

Session 2: Section 108 Issues Other Than Mass Digitization

Moderator: Nancy Weiss, *Institute of Museum and Library Services*

Speakers:

Jonathan Band, *Jonathan Band PLLC**

Mary Minow, *Dominican University***

Eric Schwartz, *Mitchell Silberberg & Knupp LLP****

Mark Seeley, *Elsevier*****

* Jonathan Band helps shape the laws governing intellectual property and the Internet through a combination of legislative and appellate advocacy. He has represented clients with respect to the drafting of the Digital Millennium Copyright Act (DMCA), the PRO-IP Act, the Stop Online Piracy Act (SOPA), and other federal and state statutes relating to intellectual property and the Internet. Mr. Band is an adjunct professor at the Georgetown University Law Center, and has written extensively on intellectual property and the Internet, including the books *Interfaces on Trial* and *Interfaces on Trial 2.0*, and over 100 articles. Mr. Band received a B.A. in 1982 from Harvard College, and a J.D. from Yale Law School in 1985. From 1985 to 2005, Mr. Band worked at the Washington, D.C., office of Morrison & Foerster LLP, thirteen of those years as a partner. Mr. Band established his own law firm in May, 2005.

** Mary Minow is the Follett Chair at Dominican University's Graduate School of Library and Information Science where she teaches Information Policy and Digital Copyright. She is also Counsel to the Califa Group, a California library consortium that is using the Douglas County model of buying e-books. She worked with Douglas County on the Statement of Common Understanding for Purchasing Electronic Content and is an advocate of library purchasing of e-book files.

*** Eric J. Schwartz is a partner in the Intellectual Property and Technology Practice at the Washington, D.C. office of Mitchell Silberberg & Knupp LLP. A former Acting General Counsel of the United States Copyright Office and a senior legal and policy advisor to the Register of Copyrights (1988-1994), Mr. Schwartz specializes in copyright law, counseling clients from the motion picture, recording, book publishing, music publishing, and business and entertainment software industries, including individual authors, composers and other creative artists. While at the Copyright Office, Mr. Schwartz negotiated or was a part of the U.S. Government negotiating team on a variety of multilateral (WTO/TRIPS, NAFTA) and bilateral (Russia, China, Poland, etc.) copyright and trade agreements. Mr. Schwartz is an Adjunct Professor of Copyright Law at Georgetown University Law Center and Vice President (and President-elect) of the Copyright Society of the USA. He is the author of the U.S. Copyright Law Chapter in the Geller & Nimmer Treatise *International Copyright Law and Practice*.

**** Mark Seeley has been General Counsel of the Elsevier science and medical publishing since 1995, leading a team of lawyers based in Europe, the US and Singapore. He chairs the Copyright & Legal Affairs Committee of the International Association of STM Publishers, and is a member of the Association of American Publishers Copyright Committee. He is also a regular contributor to STM association papers on copyright issues and best practices guidelines for research journal publishing, and a speaker at publishing, library and legal conferences and events. Mr. Seeley is a co-author (with Lois Wasoff) of a chapter on copyright and other legal issues in academic publishing in *Academic & Professional Publishing* (Campbell, Pentz & Borthwick, Eds., September 2012). He received his B.Ph. from Thomas Jefferson College and his J.D. cum laude from Suffolk University Law School.

Nancy Weiss: Well, good morning. My name is Nancy Weiss, and I'm General Counsel of the Institute of Museum and Library Services. I'm very pleased to moderate session two of today's symposium. I'm joined here by Jonathan Band, of Jonathan Band PLLC; Eric Schwartz, who is a partner at Mitchell Silberberg & Knupp; I'm here with Mary Minow, who is the Follett Chair at Dominican University's Graduate School of Library and Information Science and also counsel to Califa, a California library consortium; and Mark Seeley, who is General Counsel of Elsevier, so we have a very experienced panel here. During this session, we'll explore section 108 issues other than mass digitization. Each panelist is going to make introductory comments about what he or she believes is the ideal framework for library exceptions. We'll then delve into some questions concerning the language and the scope of section 108. Finally, we'll open the discussion, taking questions from the audience. We've already had some very interesting questions that we can follow up on.

The Institute of Museum and Library Services is a federal agency.¹ It has responsibility for the development and implementation of policy to ensure the availability of museum, library and information services adequate to meet the essential information, education, research, economic, cultural and civic needs of the people of the United States.² The agency is authorized to advise the President, Congress and other federal agencies and offices on museum, library and information services in order to ensure the preservation and dissemination of knowledge.³ And IMLS has a special role when it comes to section 108. As the overview document in the materials prepared by Mary Rausenberger and Chris Weston reflects, one of our predecessor agencies, the National Commission on Libraries and Information Science, played an important part in informing the section 108 legislative process, and IMLS is also committed to supporting educated and informed decision making.

Copyright laws have long recognized the essential role of libraries in achieving the system's goal of encouraging creativity, innovation and learning. What not everybody knows about the Statute of Anne, enacted in 1710, is that it required the delivery, before publication, of copies of books for the use of the Royal Library, university libraries and the library belonging to the Faculty of Advocates in Edinburgh, a law library.⁴ The Statute of Anne was an act for the encouragement of learning, and libraries were recognized as a part of, and important to, this purpose. Libraries continue to be central to the knowledge ecosystem. As Maria Pallante, the Register, said earlier this morning, our country has long recognized the fundamental role of libraries in sustaining our democracy. Libraries are critical

1. *See generally About Us*, INST. OF MUSEUM & LIBRARY SERVS., http://www.imls.gov/about/legislation_and_budget.aspx (last visited April 24, 2013).

2. *See* 20 U.S.C. § 9103(c)(1) (2006).

3. *See id.* § 9103(c)(2)(A).

4. Karl-Erik Tallmo, Transcription of Statute of Anne, 1710, Part 5 of 6, HISTORY OF COPYRIGHT, <http://www.copyrighthistory.com/anne5.html> (last visited Apr. 24, 2013).

to promoting economic development, education and access to information. As we learned this morning, the Section 108 Study Group reviewed the current provisions to see whether updates were necessary to address changes in technology.⁵ A lot has occurred since the study group met. Today, we have an opportunity to once again review the provisions to help us to continue to ensure that the copyright system's goals are met through effective library exceptions. So with that, I'd like to turn to our panelists and ask them to make a few introductory comments. Jonathan Band.

