Session 4: What Should Be the Conditions on Libraries Digitizing, Maintaining and Making Available Copyrighted Works?

Moderator: Chris Weston, *U.S. Copyright Office*

Speakers:
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Chris Weston: Thank you to June and all of her colleagues at the Kernochan Center for organizing this. In this panel we're going to be discussing the conditions that should be applied to libraries and archives in their digitizing, maintaining and making available copyrighted works. This is an area where there was a lot of discussion and debate in the Section 108 Study Group because while common ground could be found on, for example, allowing libraries and archives to make proactive preservation copies of published works, agreement was much harder to come by on how this should be conditioned. Conditions and limitations on exceptions were a particularly divisive topic when it came to libraries and archives distributing and providing access otherwise to copies of copyrighted works. Should off-premises access be allowed? For what kinds of works? To whom? Should technological protection measures be mandated? We're going to delve into these and other questions in this session.

To begin, I'd like to briefly introduce our panelists and, as before, more information on each of them is available in your program. First of all, to my left is, standing in for Allan Adler, who could not be here, our pinch-hitter today, Mary Rasenberger. She is the primary author of the *Section 108 Study Group Report*. Currently, she is a project director of the Compendium Project at the Copyright Office. Next to her is Ivy Anderson. She is the Director of Collection Development and Management at the California Digital Library. Next to her is Roy S. Kaufman, the managing director of new ventures at the Copyright Clearance Center. Next to Roy is Kenneth D. Crews, who is the director of the Copyright Advisory Office at Columbia University Libraries/Information Services. And then William Maher, the university archivist at the University of Illinois at Urbana-Champaign, is next to him. So, what I'd like to do first is to have each panelist take a couple minutes and give us some brief background on the interest that they and their organizations have in section 108 and its reform. And I'll let anybody who feels like starting, start. Okay, Mary, why don't you start?

Mary Rasenberger: I'm Mary Rasenberger. As Chris said, I worked at the Copyright Office and the Library of Congress Office of Strategic Initiatives, with

speaker on university archival administration, archives and history and copyright law. He has taught over five hundred students in the SAA's workshop on Copyright for Archivists since 2000.

 *****   Mary Rasenberger has worked in the area of intellectual property, technology and copyright law for more than twenty years, with a particular emphasis on the intersection of copyright and technology. She is currently Project Director for the revision of the Copyright Office's Compendium of Registration Practice and Procedure. From 2002-2008, Ms. Rasenberger served in the Copyright Office and the Office of Strategic Initiatives of the Library of Congress. She also served as policy advisor for the Copyright Office, where she oversaw legislative and policy initiatives, advised the Register, Congress and executive branch agencies on international and domestic copyright issues, and participated in bilateral and multilateral treaty negotiations. From 1994–1999, and from 2008 until joining CDAS, Ms. Rasenberger was counsel to Skadden, Arps, focusing on copyright, technology and entertainment. She is chair of the ABA International Copyright Law and Treaties committee, a member of the Board of the ABA Annual Review of Intellectual Property and the New York City Bar Association Copyright and Literary Property Committee and an active member of the Copyright Society of the U.S.A.

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Chris, as I was the administrator, project manager, cheerleader, for the Section 108 Study Group. Our job was to try to get agreements on issues, get the work done and the report done. I can't say we were super-successful at the latter. We did get it done, but it took three years. We really appreciated the time that the whole group put into it because they put an awful lot of work into it. And I do think that, having reviewed the report for this conference, it really shows. So I am sitting in for Allan Adler today, whom all of you know from the Association of American Publishers. I am not going to try to channel Allan, I think. I don't think I could if I tried. I certainly won't be as eloquent. I did just find out that I was going to do this at noon, so I'm doing this on the fly and I only just reviewed our recommendations over lunch. So have a little mercy on me, please.

Weston: Ivy.

Ivy Anderson: So the perspective that I bring to the topic today is about the educational, research and public service mission of research libraries and the imperative to adapt our legacy collections to the digital era in the service of that mission. And key to this are our roles as stewards of the intellectual record and as educators and public servants.

The Association of Research Libraries has estimated that North American research libraries have invested at least fifty billion inflation-adjusted dollars in content purchases since 1908—an amount equal, we've noted, to the economic devastation wrought by Hurricane Sandy right here in New York just a few weeks ago.[1] When you add the cost of capital and operational resources that libraries have invested to steward these collections over long time frames, this easily becomes 100 billion dollars in costs, on par with the losses from Hurricane Katrina.

To the University of California, where I work, these aren't idle comparisons. In our seismically unstable region, where the next "big one" is widely anticipated, concerns about preservation are very real. Large-scale digitization offers us a new tool by which to preserve and protect the rich collections that we've carefully stewarded at enormous expense over decades and centuries. And we need to be able to use this tool and use it proactively.

