but reason to know.²⁰ And then, in the Ninth Circuit, on appeal is the *Veoh* case—the *Universal Music, Veoh* case—and in that case, the lower court had a very high standard of what constituted reason to know and held that *Veoh* didn't have reason to know because, basically it hadn't been provided notice of the actual infringing content.²¹ But I think it's an open issue. That case is on appeal, and we'll see what happens in the *Viacom* case.²²

Question: I'd just like to ask a general question and to make a statement. It's a little off topic of copyright. But as an archivist who's been in the field for the last thirty years, I think this is the first time I've been in a room with this many archivists and this many lawyers or future lawyers, and I find it extremely helpful, extremely informative. And I would just like to use this opportunity to ask one question of the lawyers in the room, which is: one of the major intellectual collections that is missing from our society are the papers from law firms. And this is a whole other session we could get into, but the attorney-client privilege that goes on for hundreds of years maybe needs to be readdressed. I know of a firm here in New York that has amazing papers from 1799 that are not available to researchers, to historians. So I'm just wondering if the lawyers in the room ever think that their collections might go online?

Mary Rasenberger: Well, let me just respond by saying that we probably have the foremost expert in that area in the room. I'm going to put David Kirsch on the spot, from University of Maryland. He has been leading a project, which is one of the NDIIPP projects at the Library of Congress on just this. He has the digital files from the now defunct Brobeck firm. David, do you want to say a little bit about that and some of the challenges dealing with the attorney-client privilege?

David Kirsch: Sure, I'm happy to. Well, first, I'm hesitant to say, to admit to being an expert on anything having to do with law in a room full of lawyers; I should know better. But I think the problem raised is a very good one. And I think part of the issue is that, as the clients of law firms become more technologically sophisticated and save less and less as part of the document retention policy

19. *Id.* § 512(c)(1)(A).

20. *Viacom Int'l Inc. v. YouTube, Inc.*, No. 07 Civ. 2103, 2010 WL 2532404, at *10 (S.D.N.Y. June 23, 2010) (holding that defendants fell within the scope of the DMCA's safe harbor and that general knowledge that infringement is prevalent does not impose a duty on the service provider to monitor or search its service for infringements).

21. *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 665 F. Supp. 2d 1099, 1112–13 (C.D. Cal. 2009).

22. *Veoh*, 665 F. Supp. 2d at 1099; *Viacom*, 2010 WL 2532404, at *1.

adoption diffuses, that in a lot of ways the law firms may be the last repositories in some sense for some of these records that we admit do have potential historic interest. I think the problem with our records—we were able to save our records, Brobeck's records, Brobeck's clients' records—what made them salvageable was that we were able to identify quite quickly after the firm announced its intention to liquidate that there was historic value. They represented particular firms that had since gone out of business, the history of which would be of great interest to the scholars of the .com era and, you know, anyone interested in capitalism would want to know what happened.

And I think the problem in general is figuring out what's worth saving. We've obviously spent a lot of the Library of Congress's and your money trying to do that and we're no closer to being able to make them available for history. What we are able to do is offer them to social scientists under terms similar to those that govern the use of census records. So, under very controlled conditions, with very strong external review of what gets disclosed to protect the attorney-client confidentiality. So, I think the bigger question you raise is still open, which is: should the attorney-client privilege expire at some fixed date, you know, maybe 100 years after the copyright expires, you know, or pick your number. So, I think the larger question you're raising is a very good one. What we've done is just taken one little baby step towards saving one readily identifiable collection of evident historic interest.

Robert Sink: Before we get too self-satisfied at having caught lawyers up in an inconsistency, we need to point out that the other half of the audience, particularly those that are members of the American Library Association, also has a totally confidential approach to library records, which is inappropriate and also should have that same sort of set time period when circulation records are closed. Speaking as a former institutional archivist in the New York Public Library, having records that showed what Jews read in the Lower East Side in 1910, or what Bohemians read in the Upper East Side in 1910 or what Puerto Ricans read in the Bronx in 1920 or '30 is important historical documentation, and the American Library Association is equally at fault here for having an approach for total confidentiality and the destruction of important historical records.

Question: Now that we're getting confrontational, I thought it might be useful to say something about the roles of counsel and librarians or archivist: that counsel is there to advise, is there to tell you about the law and how it applies and to help you assess risk. But it's still the librarian or the archivist or the institution's job to decide whether it's worth doing it. You know, so is this mission essential, am I willing to assume the risk? And it really shouldn't be the legal counsel who's making the decisions, only advising. So we both have really important roles.

June M. Besek: I actually think that's a really important point. And I think as an attorney, sometimes you're put in a very difficult position because your client wants assurance. They want to hear that it's OK. And so if you say, "These are the risks," it is perfectly appropriate in many cases to go ahead despite those risks and decide you're going to absorb them. But counsel's concern is that if there is a problem, you're going to come back and say, "You told me it was OK," when what you said was there's some minimal risk. And that's particularly true when the

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problem is: yes, the other party would have the good claim, but there's a relatively minimal chance that they'll come forward. But if they do come forward, then you do undergo the possibility that there will be some liability. So I guess, for lawyers, when it's your malpractice insurance on the line, you have to be careful what you say. So, you can't say, "That's fine, go ahead; you're OK."

Mary Rasenberger: If I can just follow up on that. As outside counsel, whenever there's a situation like that where there are a lot of risks, I mean, I just insist on putting it in writing. You know, so it's documented. You know, "Here's our analysis." And it's very clear so no one can say later, "You told me it was OK." And the assumptions are there.

June M. Besek: Well, I want to thank everybody today. I would like to thank the Rockefeller Archive Center for supporting us in so many ways. I want to thank everybody at Columbia who helped out to make this conference work today. Of course, all of our speakers on this panel and throughout the day, and to all of you because I think we had some really good questions and I think that's part of what makes any conference like this effective, is getting questions and feedback from the audience. And, you know, we appreciate your staying with us the whole day and listening, and the back and forth that we've had. So, thank you all very much.