Jonathan Band: Thank you very much, Nancy, and thank you all for coming today. Very briefly, I represent the Library Copyright Alliance, which includes the American Library Association, the Association of Research Libraries and the Association of College and Research Libraries, but of course the views I'm expressing today are my own. But they have a remarkable coincidence with their views. So, with respect to this whole underlying issue of 108, is it obsolete? Yes, it's obsolete. And certainly as an academic exercise, which would be appropriate here at Columbia University, we can talk about how we can update it and what would be the best way to improve it.

But as someone who's been involved in the trenches, lobbying—and I'm a registered lobbyist, and I'm not ashamed to admit it—I think that from a political point of view, reopening 108 would be not a good idea. And let me give you a few reasons why. First of all, I think it would be extremely difficult to reach any kind of agreement. We saw that just with the 108 Study Group, and that was with knowledgeable, informed people, without all the Members of Congress to bring along. And they, at the end of the day, did not reach agreement. They reached a sort of high level agreement on some issues, but on a lot of issues didn't reach agreement at all, and certainly didn't come up with statutory language other than in a couple of very narrow areas. So it would be very hard to reach agreement, and it would take a very long time if we ever did reach agreement.

Because of the nature of the political dynamic, the lobbying strength of the relative parties, the pervasive concern with the enforcement agenda and so forth, I think that the legislation that could emerge—if any legislation did emerge—could very well make libraries worse off than they are now, not better. So even though a lot of us in the library community would say that we want to do this, to make 108 work better and improve the situation of libraries, I think it could very well be counterproductive, and we could be worse off.

It would certainly be incredibly complicated—we had that question before, that Dwayne raised. As complicated as 108 is now—and it's already very hard for librarians to understand—based on when Lolly was showing her slides about the kinds of things that were being talked about, it looks like it'll be a whole lot more complicated, and so much more difficult that even Dwayne Butler's mechanic will not be able to understand how to do it. Also, I think that already, now, there are other issues, more pressing issues. As we heard, the 108 Study Group left certain very important issues off the agenda, and there are going to be even more important issues that will be off the agenda. And let me just finish: we all understand that

5. See THE SECTION 108 STUDY GRP., <http://www.section108.gov/> (last visited Apr. 24, 2013).

more pressing issues, like licensing and so forth—those are not going to be addressed. So you sort of say, what's the point of taking all this time to address it and not reach the real issues? And then at the base, what is the real problem, what is causing so much of the complexity here, at least for libraries? We all know the elephant in the room: it's copyright term. Copyright term is way too long. If you shorten copyright term, then so many of these problems would go away or be reduced, but that is, again from a political point of view, not going to happen or very unlikely to happen, especially with all our international agreements. So the real solution to the problem is already off the table.

Weiss: Okay, Jon, thank you. We'll roll up our sleeves and delve into the language of section 108, and also return to some of these broader discussions. Mark.

Mark Seeley: So, even though it's insoluble and there's no potential resolution, I still think it's worthwhile to discuss. From an Elsevier perspective—the major international publisher of academic and professional materials, part of the international company Reed Elsevier, which also includes LexisNexis—we're really publishing for the research and academic community, and our major customers are research oriented, institutional, educational libraries. So our primary interest in debates and discussions about things like section 108, and broadly about copyright matters, is to try to ensure that there continues to be a market space, even in the academic and research environment, to support investment, to support engagement, and in a corollary fashion, to make sure the corporate markets, which are not our primary markets, but which are important, continue to pay their fair share. I'm thinking of industries such as energy, pharmaceutical, chemicals and the like.

Any transition is difficult, and the transition from print to digital has been far from smooth. It's certainly difficult for legislators, I think, to contemplate what the new environment actually looks like, what it provides, what the appropriate metaphors are for past uses and past exceptions in the print environment, and what they should look like in the digital environment. I still think that the fundamental balancing interests that are discussed and mentioned in the debates on the 1976 Act are still relevant today, and they have to be thought through from the perspective of what they mean in the digital environment.

My thinking is that more focus on sector-specific approaches is the right way of thinking—if you will, a kind of “soft law” approach on many of these points. I don't think we'll really be able to address the entire range of copyright works and the entire range of archival and preservation purposes in one overarching copyright law revision. However, I do think that we could look at things on a sector-by-sector basis and come up with reasonable approaches. That does require some dialogue, and it does require actually sitting down together, but I think that's the appropriate and positive way forward. Thanks.

Weiss: Thank you. Mary?

Mary Minow: Thank you. I, too, definitely hear from the library community fears that we don't have the political muscle to make things better, and, in fact, it could get worse. However, I believe there are important changes that we need, and

the current issue that I see exploding in libraries is e-books. A combination of the bygone copyright law, bygone era, and the weak negotiating power of libraries could leave us without strong collections in the future. Talk about collection building—this is collection shrinking. The core value that libraries offer is the safety value, so that everybody doesn't have to pay to read everything. How often does an author say, "But for the library, I wouldn't have written my novel"? We need libraries for the preservation of books for the future, and e-books are important to libraries because, with more e-books in print—and many are only as e-books—where does that leave library users?

The digital environment makes possible a creative array of licensing models that are beneficial to both content owners and library users. Books disappear at the end of a two-week loan. I mean, how great is that? But relying solely on the marketplace is leaving important gaps that public policy can fill. Because at the end of the day, the library needs collections, not access. We need to be able to preserve, to do interlibrary loan and to do replacements. And without first sale, the libraries are beholden to embargoes, to missing titles completely, and a library copyright exception could make an enormous difference. For example, if a library copyright exception ensured that for every title purchased or licensed, the library had a right to make an archival copy, using the safeguards that Lolly had discussed in the last panel, we could envision a library of the future. If a library copyright exception ensured that interlibrary loans don't evaporate under licenses, then a library user, who yesterday could request a three year old book on obscure military aircraft but tomorrow cannot, because the copies are restricted and cannot move, then we risk an enormous loss of sharing resources. But a copyright law exception could ensure an interlibrary loan with a one book, one user model.