Supporting the *use* of these legacy collections via digitization is the second imperative. The circulation of physical library materials has declined significantly since the 1990s. This has been charted by many organizations, and UC is no exception. Documented declines in circulation range anywhere from twenty-five percent to fifty percent in some cases, despite increases in foot-traffic in libraries and, of course, exponential increases in online use. I should add that some of my colleagues would dispute this picture of declining use of physical materials with me, so there may be contexts in which this trend isn't manifest. But in the aggregate, it is true. "If it isn't online, it doesn't exist" isn't just a catch phrase: it's an accurate reflection of the way most library users work today and of the way in which they will increasingly work tomorrow, especially with the rise of digitally based scholarship. As a consequence, a vast swath of the documented history of human endeavor represented in our nation's libraries—at UC: thirty-three million

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1. Source on file with speaker.

volumes in library print collections and an equally vast number of holdings in other physical formats, seventy to eighty percent of which are likely still under copyright, and most of which are long out of print—are threatened with invisibility and irrelevance unless we can make our collections accessible to today's digitally oriented users. This represents not just a service problem for libraries, not just an economic problem for libraries, but an incalculable detriment to the public interest and to our intellectual heritage.

I'd also like to posit that this is a bounded problem: a bubble of sorts between the historical public domain, on the one hand, and the new realities of online content provision on the other. The market for both current and retrospective digital content is strong, and its use parameters are being hammered out in the marketplace every day, as they should be. Librarians make choices and judgments every day about when to acquire older content in digital form. As director of collections for the CDL, I have millions of dollars in such offers on my desk right now. Some of them I will surely acquire, but I just as surely can't afford all of them, and some of them may not make sense for my institution to acquire. My point is that the digitization services that libraries are adopting to bring their legacy collections into the digital age already coexist with a robust digital marketplace. They should be recognized as a complement, rather than a threat, to that marketplace and supported accordingly. This is precisely the balance between a private and public interest that copyright aims for.

As has been observed here today, most research libraries are relying on fair use right now for these activities. A fair use interpretation has been sustained by several courts so far (although still under appeal), and it's also an interpretation that is supported by best practices, which attempt to chart a careful course between uses that are legitimately transformative and those that might violate the underlying purposes of copyright. The provisions of section 108, meanwhile, are very detailed and narrowly crafted, and it's hard to see how they can be usefully overhauled to serve this larger purpose. Nonetheless, we're prepared to engage in that dialogue and see if there is a way to do that.

Weston: Thank you very much. Roy.

Roy Kaufman: Hi, I'm Roy Kaufman. I think this is the first time I've been on this side in this room, having gone to law school here, so it's kind of cool for me. I'm here, basically, for two reasons. One is that I'm Managing Director of an organization called Copyright Clearance Center, which shares quite a bit of history with section 108. Both of us came out from ideas considered by Congress in the deliberations for the 1976 Act, and both of us sort of were a response to the destructive—or constructive-destructive—power of the photocopy machine. To use the terminology I've heard today, we're an organization of private agreement on mass scale, the idea being helping to make copyright work. We started with the photocopy machine without much controversy. We went into e-mail, intranet. We've got a pretty nicely developing ILL product, which is done in collaboration with rights holders and libraries. We're working on a text- and data-mining project—we might get to that one a little bit later. Some things we have done are a little bit more controversial, perhaps. But the idea for us is to try to broker the

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conversation between users and rights holders. That said, I'm also here as the author of two out of print works and one in print work. And I don't think any of them have been orphaned. I think I could be found pretty easily on the Internet, so I feel like I have something to say about those issues as well. I'm looking forward to this. Thank you.

Kenneth Crews: Thank you very much. I haven't yet affirmed my thanks to colleagues Jane, June, Pippa and others who contributed to making this conference possible. And thanks to all of you for being here. I know for many of you it was a challenge because of the weather, but it is also gratifying to see the depth and scope of interest in these subjects, and I'm grateful for that. Because my interest in being here is related to these issues, as I have, for about the last twenty-five years, worked with exactly these particular issues, I come at the issues with a variety of objectives. I feel very much, Roy, the same way you do on that last point about having interests because I'm an author. I have out-of-print books and in-print books as well. Some I give away, some bring in a little bit of money. And so we all feel this tension. Mostly what I feel is a motivation to support education and to support the work that we're doing through copyright, support library services, and to support the growth of collections in those libraries as well. At the same time, try to find some understanding of copyright that encourages the creation of new works and new creativity where it can do that. Sometimes it does, and sometimes it doesn't. And so this is a process of respecting both private interests as well as public interests.

I'm trying to find—and I hope it comes through in all of my comments—some way of creating a meaningful copyright law that is practical in all of its respects and that is practical really for law abiding citizens who are choosing to say, as we are saying here, that we are recognizing the law, working with the law and understanding the law as best that we can. The theme of this panel is about the conditions on the use of materials under a section 108 and so looking at those conditions we might also think in terms of levels of certainty about the law. We've had allusions to that at different times through the day today. We've heard talk about virtues of certainties, virtues of uncertainty. We've had some discussion about problems of uncertainty. I would add to the conversation that we need to be aware of problems of certainty. A law that provides certainty has other inherent problems. It becomes obsolete; it becomes confined; it becomes narrow; it creates an illusion of this thing we call balance, which I think is really tough choices rather than balance because we all have different concepts of balance.

So my last closing bullet point is to reflect on my vision at least of moving forward. Opening up section 108 has its risks, but I think it's something we need to do earnestly and think about the possibilities, as well as opening up something else that we have not mentioned in a significant way today: protection from liabilities that might result for the good faith law-abiding actor. Finally, we need to nurture a robust fair use because fair use is always necessary to fill in the gaps, to reach out beyond the horizon, to be able to address issues that a law that moves toward certainty cannot possibly encompass. Let me add that we've had some expressions of some concern about whether we need lawyers, or is this just inviting lawyers in?

Yes, we need lawyers. Lawyers are an inevitable part of this process and, speaking as a lawyer, lawyers are your friends.

William Maher: In the words of John Cleese: "And now for something completely different,"[2] perhaps. I'd like to start by thanking the Center here, for organizing the conference. It's been very interesting, and I hope it gives the Copyright Office lots of ideas on how to go forward. I'm going to apologize for actually reading a text here because it's the best I can do to keep things within a narrow confine of time. But I want to start by saying that I've got several decades of work at the University of Illinois in the Archives. I've been a leader in a national organization and I've been on its Intellectual Property Working Group and I've been on the International Council on Archives Copyright Committee. I speak as an individual from my experience as an archivist. While section 108 calls the "libraries and archives" exceptions, by and large the fundamental nature of archives has not really been under discussion, or perceived even, in the room here in any way. So I hope to at least maybe break through that, maybe with a little bit of a shock or maybe not.

Archivists bring a romantic, utilitarian perspective to their roles in the information and education ecosystem. We're driven by the conviction that the great treasures in our archives are there to be used to shape the future. Thus, we consider the role of authors to be fundamental because the primary source documents that they create are what teaches tomorrow's present about the past. Yet we are utilitarians who look for balance in copyright to enable broad accessibility of those works both now and into the future.

Archivists take a historical perspective, not surprisingly, on copyright. Invented in the eighteenth century, and embraced by the Constitution and the First Congress, copyright was designed to provide a financial return to authors and publishers, to settle chronic market disputes and to encourage the development of learning in a country trying to free itself from the mantle of aristocratic patronage. The 1976 revisions changed the basis of copyright from publication to the basis of authorship. But the focus was still on the professional writer or artist creating works for public dissemination.

The problem for archivists is that our collections were rarely created by professional writers for public dissemination. They are mostly unpublished letters, diaries, emails, photographs and such that were simply byproducts of their creators' lives. Such documents are invaluable to society but they're the square pegs that are being pushed into the round hole of copyright. As popular documentaries such as Ken Burns' *Civil War*[3] and *Dust Bowl*[4] programs show, archival holdings are more than esoterica. They are the threads that enable us to weave together an authentic picture of society. Clearly, knowledge, culture and education require the copying and use of these materials.

At the same time, today's technology promises to liberate archives from their

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2. *Monty Python's Flying Circus* (BBC 1969-1974).
3. *The Civil War* (PBS 1990).
4. *The Dust Bowl* (PBS 2012).

physical location. Users all over the world, and not just those nearby, could virtually come to our primary sources via digitization if diligent adherence to copyright did not stand in the way. Archival materials rarely fit within any market structure, but they still face exactly the same copyright law as commercial enterprises. Thus, we are constrained from serving researchers, especially via new technology, which is the public's medium of choice and will be even more so.

Still, archivists believe strongly in the principles of copyright, and we've worked conscientiously, as Eric Harbeson noted earlier, to communicate a respect for the law to our fellow archivists and to our users. Copyright has adapted to digital technologies, but now it must also adapt to users' needs for a broader range of materials in the digital age. Digital access is essential to maintain society's heritage and to hold governments accountable. Without appropriate exceptions, however, archivists cannot fulfill our mission. Thus, we find ourselves having to ask, "Does the copyright world want us to help it reinvigorate copyright by adopting reasonable exceptions for the sort of nontraditional materials archives hold or not?" Otherwise, I fear that archivists are likely to find copyright law so far removed from the reality of our materials, our work, our user communities and our missions as to suggest that it is entirely irrelevant. When first passed, the provisions of section 108 provided the basis for archives and libraries to move into the technologies of the 1960s and 1970s, allowing us to fulfill our educational missions. In the twenty-first century, we need amendments to make it a viable framework we can use and defend in today's digital information world. Thank you.

Weston: Thank you very much. To begin the discussion, I'm going to start out with a fairly general question. If we accept, just for the sake of argument, that as a given, section 108 needs to be updated for the digital era in order to allow libraries and archives, and potentially museums, to fulfill their missions, what are the key interests of creators and owners, on one hand, and of users on the other, that have to be kept in mind when we are considering these exceptions and when we are considering how to condition these exceptions? Mary, do you want to go ahead?