It doesn't have to be constrained by license if we have a strong enough exception. I see a future where we can have an interlibrary loan system. Right now, we have a spectrum of returnables that don't implicate copyright law, because they're print books—they come back, no issue—and then the nonreturnables, where section 108 makes provisions to allow us to make the copies.⁶ What I see in the e-book world is something I would call a super-returnable, because with the Patriot Act, it comes back after two weeks, whether they want it to or not.

Finally, I think that we could make an enormous difference if we had a copyright exception to allow us the reproduction and distribution of an entire book, if the library has determined, upon a reasonable investigation, that a copy cannot be obtained at a fair price, because we are missing titles right now, and we need help.

Weiss: And Eric?

Eric Schwartz: Thank you Nancy, and thank you to June Besek and Jane Ginsburg and all at the Kernochan Center, and to Maria Pallante and everyone at the Copyright Office for organizing this program. I look around this room and realize that I am among many colleagues who, like me, have been discussing these issues for a long time. In preparing for this talk, I found notes of mine from the early 1990s on similar programs that I had participated in when I was at the U.S.

6. 17 U.S.C. § 108 (2006).

Copyright Office.

First, the caveat: I am here speaking on my own behalf, not for any clients, or for the National Film Preservation Foundation, an organization that I helped to found in 1997 and that preserves films in cooperation with libraries and archives. I am here speaking from my experience of twenty-five years as a copyright lawyer and twenty-five years as a film preservationist and archivist, and more recently, also a sound preservationist and archivist. The film preservation organization that I helped start financially supports libraries and archives, and it focuses specifically on the preservation of and access to orphan films. Some of my colleagues here from larger institutions may scoff at the size and scope of our film organization; we have saved about 2,000 films at about 250 institutions nationwide. Those are small numbers of films compared to the other institutions here. But our experience, not our size, is what matters. In producing multi-archival DVD sets of preserved films (five sets to date, including two more DVD sets coming this year, one with the first film that Alfred Hitchcock was credited on, and with an early John Ford silent film), here is what I have learned. In clearing rights for the preserved films and underlying materials for the DVD sets, after all of these years, we have never received a dunning letter from anyone claiming that we did not have the ability to make materials accessible to the public. And the same is true for our online screening room at our website, filmpreservation.org.⁷ We have never received a takedown notice. So, clearing rights for older materials can be done. It is tedious and difficult, but it can be done.

To the topic at hand, I am here with two messages on the public purpose of section 108. Most of the speakers today are focusing on access, but let us not get ahead of ourselves. The number one priority for libraries and archives is preservation—we have to save the material first. I am looking especially to students in the audience, because it may surprise you when I say that, at present, digitization is not a preservation medium for moving images. Here is the best example of that: all of the major film studios that are shooting movies or television programs on digital media are transferring those digital materials to thirty-five millimeter film and storing those film materials in cold storage archives. The issues of preservation are not legal issues; they are money issues. The archives need money to successfully save moving image materials. And that is true for recorded sound materials as well. We can, and will today, talk about the legal issues, but in terms of the tremendous public service that libraries and archives have undertaken above all else, it is about the collection, retention and preservation of material.

On access, in the remaining time that I have left in my remarks, let me add a few things. Clearly, we are delving into not just the traditional roles of libraries and archives, but an attempt to redefine the status and role of libraries for the future. The best way, I think, to address these many complicated legal issues is to unbundle them, as is being done panel by panel in this program today. For

7. NAT'L FILM PRESERVATION FOUND., <http://www.filmpreservation.org> (last visited Apr. 24, 2013).

example, mass digitization is not the same, and does not raise the same legal or policy issues, as orphan works. And that is also true of the basic work and role of libraries and archives under section 108—to preserve and make material available to patrons. My suggestion is to break up the access issues in three ways: (1) by users; (2) by use; and (3) by the nature of the works (and that includes treating works differently based on their age or vintage). Jonathan mentioned copyright term as a hurdle. Let me mention subsection 108(h)—my contribution to section 108 was drafting that provision initially during the 1998 term extension consideration. Section 108(h) says that in the last twenty years of copyright term, qualified libraries or archives can make materials available to the public if they are not otherwise being made available by rights holders.⁸

There are three options for improving public access by libraries and archives. One is by private agreement. More material has been made available by libraries and archives in the sound area by contract in the last few years than by any other means. Two years ago, Sony Music signed an agreement with the Library of Congress to make all of its pre-1925 recordings, which comprise eighty percent of the commercial recordings of that era, publicly available for free.⁹ You can find that material now by going to what is called the “National Jukebox” online at the Library of Congress.¹⁰ A second example is the Universal Music agreement of last year. This represents the largest ever donation of recorded sound materials to the Library of Congress, including all of the “master materials” of Universal Music (from 1928 to 1948). I worked on both agreements.

The second option is changing access through legislation. And as Jonathan says—and I’ve been in the trenches; I worked ten years on Capitol Hill—it will only come by agreement of all of the parties. That is very difficult to do. I am not giving anyone news to point out that overall, today’s Congress is broken, so if it won’t work for other important national priorities, it won’t work for copyright. The only legislative solution would be if all of the parties, in sessions like this one, and one on one intensely, could work out their differences.

The third option is to change the rules of access through litigation. Here, it seems that the libraries and archives are content to allow fair use, at the moment, to dictate their activity. But pendulums swing, so what the courts are doing now will not necessarily last. And, more importantly, my work with libraries and archives tells me that what most working archivists want is certainty. If I start to respond to a question from an archivist by saying, “Fair use is fact determinative, it is very complicated, let me begin with the four factors, et cetera,” the archivists I work with say, “Stop, I cannot do it,” because the law of fair use does not make any sense to them, and it does not actually help them in a practical sense. So, in conclusion, I really do think that the certainty of a section 108 fix is something that

8. 17 U.S.C. § 108(h).