Rasenberger: I first want to just address the 108 reform generally, in the interest of users, libraries and rights holders. And that is the need for legislation, something that was talked about this morning. I am—and I am speaking very much for myself now—very much in favor of getting some legislation on the books for the same reason I got interested in this project in the first place. And that is because when I was in the Copyright Office advising the Library of Congress, among others, and I was studying 108, I just found it abhorrent that 108 was just so out of date, so unworkable in the current era. I guess it offended my sense of order in what the law should be, and the law should be something that the people can follow—that's the notion of the rule of law. It is very out of date. It is followed, I think, by most libraries and archives in spirit, perhaps, but it does not give much guidance in practice to libraries in the trenches, or archivists.

I also don't think fair use is the solution because fair use is, as has been said many times today, really hard to use, and it requires lawyers. And even those of us who spend most of our careers in copyright and spend a lot of time making fair use analysis, we don't always agree; there are a lot of close calls. It's hard. Fair use is

really hard. I don't think it's the solution. Legislation is really hard, as was said this morning; it's not easy, but I think forums like this are great. People sit down together, and, as Gloria said, we've got to listen to each other, listen hard, and I do think it's doable. Of course, I'm an eternal optimist. But I think this is very doable, having sat through three years of listening to librarians, archivists and rights holders discuss these very issues three years ago. Things have shifted somewhat, but when I turn back and read the report, things have not shifted as much as you would have thought in three years given the progress of technology.

The particular interests of users and rights holders are pretty self-evident. For users, I think, it's obvious. The way people research has changed. It's a practical issue. The train has left the station. It's just the reality of today. Research is done online. I know my own teenagers are high schoolers, and they do almost all their research online. My daughter was given a paper to write last Thursday, and Sunday evening during the Super Bowl she's in somewhat of an agitated state because her paper is supposed to be on industrialization in Indonesia and she can't find anything on that on the Internet. It's not a hot topic on the Internet. It hadn't even occurred to her to go to the library; it hadn't occurred to her teacher to give them enough time so they could go to a library—not that there's that much in their school library anyway. The local library isn't even open when she's out of school. So, what would we do in a case like that if we had more time? Go on Amazon, I told her, and see if you can find a book. Anyway, I think the interests of users are very self-evident.

The interest of libraries is to serve their users in this new environment. The interests of rights holders? Very simple. It goes to the basic principles of copyright and why we have copyright law in the first place: rights holders need to be able to control the economically valuable uses of their works in order to create and sustain a marketplace, a robust marketplace, an ecosystem for publishing. Paul Aiken spoke about it a little while ago, the notion that these are authors' incentives. If libraries start making works available to their users or to others in a way that impacts the ability of rights holders to sell their works, obviously when the rights holders are able to publish their works in the future, they pay the authors less. We've already seen this in publishing. I don't know what the actual direct causes are, but right now, authors are getting paid less. I did mention I also have worked in private practice at a boutique here in New York, Cowan DeBaets, and a lot of our clients are authors. You used to see advances of $200,000. Same people: advances are under $100,000. A book takes a couple of years to write; it's not a lot of money, even if you're writing articles on the side, or speaking on the side. A lot of my family and friends are writers and they have to do other things now. So you see a very, very direct impact on the incentives when you see publishers making less money: fewer people are able to support themselves in a professional way in the creative arts. I'll stop there.

Weston: Thanks.

Kaufman: Thank you. An interesting part of the question, Chris, was "what are the key interests of creators and owners, on the one hand, and users on the other?" So, the first observation I want to make is that there are libraries who are

not publishers and there are authors who are not archives, but I've never met a creator or owner who isn't a user. And I want to make that point because in the middle, there's a lot—there's a lot of commonality that sometimes gets lost in polemics. Because this is the general question: how do we look at this, what are the key considerations? I like to think of works as falling into three categories. You can argue how many categories and you can argue whether my categories are right, but this is how I conceptualize it. The first category almost channels Bill and channels the discussion earlier about the recordings of bird calls. There's a lot of copyrighted content for which there is no, and never was, a library market or archival market per se. So what am I talking about? Promotional materials, product brochures, political campaign literatures, bird call recordings, ephemera websites (although "ephemera" is sort of an interesting word for websites). For all of that, we can have exceptions for use and preservation which don't implicate the Berne three-step test,[5] which are pretty fair to everyone, which meet some serious societal goals without stepping on anyone too much. So that's one place you could theoretically start. So that's what I call category one.

Category two is where libraries are important, but not necessarily the most important or primary market. So what's that market? I'm thinking consumer magazines, trade books, DVDs and CDs—although I wonder at this point if libraries are the only people buying CDs and DVDs. It may be true, and it may be because of issues that have come up in today's session. Those are going to be a particular challenge on both sides because there's not a huge amount of dialogue. As someone said earlier on the ebook issue, "Well, it's only five percent of my market." So there is not a huge incentive to collaborate, and we need to find a way to get through that; the user community, as represented by libraries and archivists, on the one hand, and the rights holder community, as represented by authors and publishers on the other, need to find a way. And that's going to be very hard because these are communities that are not antithetical to each other, but they're just not joined together constantly in conversation.

The third category is products that are designed for the academic and library market specifically: academic books, journals, reference works, databases and things like that. Those are, to many libraries, the most important thing. On the other hand, even though the parties will sometimes disagree—and maybe even loudly over certain issues—they're also talking to each other pretty constantly. So when you think of archival issues in science journals, well you've got *CLOCKSS*[6] and *Portico*[7]—Nancy Kopans mentioned these before—where the parties are used to disagreeing with each other, but they're also used to sitting down and trying to find some private accommodation. And so, as you go forward with legislation, it isn't one size fits all for rights holders. It's clearly not one size fits all between—as we've learned today, or as I've learned today—archives and libraries. I always think, try to start with the easy stuff first and work your way up, and I think the 108

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5. *See* Berne Convention for the Protection of Literary and Artistic Works art. 9, Mar. 1, 1989, 102 Stat. 2853, 1161 U.N.T.S. 3.

6. CLOCKSS, http://www.clockss.org (last visited Aug. 1, 2013).

7. Portico, http://www.portico.org (last visited Aug. 1, 2013).

Group did that somewhat, that it said, "There are easy things like the three-copy limit. Okay, let's start there and work our way up." And that's still always going to be true. Find the ones where everyone would agree, where the users who are the creators say, "Yeah, let's preserve this. Let's make this available because no one else will." And then let's look at whether there's a market solution for the other things, and if there isn't a market solution, whether we can create a market solution. There are market solutions for a lot of this, maybe not everything. But, and I think Ivy said this as well, there is overlap here. You can believe in fair use and still take a license for something because the service is good. These are not inconsistent concepts. So as we get to the narrow questions I'm going to keep coming back to my framework—one, two, three categories.

Crews: I actually want to emphasize that same starting point, that question about interests of this group or that group, or this player and that player. There's an assumption in the question that players in those categories with those labels somehow all have commonalties of interest. The reality is they don't. And, Roy, you explained some of that and I would just emphasize it, whether we can tackle it yet another way. Jonathan Band, for example, said that one of the problems, a core problem, with the issues we're struggling with is copyright duration. I think that's true, but I would add to it. A core problem is the instant, automatic copyright protection—the lack of formalities—because that has the effect of sweeping multitudes of works under copyright protection where there is no interest in having protection. And then the exceptions—pick any of the exceptions—apply to all of these types of works in a roughly equal-ish kind of manner. And so the tension is with the basic fundamentals of copyright: duration and instant protection. And they're intractable. Those rules of law come to us from multinational agreements. We have a lot of our copyright law, a lot of it is the way it is—maybe it's good law, maybe some of it's a good idea—but a lot of it exists not because it's a good idea. It exists because the treaties say it has to be this way. It might be a good idea, but that's not necessarily why it is the way it is. And so we have to recognize that we have this deeply entrenched system of rules that makes it difficult for us to create nuance in the exceptions, and it raises the importance, though, of those exceptions in the realm of copyright.

Maher: Thank you. Just to be very brief, I think Kenneth has really hit upon why this is such a difficult problem. There is such a broad range of material that has, since 1976, been brought under the sweep of U.S. copyright, and the kinds of rules that need to apply for different sorts of material are all the same rules. The material doesn't want to be all under those same rules, if material can have a will. It doesn't fit. We can say it doesn't have a will, but you're not going to get a square peg in a round hole. That's the crux of the problem and the dilemma we all face on both sides, or four or five sides, of the issue that exists in this room. We would like to see some simplification in whatever comes forward. We would like to see the clarity of exceptions as section 108 can provide as opposed to the vagueness of "fair use" in section 107. And we do not want to have to depend on having things worked out in court, as is the case with section 107. The users of archives, who are also creators of tomorrow's copyrighted works, have a huge stake

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in having such access. I will just leave my comment at that.

Anderson: In the interest of brevity, I would just underscore and agree with the point that creators and owners are not monolithic by any means. We all know about the academic authors, for example, many of whom want their works to be available in libraries. We often hear from descendants of people whose works are in our collections or have been digitized in our collections, who may well be rights holders but they probably don't know it. They're just really excited to see that their ancestors' work is available, and they want to give us more of it or tell us more about it. So, I think we're not talking about monolithic communities by any means. Just another point I wanted to make about library interest as well is that there's another set of activities going on in libraries right now, particularly in dealing with published works, and that is the attempt to reduce the duplication in print collections among libraries across the county. There's a tremendous amount of collaborative activity going on right now to reduce that duplicate physical footprint, and much of that is dependent on, or is being done in synergy with, opportunities to make that material more digitally available as a way to access it. From the user perspective, there's also the increasing interest in text-mining and other ways of interacting with material. And, again, I'm mainly thinking about legacy material, not so much forward looking publication, but the material that is in our libraries that has been invested in and stewarded over very long timeframes and needs somehow to be made amenable to these newer kinds of uses and engagement. And just one final point about the role of libraries: Another thing that libraries care about and have a lot to contribute in terms of solutions is in the area of metadata. Libraries care about good metadata, including attribution and provenance and authority control, and there should be opportunities to collaborate around ways to use metadata to support some of the needs that we all have.