9. *Library of Congress Launches, with Sony Music Content, The National Jukebox, an Online Destination for Historical Sound Recordings*, LIBRARY OF CONG. (May 10, 2011), <http://www.loc.gov/today/pr/2011/11-087.html>.

10. *National Jukebox*, LIBRARY OF CONG., <http://www.loc.gov/jukebox/> (last visited Apr. 24, 2013).

is a better solution. It is hard work, but I think it is worth doing.

Weiss: Thank you. We've had very interesting comments. We also have a number of questions we've been asked to consider, so I'd like to review those with the panelists, and then we can respond and address some of these topics that have been raised. So rolling up our sleeves and starting in: should the section 108 exceptions be limited to libraries and archives, or should they be extended to other institutions? Eric, let's start with you.

Schwartz: I refer back to the section 108 report,¹¹ and—I am speaking on my own behalf—I am perfectly fine with adding museums. Section 108 needs clearer eligibility standards for the institutions that would qualify. It does seem to me that if we increase the number of institutions that qualify under section 108, the natural inclination of rights holders is going to be to narrow the ability of those institutions to make materials accessible. And I think that in that counterbalance, you have to be cautious to say that you want to add more institutions for the purposes of preservation and access and to fill those niches that rights holders or other institutions aren't filling. But I do worry that if you don't have strong eligibility standards for the institutions that would qualify, then you are going to have a tightening of what they can do under the right to both reproduce and distribute, which is, after all, what section 108 is—exceptions to the reproduction and distribution right.

Weiss: Jon?

Band: As I said before, I would be concerned about reopening section 108 in general. The two exceptions where I could conceivably see a very narrow, technical fix would be on this issue, including museums, and also on using a reasonable number of preservation copies, as opposed to three. So those would be two very—in theory—simple, technical fixes.

But to some extent, again, what I am concerned about is the dynamic that would then unfold. To some extent, I think that it was even just suggested now by Eric. I would say, just add “and museums,” right? Just add those two words. But then, all of a sudden, some group is going to say, “Ooh, we need to define what a museum is, and we need to define what a library is, and we need to define what an archive is, because maybe someone out there is going to abuse it.” Has section 108 been abused until now? Well, no, of course not. But the political dynamic sort of invites these people coming out of the woodwork with kind of paranoid delusions that even the narrowest, simplest technical correction will be hijacked. And even if we limit it to those two corrections, that could easily take two Congresses to work out.

Weiss: Mary?

Minow: I kind of disagree with that, because I think times are different now. Everyone is calling themselves a library or a museum or an archive, so I think it is reasonable, actually, to define a professional staff, public service mission, et cetera, as recommended in the report.¹² I would include virtual libraries, if they meet

11. See SECTION 108 STUDY GRP., THE SECTION 108 STUDY GROUP REPORT (2008), available at <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>.

12. *Id.* at 36.

those criteria, so that would be one broadening as well as a narrowing.

Seeley: I agree with that comment. I think that I am quite flexible about, for example, the creation of purely online libraries and online resources such as archives. I do think, however, that in order to expand, you do need obligations and requirements for professional standards. In the STM journal space, for example, archiving electronic journals requires a lot of expertise and care about things like digital formats, preserving links and the like. It's not easy stuff to do, and I do think that the notion is appropriate that this can best be done with professional staff, one that understands those types of requirements and the legal obligations. So expand in terms of virtual, absolutely. There's no reason why this should be limited to bricks and mortar. I do think that the notion of professional standards should continue, however, and perhaps needs to be expanded on a bit.

Band: Well, again, the problem is that now something very simple is going to get very complicated. It's always the fear—yes, in theory, if it's not defined, if it doesn't have the standards for professionalism, then maybe someone out there will abuse it. But what is the likelihood of that happening, of the abuse, given all the other people out there who are abusing the copyright law, to be worried about this community and someone calling themselves an online library? I just think, again in the grand scheme of things, that this is not where it's worth arguing about. There's a simple fix, and we should just do it, and if not, let's just rely on fair use.

Weiss: Okay, moving on a little bit: should libraries and archives be permitted to capture content from the web, and should this content be limited in any way? I know Jon has written that this is a new age, a new day for web archiving.

Band: Just very quickly, if two of the largest and most successful corporations in the world, Google and Microsoft, are archiving the World Wide Web all the time, it just doesn't seem to me that there should be any issue about libraries and archives doing it. They do it under a fair use theory—Google in a very public way, Microsoft in a very quiet way—but they are both relying on fair use to do what they are doing. So I'm just not sure why we even need to have a statutory exception to do it. There's good case law, and yes, at some point, maybe the pendulum will swing the other way, but I have a feeling that the likelihood of that happening is very small, at least when we're talking about websites and website archiving that is already being done by these very large corporations. And to come up with a statutory exception, again, would be needless complication.

Schwartz: Again, to harken back to the 108 recommendations, certainly on websites it makes sense. I always joke that stating the obvious is my forte, but to state the obvious, I don't think that rights holders are as concerned about what's incoming to qualified libraries and archives as what's outgoing. So the ingestion is not necessarily the concern. I do think that it should be done respecting the terms and conditions of the rights holders on the websites—I do believe in respecting those rights, whatever they are. Again, there's the tension between what is being done for the purposes of preserving material, so that it'll be available for posterity, and in making it accessible.

Minow: I was going to say that this is an area where the studies and recommendations have really become the common law. I mean, libraries are

already doing it. It hasn't really been an issue. I've seen lots of libraries that cite this recommendation as though it's law, so it seems as though that part is working pretty well.

Seeley: The Internet is basically the same kind of mass literature as the popular literature of earlier eras that archives are trying to preserve. We used to have regional newspapers and all sorts of other materials that would be preserved in order to have that legacy, and I'm glad to hear that online materials are being preserved. I do think, however, that there are conditions out there that creators and others are setting for their online content, including observing robots.txt technology in terms of crawling and that kind of stuff, and I think that there are other, newer technologies and online licenses, including some of the Creative Commons licenses out there, that make quite clear the terms and conditions that are being set for such content. And those have to be somehow recognized and acknowledged.