Weston: Thank you. Getting into the meat of the topic, for instance in section 108(b) and (c), when you have preservation of an unpublished work or you have a replacement copy of a published work, the law says digital copies cannot be made available to the public "outside the premises of the library archives."[8] One of the things that the Section 108 Study Group talked about was that it would certainly be incredibly useful to a lot of scholars to have some of this stuff available outside of the library or archives.[9] I was wondering what people thought would be reasonable ways to condition those sorts of availability. You have everything from just putting it on the Web to making it available on a time-limited, expiring link, things like that. You can also look at it through the lens of Roy's three kinds of works, or you can look at it through the commercialization lens. So I'd be interested in people's thought about that.

Rasenberger: My response is that it depends. And it depends, I guess, on the type of work and on the type of use. I do think there are ways to make replacement and preservation copies available to users off premises. I also think you need to

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8.   17 U.S.C. § 108(b)(2), (c)(2) (2012).
9.   Section 108 Study Grp., The Section 108 Study Group Report (2008), *available at* http://www.section108.gov/docs/Sec108StudyGroupReport.pdf.

distinguish between preservation and replacement copies. Preservation copies under section 108 are for unpublished works.[10] These, by and large, are archival works and they are generally only works where there is only one of a kind. They're in an archive that may focus on a specific type of work, meaning there may only be one in the county. They're not dispersed around the county. So, for preservation copies under section 108(b) there may be more of a need for remote online access, which is one of the reasons why section 108(b) allows the maker of the preservation copy to also provide copies to other institutions, and the idea is to disperse access to that work.[11] So, in any case—and this is true for replacement copies too—if you're going to make them available off-site through electronic media, you're going to have to do so in a way that is secure, and I think that's really the biggest concern: technological security. Also, it's got to be clear that you're providing access only to the particular user. That user can't download or further forward the material in any way, there's got to be technological protections there. Maybe you're providing electronic access, but only on site.

And to get back to my point, it depends. For instance under interlibrary loan, it's an excerpt from a book or an article. Right now, libraries are providing access by making a digital copy and putting it potentially on a private URL, or through email, or some other kinds of point-to-point exchange. Obviously those works shouldn't ever be put on a website; otherwise you are interfering with the market in a very, very important way. But I compare that to motion pictures, and particularly anything that still has commercial value. I was down at the Library of Congress' Culpeper facility earlier this week, and it's really amazing what they have. The old nitrate films, these ancient records some of which are not in very good shape that were made by actually playing into a big tube. The films need to be preserved. There are not a lot of copies of them, or any in some cases. One of the ways to preserve them is to make digital copies; the technology is now in a place where you can be confident that you are refreshing it, updating it, and keeping it alive for years, if not centuries, to come. So, it can be a very good preservation media. Now, with respect to access, they have created very secure data streams from the facility in Culpeper to the reading room in Washington D.C. It's not fully operational yet, but it's a good model—a way to provide electronic access to materials where there's commercial value and there's potentially risk of piracy, namely through secure reading rooms, which could be widely distributed.

Maher: I would just like to follow up briefly on Mary's comments. I think those points are all fine and good, but I didn't hear anything in what she described that took us away from what is the statute now. And it would seem to me that if the provisions for the very strict limits on what is done with a copy—I'm talking clearly from my perspective of archival materials that haven't enjoyed wide circulation to begin with—in making copies available offsite, if it's only limited to that narrow framework, I can't see somebody in the community out there looking at this as any step forward in modernization of the statute. That said, I believe, at the

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10.   17 U.S.C. § 108(b) (2012).

11.   *Id.*

minimum, when we have digitized copies of archival collections, if you will—things that are more or less unique in our own repositories, that don't exist anywhere else in the world—that we should be able to make those things available in an electronic delivery form, for example, as a PDF document sent to a user, provided that the user on the other end is subject to the same sort of notice requirement that we have built into the statute right now. The concept is in the statute: back in 1976, placed into the law was a provision that, if you're going to make a copy for a user, you're going to have to fulfill an order form. That can be handled in a digital form just as well and be made available as a one-off response to each inquiry. And that's short of where I'd really like us to be if we digitized the collection of that kind of material; I'd like to see us be able to make that available more or less globally depending on the kind of collections.