Weiss: Should there be any exceptions to that recognition, or any that you can identify?

Seeley: Well, one thing that I was going to mention earlier, and it goes to the duration, and it's a bit the opposite of Eric's discussion about the last twenty years of film. I do think that—well, there's a question about timing, and I do think that as material is out there and is not refreshed, and as websites and creators are not actively doing something with the site, it does seem to me that there is a potential that it kind of falls into the ether somewhere. So it does seem to me that we could have a discussion about exceptions in terms of timing and frequency. I think that more active websites that are actively setting out terms and conditions and monitoring what's going on should be looked at more skeptically or more carefully.

Band: Robots.txt was mentioned, and I think it's important. This is exactly the kind of space where it's important that there not be a statutory provision and that, instead, we rely on fair use and the judgment of librarians. My understanding is that there are all kinds of reasons why website developers use headers and exclusion headers and robots.txt and so forth, and a lot of it, or in fact most of it, has absolutely nothing to do with copyright, but it has all sorts of things to do with traffic management or default settings that people use without thinking. And so, if you have an exception that excludes websites that use those exclusion headers, and that's what a library would have to follow, then a large amount of important material that perhaps is not as appropriate to be crawled by Google or Microsoft, but is appropriate to be crawled by a library for preservation purposes, would get excluded. So I think that's exactly why the fair use framework and the judgment of librarians work better than having a fixed congressional mandate.

Seeley: I think, to me, what it also suggests is that these things need to be looked at almost on a site-by-site basis, as many of the large search engines that you mentioned, Jonathan, often do. That is, for a particular library archival project, I think the organizer should sort of think about which types of websites and which specific sites they want to capture and archive, and if there are issues about robots.txt or terms and conditions that might conflict with that, we have discussions with those sites.

Weiss: Is it possible to contact those sites all the time? What would some of

the implications be of that method?

Band: And I think that, in fact, is the practical problem that libraries are encountering. They do reach out to the websites, and they never hear back.

Minow: It's about a fifty-fifty return.

Weiss: Would there be moments where you would allow that without their permission?

Seeley: I'm not crazy about the notion of an opt-out. There's something I'm slightly allergic to about that phrase, but I could imagine, in those kinds of circumstances, that might be an appropriate approach.

Schwartz: That does then raise the question, does every library or archive or qualified library or archive need to do this? One, it's not a good use of resources, and two, why—as in a demand deposit world—why not the Library of Congress? I look around the room at some of my colleagues, and they're going to say that it's not necessarily fair for one institution to be the only one permitted to do it. But on the other hand, that is what Congress made decisions about, with regard to copying of television news programs and other exceptions, with the idea being that this was being retained for a preservation purpose. The question then becomes if the Library itself is not making the material accessible; that's a different public policy issue. But if it's a question of ensuring that materials are not lost, then allow one institution to do it. But I'm not sure that you need to allow every institution to do it all the time.

Weiss: Mary?

Minow: The reason some libraries want to do it on their own is that they are taking subsets, very small subsets, of curated collections, in case of disasters such as Sandy.

Weiss: Is there an issue of timeliness or balancing collections? Can the Library of Congress do all of this?

Minow: I think that it requires a carefully constructed opt out. The recommendations in the study group are very carefully done. There's a different standard for political websites that I think was well thought out.

Weiss: We're going to move along a little, because we do want to leave a lot of time for questions. What exceptions are necessary for preservation?

Schwartz: I think the correct answer is: whatever exceptions are necessary for preservation to be properly undertaken. Looking around the room, I see several colleagues who worked with me on a Copyright Office roundtable discussion and study of the treatment of pre-1972 sound recordings. In the roundtable discussion, some of these issues surfaced with regard to the treatment of pre-1972 sound recordings. These recordings are not, at present, protected by federal copyright law, so section 108 does not apply. Even though section 108 does not apply, in discussing the issues and questions pertaining to the preservation of these recordings, one question surfaced in the roundtable: namely, whether or not any library or archive, or any of the organizations represented in those discussions, had ever received a letter from a rights holder saying, "Stop your preservation activity." The answer was that no organization had ever been stopped from legitimate preservation activity, even if the law does not cover those activities. My

experience in working with many film archives is the same. The answer is that no rights holders object. So this is an instance where the law just needs to catch up to the actual practices of archives regarding the number of copies made and the transfers and digitization necessary for preservation—certainly as digitizing is a preservation medium for sound recordings, when done at the right technical standards for the copying and everything else. Then there is a totally different crisis, which is that we do not have the technical expertise. We do not have enough young people who understand the old technologies, and we need schooling and everything else to do that. That is not a copyright law issue, but it is very much a real and live issue, and I think we do need to address that.

With regard to the specific section 108 exceptions for published versus unpublished works and so forth, it seems to me that those distinctions are no longer relevant for preservation purposes. But I again raise the question: must the exception apply for every archive? Must every archive be doing preservation work, for all works? I think, there, the priority and right answer is more a matter of dividing the efforts of preservation. This is occurring more and more in the film archival community in particular, with a lot of cooperation, both among the archives and between the archives and the rights holders, which is not something that we have discussed here. But there is an awful lot that goes on below the surface of the law in terms of private agreement and participation and the sharing of costs of preservation and access, which I think needs to continue and needs more examination and discussion.

Weiss: Jonathan?

Band: Yes, I think that I sort of agree with what Eric was saying, but I'm not one hundred percent sure. To the extent that the question is, do we need to amend 108 to allow it? Again, I think that you could. It might be worth considering getting rid of the numerical limit and talking about a reasonable number, if there is a way to make sure it doesn't open up a whole can of worms, which is always a problem. But again, this is an area where I think, and to some extent where I think Eric and I agree, that it seems that there isn't really a problem in terms of current practice, because people are doing that preservation anyway. To the extent that there is a legal theory undergirding their activity, it's, of course, fair use. And that's why—just getting back to a comment Maria made before—I think that there's no reason to even think about repealing 108, because 108 does guide 107. And I hate to sound like a law professor citing a law review article that I wrote, but in the current *Journal of the Copyright Society* there is an article that I wrote that talks about how you can use fair use to sort of update exceptions that might be a little bit out of date, and I talk about 108 extensively as something that can guide courts.¹³ And so, to the extent that 108 doesn't quite get you there, but you have substantial compliance, 107 can take you across the line. So I think, at least in preservation as opposed to access to preservation—and I agree that there's a distinction that Eric's making there, and I agree with that distinction—I think 107

13. Jonathan Band, *The Impact Of Substantial Compliance With Copyright Exceptions On Fair Use*, 59 J. COPYRIGHT SOC'Y 453 (2012).

plus 108 get you where you need to be.

Weiss: Mary and Mark?

Seeley: I think I agree with most of the comments made in terms of the numerical limits. I do think that there's probably more work that needs to happen to look at the question of format shifting. Section 108 does address the question of obsolete formats, but it seems to me that there's probably more work that could be done to expand this area. I think one of the challenges we see on the journal archiving side is that electronic formats change fairly quickly, and when they change, they become unreadable and difficult to work with. Ironically, paper is better, in some respects.

Schwartz: Many of you know this, but the only reference in the House or Senate reports of the 1976 Act regarding fair use and the copying of an entire work referred to what is essentially format shifting for film preservation, although the reference got the date wrong. In the House and Senate reports, which were identical, reference was made to preservation copying necessary for nitrate film materials, which are the most fragile film materials. It referred to those films as "pre-1942," when nitrate film was actually used until about 1952. But the reference is to copying, from nitrate to more stable films, that is necessary for a preservation purpose only, and the reports referred to this format shifting activity as an example of fair use.¹⁴ It may or may not apply to other formats, such as the videotapes referred to earlier this morning, where copying to more stable formats for preservation is necessary. Whether fair or not, these are the practices of archives undertaken today for preservation.

Clarity on the subject of preservation by libraries or archives would be very helpful, especially for some smaller institutions that do not have legal counsel, or at least do not have IP counsel. This may be my mantra today for why we need section 108 reform. The legal counsel in these smaller institutions, as I always joke, never get fired for saying "no." And so, when asked if something regarding preservation or access can be done with copyright materials, their first response is "no." The clearer that Congress can make the practices in a revised section 108—certainly for preservation and retention purposes by libraries and archives, and certainly for transferring formats for deteriorating and fragile material—the better it will be for all of the institutions, not just the ones represented here, but also a lot of the smaller museums, archives, historical societies and others that do not have the counsel and just need to know the following: "Just answer my question, yes or no. Can I do this? And don't give me the four fair use factors."

Band: Well, to some extent, on that specific issue, with respect to preservation, I think something like the ARL Code of Best Practices in Fair Use can satisfy that need, perhaps better than 108, because it's a lot easier to understand.¹⁵

Weiss: Alright, I'm going to move to a new question. What changes are needed, if any, for section 108(d) and (e) to allow libraries and archives to make

14. S. REP. NO. 93-983, at 119 (1974); S. REP. NO. 94-473, at 66 (1975); H.R. REP. NO. 94-1476, at 73 (1976).

15. ASS'N OF RESEARCH LIBRARIES, CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES (2012).

and distribute single copies to users, including copies by interlibrary loan? We talked a little about it at the beginning, but should these exceptions be amended in light of the increasing use of digital technologies by libraries and archives?

Band: Well, I would imagine that much of that interlibrary loan issue is really in the scholarly educational market; that's where it really takes place. So what I would like to believe is that in ten years, so much of that market will be open access that this issue will wither away. Now maybe not everyone on the panel agrees with this or thinks that that's a desirable outcome. But to some extent, I would like to think that this is an area where the market and changes in the market will overtake any kind of statutory issue.

Seeley: I kind of agree, although from a slightly different perspective. I do think that there are lots of market solutions out there, and open access, in terms of sustainable access that means that content is free at the point of usage, is certainly one of those. But there are also license alternatives and transactional opportunities to purchase and obtain individual articles, for example, from journals. So there is a fairly robust market and a developing market. And I do agree that one always needs to look at exceptions and limitations carefully and in light of the current market and market developments.

I suspect that the issue that we often deal with in scholarly publishing is a long tail: the many thousands of publishers around the world, the many small societies, for example, that publish only one or two journals. And for that matter, the other long tail, in terms of the user side, is that not all institutions and all libraries are going to have the same sort of breadth of collection and the same orientation in terms of subject matter. So somehow, there probably will still be a space that is not completely filled by the market options and market alternatives. And I do think that, therefore, there will continue to be a space for exceptions and limitations here. They have to be carefully calibrated to think about the market. And as far as digital access and digital copies, I'm quite supportive of the notion that in the digital environment, people need electronic documents. That makes perfect sense to me. Over the past couple of years, a number of publishers have done some FOIA requests of some public universities to look at patterns of document delivery or interlibrary loan in terms of geographic distribution.¹⁶ Some of the results have been odd, and this is an area where I think we do need, sometimes, to look at patterns. For example, the notion that we found that U.S. libraries should deliver copies to Canadian libraries or French libraries or perhaps even Chinese libraries—I'm not entirely sure I understand the logic of that. I do accept and understand the logic of U.S. libraries or French or Chinese or Canadian libraries delivering copies to the developing world, to countries where there are not the kind of collections of sources that we might see in other parts of the world. It's that kind of calibration that we should be doing—what is that long tail, what does the market look like, and what are the needs that we're trying to fill—and not sort of substituting for market solutions. That I think is critical.

16. See, e.g., 5 U.S.C. § 552 (2006). Most of the requests have been done under analogous state law provisions.

Minow: I think that having a mix like we have today, using the CONTU guidelines, the rule of five,¹⁷ plus document delivery with payment going to the publishers, is a good solution. I think that if there are bad actors, we need to find them out, but the system, I think, works pretty well. I also think that the issue of making that necessary copy to transmit permeates all of digital works, and I don't think that we should item by item say "as many copies as necessary." I think that we should actually have a definitional change of 106 reproduction rights and that the right should reflect persistent copies and not these transitory essential copies.¹⁸ I think that should be in the definition or in a new section that expands 117 or 112 ephemeral recordings.¹⁹ But be done with that. The model is out there with the clouds; it's a multi-billion dollar model. Everybody's using the essential transitory copies.