   Crews: And if I can add a different aspect to the conversation. There are so many ways to respond to the question exactly, but the question is built around that language in the preservation and replacement law about digital copies being available only on the premises of the library,[12] and we struggle with that constantly. It's a deeply, deeply problematic clause in the statute. Now I can look at it, and, if I were answering your question, I could begin to think of dimensions of market analysis, marketability of material, what has a market, and what doesn't—and that is part of copyright law in other ways. There are other issues, going to the unpublished and archival materials, about privacy interests. Believe me, I don't want privacy interests integrated into copyright, but privacy is a separate consideration that at times is important to evaluate. And so there are lots of ways that we struggle with this. But going back to one of my basic themes: how do we develop really good law? When Congress added that language about limiting access to the premises of the library,[13] they did so in 1998, in what I saw as a false tradeoff, and one that we need to be wary of because it was a tradeoff of adding explicitly that digital preservation was allowed in exchange for the language of limiting it to the premises. The reason why I called that a false tradeoff was that I was definitely of the school of thought then, and I am now, that digital preservation was explicitly allowed under the law already. We don't need that clause added as Congress added it. It's already there in principles of technological neutrality, and it was already there in the definition of "copies" in section 101, and section 108 allows the making of copies.[14] We didn't need the language that was added to section 108. But the pressure to add the language brought pressure for the tradeoff language of the premises. So it's an object lesson in being careful about what you ask for and what bargains you strike.

   Kaufman: What's interesting to me is, at least outside of the context of orphan works, a limitation to use on premises of a replacement or archival copy doesn't mean that that replacement and archival copy may never be used off premises, doesn't mean it can't be used by every library, shared with every library, or

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12. *Id.* § 108(b), (c).
13. Pub. L. No. 105-304, § 404(2), 112 Stat. 2860, 2890 (1998) (codified at 17 U.S.C. § 108(c)).
14. *See* 17 U.S.C. §§ 101, 108 (2012).

anything else. What it means is there needs to be a dialogue between the rights holder (outside of the orphan context) and the library, and licenses do this. We accomplish this in the market. There are a lot of licenses that allow different types of sharing: on premises, off premises, in defined user groups. It's not an unheard-of concept. And so just remember that a lot of times the license solutions are just the best ones because instead of relying on this debate between two sides as to what we're willing to say publicly, you actually get in a room and say, "Well you need this, but you also need this; well clearly the law won't give you this, so let's give you that as well," and come up with something good. Again, I keep talking about *Portico* and *CLOCKSS*. It's not just preservation; it's preservation plus access pursuant to trigger mechanisms and controls—a great solution, but you'd never get that through legislation, you'd get that through collaboration.

   Anderson: So in the provision of online content we have an analog for limiting to a user community, and that's through authentication mechanisms. And we have pretty robust and well-functioning authentication mechanisms within libraries that can serve as the analog for restricting to a community. I think that really is not so much an issue; you can think of premises as the user community and restrict in that way. But I think the types of material do make it somewhat of an issue because there's some material where it might make sense to limit access to a particular user community and others, particularly for archival collections that weren't published, where the practice isn't to do that, and it wouldn't make sense to do that. On the other hand, with recently published work it may make sense to impose authentication limits because there clearly is more of a market interest, and so there could be some discussions around the question: Should there be some dates after which you need to be careful about imposing some sort of authentication limit, but prior to that, when there's no longer any demonstrated market interest or you can reliably make that generalization, that you wouldn't have to impose that kind of restriction? There are also well established practices for take down policies, and it's very easy to respond to the concern of a rights holder on an individual basis. I shouldn't say we do that all the time because we rarely get those requests, but we have all the systems in place to do that and are able to respond very quickly when that happens. That provides another mechanism for essentially sort of an opt-out of making material available, so it does seem that there should be ways to deal with this.

QUESTIONS AND ANSWERS

   Weston: Okay, so unless anybody has a reply to anything any of the other panelists have said, we've got about fifteen minutes so I want to open the floor to questions. I know there was someone who had a question in an earlier panel who did not get to ask it.

   Howard Besser: Howard Besser, New York University. Let me make a few very quick comments. First of all, as to the "on premises" issue, that's a real twentieth century idea. If we are talking about our highest value material from our most restrictive publishers, the language that is used by Elsevier or any other

publisher for high value material is not "physical premises," it's your "user community." With material that's of less high value, why would we consider using the word "premises"? It just doesn't make sense. Second, on Mary's comment, there are not a lot of copies of those older films in Culpeper at Library of Congress. Well, the study that we did, part of it's reflected in this book, shows that there are not a lot of copies of things made in the 1980s. We studied videotapes that were commercially distributed, and roughly at least ten percent of our collections are out of print and unavailable anywhere else. They're only available in one library in the country. That's a significant problem. And that gets to some of the orphan works issues. It also gets to some of the things Roy Kaufman said about the three sizes. The problem, though—the danger I see in your different sizes—is that these things started out as commercially viable, they started out as highly circulated, and now, thirty years later, there are hardly any left. Though I do agree with both Kenny and Roy about this, that's a serious issue.

And one last point left over from the last session, but we just touched on this, is the issue of digital preservation. I've been doing digital preservation for twenty years. No one does digital preservation lightly. It is a serious commitment. This is not, "I'm going to scan something and keep it on my hard disk." This is a long-term commitment. It's really difficult. I teach digital preservation. No library would ever get involved in doing digital preservation on a lark. It's a huge commitment. And in response to Jane's comment earlier, the HathiTrust is an entity that tries to avoid duplication between different organizations so that they don't digitize the same work because it's expensive, it's time consuming, it's difficult, and it's a long-term commitment.