Weiss: Eric?

Schwartz: Again, I think this comes back to users, use and works breakdown, if we're talking truly about interlibrary loan and the types of activities. We were talking about libraries and record keeping over dinner last night, and one of the areas that's sort of built in to the library system is record keeping in and for interlibrary loan. And so I think that there has to be some ability for rights holders to feel secure about the activities that are being undertaken, some types of security to keep the use and users to what is intended. Look, libraries and archives are the institutions that most uphold the copyright law, and it is their mission to balance that and also to serve the public. I think that they are good at it, and so it comes full circle back to the first question we were asking: what is, and what is not, a qualified library or archive or museum? I think, again, the more clearly you define the universe of actors, and the more clearly you define the users and the purpose, the better off you are. I don't think that that becomes an issue unless you're talking about much broader acts beyond interlibrary loan.

Band: I'll just give, again, a very quick plug for my article, because I address the issue that, to the extent that 108(d) and (e) might not allow exactly what we think we need to do, fair use, guided by 108, says, "what is the functional equivalent?"²⁰ First of all, I think that 108(d) does allow electronic document delivery. But to the extent that it doesn't, clearly 107 as a gloss on 108 would allow you to do it. That's why we already have the flexibility to do what needs to be done.

Weiss: Mary?

Minow: I was just thinking, why do we have the problem with e-books and not with journals? It's all licensed. It's because the licenses with the journals typically say, "This will not override 107 or 108." We don't have that with the e-books, and that's a serious problem, similar to the *Up* issue that was raised earlier.

Seeley: I'm not sure there actually are licenses that deal with that language. So,

17. See NAT'L COMM'N ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REP., 54-55 (1978), available at <http://digital-law-online.info/CONTU/PDF/Chapter4.pdf>.

18. See 17 U.S.C. § 106 (2006).

19. See 17 U.S.C. § 117 (2006); 17 U.S.C. § 112 (2006).

20. See Band, *supra* note 13.

I—

Minow: They do.

Seeley: Well, hopefully they don't always. Anyway, the problem that I would have with that is—okay, if the librarian customer can explain to me exactly what they want to do under section 107, then that's something we could talk about.

Minow: Or 108.

Seeley: So, I do think that licenses need to be very clear, and they need to address the key issues that the institutional libraries have. I think they should address archiving; I think they should address interlibrary loan. And I think that most of them do. Again, you do sometimes have long tail problems, so that there will be some journals which haven't thought through all these issues. Sometimes, also, I get complaints, or I hear complaints. For example, I was reading a British Library submission in UK debates last year which listed a hundred terrible licenses, if I remember right. And although I didn't look at every single one, my guess is that most of those terrible—from the British Library perspective—licenses were probably software licenses or mass-market licenses of one kind or another. I would argue that those kinds of mass-market licenses have some utility and probably, in terms of transactional costs, are fairly efficient, but I do accept that they don't address all the issues that are probably of more significance and concern to the institutional library customer.

Weiss: So do you think that the copyright exception should trump licenses in those types of situations?

Seeley: No, I guess I'm a believer in freedom of contract. So I think people should negotiate what they think is relevant and what works for them.

QUESTIONS AND ANSWERS

Weiss: I think it's time to open this up and make sure that we take some questions.

Gloria Phares: Gloria Phares, of Patterson Belknap. Let's just go back to that last comment about the mass-market licensing. I mean, isn't that part of the problem in this area, that frequently people are unable to talk to the other side of the contract, so that the notion of a freely agreed upon license is a complete fiction? And that has, in fact, had very wide ranging effects on broad aspects of copyright, including the increasing absence of first sale?

Seeley: Well, my involvement in license negotiations and license drafting is kind of on the other end; it's large contracts with complex issues about archiving and interlibrary loans. So I'm not an expert on mass-market licenses. However, I would say that something like a license to use Microsoft Word in your institution frankly isn't worthy of an extensive negotiation. I'm just saying that there is a reason why mass-market licenses are very efficient and effective. Hopefully, they don't deal with resources and services which are really vital in terms of the collection programs that institutions and libraries have. If they were—if, for example, a publisher was trying to use a very standard mass-market license from the software environment to deal with these kinds of complex issues—then I think

they should be called out, and specific negotiations should happen to make sure it doesn't happen in that way.

Weiss: Mary?

Minow: Well, in terms of negotiating in e-books, the libraries are told by the vendors: "Five percent of our market of publishers don't want to sell to you anyway." So we really have nothing to say we want to include a 108 exception in the license.

Weiss: Eric?

Schwartz: I'd like to address, not the mass-market license question, but whether licenses trump the 108 exception. Looking in my universe—and maybe only my universe—the answer, I think, is yes; and the reason is donor agreements. The one thing you want to do in the library and archival world, for the non-print material especially, is to encourage donations. The way you do that is by allowing the contracts of the donors to govern—also in the print world, for manuscripts and other things, but especially in the film and sound recording worlds and for other materials. I think that you want to encourage that, because you want them to come into these institutions, and you don't want the donors to walk away thinking that, notwithstanding their agreement, whatever happens will happen in terms of the accessibility of the materials.

Band: I would think that there are ways to split the baby, and to some extent, we've identified them. It would seem to me that if you have an arm's length negotiation between entities of equal bargaining strength, then it would certainly make sense for the terms of the license to trump copyright law. On the other hand, when you do have a mass-market license, there might be all kinds of good public policy reasons to have the public law of copyright trump this private law of contract, especially to the extent that you're waiving things like first sale and fair use and so forth. There really are serious public policy implications. It could very well be that those terms might be preempted. A lot of the cases that have looked at the issue have focused on 301(a) preemption, but there are a couple of cases that look at constitutional preemption. I think that that's one of those issues that might ultimately have to percolate up through the courts and be resolved by the Supreme Court. That's one of those areas where I just don't think that there will ever be agreement in Congress, even though, from time to time, people do raise that issue.

Weiss: All right, lightning round questions.

Stephanie Gross: I'm Stephanie Gross, again from Yeshiva University. I read, with some surprise, Amazon's public disclosure that they were intending to allow resale of digital books. Professor Minow, I'm addressing this to you. I'm just wondering if this is some sort of a sign of a thaw in the environment or some sort of a change in the mindset of publishers regarding digital content. Maybe it was Mr. Seeley saying that you have a digital environment and therefore you expect electronic content, that the overall environment is influencing how owners are seeing their content and changing a bit of their perspective.

Minow: I do find that a case to watch in that space is *Capitol Records v. ReDigi*, which is a Massachusetts-based company that resells MP3s, and they say

that if they win, they will open up a used e-book market.²¹ The issue really is, as I see it in that case, those transitory copies that are necessary and for what I consider a lawful purpose; but we'll see. So far, the preliminary ruling allowed the case to go forward, and there's a strong likelihood that ReDigi will win, but we'll see.

Seeley: And in terms of long-term projects, publishers are in fact talking about and experimenting with ideas about used e-books. I think here, for these kinds of issues, there is a technical solution. The concern that publishers would have, of course, is that a digital copy is infinitely reproducible. If you sell one copy, you'd kind of like to know that the price that you have for the one copy doesn't become the price for a hundred copies or a thousand copies. But those things can be done through technology, so that one user at a time can read and access, and I think that's also true on the lending side. So those things can be done through technology; and I think it would be wise of us to think about ways to use technology to do that.

William Maher: William Maher, University of Illinois, where I'm the archivist. I'm sorry to make more of a comment than question, but I think, insofar as the Copyright Office is listening to things to consider for any revision, simplicity is very important. In connection with that, I want to follow up on something I understood to have heard from Eric on the preservation front, regarding both web archiving and other kinds of copying for preservation. What I understood to have heard was an indication that maybe not all libraries or all archives need to be able to have that capacity. The fact is, just taking web archiving or any other kind of preservation, while not all archives nor all libraries need to be able to preserve everything globally, they do need to be able to preserve everything that is within the scope of their mission and their responsibility, and you can't really do a competent job with a collection of local history or institutional archives unless you can copy everything off of websites, which have a habit of leeching out and going into places beyond the fences around the institution.

Schwartz: Just to respond, I agree on the simplicity, certainly for preservation and especially access. The suggestion—and it was just a suggestion—is talking about what if, in respect of the terms and conditions of the rights holders, they won't allow the copying to be made. All I was suggesting is, in those instances where the preservation purpose sort of trumps anything else for the purposes of posterity, maybe having an exception not unlike the off-air taping of television material, but only in that instance. And otherwise, all I was commenting, and not being flip about, was just that in terms of the archiving I know—in terms of both the film and sound recording—there is cooperation among archives. There is a discussion about who's doing what. So there may be some duplication of efforts, but in a very limited resources world, it makes sense to do that. But that's all by private agreement.

Dick Rudick: Dick Rudick. I think it was Einstein who said that everything should be as simple as possible, but no simpler. My question is for Jonathan,

21. See *Capitol Records, LLC v. ReDigi Inc.*, No. 12-0095, 2013 WL 1286134 (S.D.N.Y. Mar. 30, 2013).

although others may want to chime in. It's based on a premise, which is that very few things worth doing in life are easy, and very few of those are simple. So we have a choice, and it may not be a choice between easy and hard; it may be a choice between 107 and 108. It's a three-part question, but short. Do you really find—really, I mean there's nobody here but us chickens—do you really find 107 clear and practical for all libraries' problems? Do you think content owners should feel the same way? Do we get to have some best practices of our own? And the third question is, do you enjoy litigation? Is it fun? (Laughter.)

Band: Well, as a lawyer, of course I enjoy litigation. (Laughter.) Look, it's like anything else in the world. It's as opposed to what, or what's the alternative? If it were up to me, I could draft a great library exception this afternoon. I'm sure no one in the publishing community would like it, but I think the library community would love it. I could do that very quickly. Maybe it would take a couple of days, actually. But still, I just think that in the current environment, where you have this huge degree of tension between the publishing community and the library community, I think that to some extent it's because both of these communities are undergoing enormous transition, and so everyone is wondering what's in their future, and in that environment, it is really hard to reach agreement on things. And then when you add everything that's going on—the nature of Congress, the nature of lobbying, the degree to which Congress is more responsive to moneyed interests, and all those larger problems in society—I think that when you have that overlay, you just end up saying: “If I had to choose, which decision maker do I prefer?” I think, certainly right now—it may change, but right now—I think that if we had to say whom we prefer to make these decisions, I think a lot of people in the library community would say that we prefer Article III judges to Congress.

Weiss: Eric?

Schwartz: Back to the point in my opening statement, look, I work for a law firm; we litigate; it's very profitable. But if you're asking for simplicity, or at least as simple as might be possible, and clarity for the two-prong benefits here, preservation and access, I think that there are much better alternatives than litigation, as I think Dick's third part of the question referred to. Those two are private agreement by the parties and legislation, which these days is essentially private agreement of the parties with the blessing of Congress. I really think that both of those—it's not an either-or, it's a both-and answer—that those are the solutions, and litigation is not. It really does not help the archival community, I don't think, and the archivists that I work with don't think to simply say, “Well, a judge in the Southern District of New York said this.”

Audience Member: It's on appeal.

Schwartz: And it's on appeal, right. In the “I've got ten seconds, yes, no, can I do it?” department, the archivist and the rights holders just want to know what their rights are vis-à-vis that use. I just really think that legislation by private agreement is very difficult, but it is worth doing.

Seeley: I just want to say that actually, in most of the discussions that we've had on this panel, it seems to me that there's a lot more commonality of view and a

lot more agreement. To me, that suggests the utility of actually sitting down together and talking things through, which to some extent might wind up being sector-by-sector soft law approaches. Now, I know it's not popular at the moment to think about sitting down and talking together—there seem to be some positions that are fixed in cement on certain poles—but I frankly don't think there's any other solution.

Weiss: Thank you to everybody on the panel.