Rasenberger: I just wanted to mention one thing, which was discussed in the 108 Group and is in the report but there are no conclusions about it, was this notion of somehow using whether a work is commercially available as a distinguishing factor in whether it's allowed to be provided off premises or not."[15] There are problems with that, a lot of problems with that, because how do you determine if something is commercially available? I think that came up with Google Books. They figured out that some things can easily become commercial again if you make them available. So how do you determine when they are commercially available or not? There are other issues, too, but I think that's one way to address your concern. I hear your point. It's the twenty-first century, why are we talking about having to go to a "premises"? But there are certain types of works where, even if a library makes them available to a user in any electronic format, even more so now than three, four years ago, piracy is a real issue, and the ability to hack is increased. And if you have a commercial product it's really not that farfetched to think that somebody in China or Korea is going to be able to hack into a system and download it and make it available and really cut into a foreign market or even a U.S. market. That's a real concern. And then the other concern is, of course, if you don't have real limitations on what libraries can do, how they can provide access, and who they can provide access to, pretty soon they end up being publishers, and

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    15.   SECTION 108 STUDY GRP., *supra* note 4.

free publishers. And there are libraries that have online sites where anybody can become a user no matter where they are in the country. I don't mean academic institutions, but local libraries. Now, the stuff they're providing access to online is licensed, and that is an entirely different thing. If you're licensing works electronically then it's the terms of the license that control. I agree with what a number of people have said, that that is one of the ways forward: licensing models.

Dick Rudick: I'd like to put together Bill's question that he asked quite a while ago and Mary's comment, and now I'm going to ask you a question. But start with the observation that when you look at the NDIIPP-supported preservation projects, you could see that the question and concern that Bill had spills over into the creative community, which is dependent on archivists for many important types of projects—documentaries, what have you.[16] So, Bill's concern is not just a concern for archivists and librarians, it's a question for your patrons, who, by the way, include creative people. Mary started us off on this, the distinction of commercial availability, which is something of the 108 Group, and this is my question: Does that take you either partway or all the way to where you want to go? Because you talked, not so much about commercial availability, but the intent that people had when they wrote. And, of course, you can write something or take a picture and have no intent of making money from it, but you can change your mind, so does commercial availability or some variation of that take you anywhere useful, as a distinction?

Maher: I'm not sure I can entirely answer that without getting into orphan works. I think the best way to think about the issue is that any given archival collection can include a range of content. And if we would be doing digitization of a collection, it's going to be mass digitization, and if we make the decision on the collection level then we're going to need to be facing different characteristics of collections. If you think about what was in the OCLC Research Group's "Well-Intentioned Practice for Putting Digitized Collection of Unpublished Materials Online,"[17] with which I have some difficulty and have registered those, that's the sort of assessment that has to be taken. It makes an assessment for the possibility of commerciality involved and pays a certain amount of attention to that. The sensitivity factors address the possibility that if the work was created originally for—or the predominance of works where the nature of the subject matter involved was created for—that kind of an audience, then you may not want to use a bulk practice. But that doesn't solve all the problems. That's only one approach.

The one concern I have about using a criteria for my kind of material for determining whether there's a viable market out there, is that if we're going to seriously consider that—and this is the problem I had with the "Well-Intentioned Practice" guidelines—you really have to look at it at least on an author-by-author basis, or if not, maybe even a work-by-work basis. Once you get into that, the

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16. *See Digital Preservation*, LIBR. OF CONGRESS, http://www.digitalpreservation.gov/ (last visited May 29, 2013).

17. OCLC, WELL-INTENTIONED PRACTICE FOR PUTTING DIGITIZED COLLECTION OF UNPUBLISHED MATERIALS ONLINE (2010), *available at* http://www.oclc.org/content/dam/research/activities/rights/practice.pdf.

possibilities of doing, if you will, mass digitization or digitization of an entire collection, whether the collection is two boxes or two hundred, mean it's unviable. But I think those of us who have been working with such collections—and I don't want to be in a position to say "just trust us we know what we're doing," I'm not sure I always know what I'm doing—but you do get a sense from having worked with collections over the years of which ones contain material made by creative authors who made their living in that kind of stuff. Yet there's a lot of, if you will, administrative archives that don't contain much of anything other than administrative action works, and these are entirely different stories. So it's kind of a bulk approach to coming to a principle you apply as to how necessary it is to investigate commerciality.

Audience Member: This is a kind of follow-on in terms of the section 108(b) question for archives, and that's the issue of when something that has no commercial value individually piece-by-piece, say a correspondence collection, slips over into Roy's category three, because it has some commercial value as a collection. We digitize it, and then it's got commercial value. What space is there within 108(b) for those initially uncommercialized mass digitization setups for archives?

Maher: I kind of think that's a nonissue, a non-problem. If it has value as a collection, which it certainly does, that's why we'd want to pursue it; the value is as a composite of the many, many different authors and many, many different works in there, but those authors and works individually don't have much value. Now, I can think of an example of a literary magazine archives which we hold, in which there are lots of prominent authors, that would be off the table for the kind of discussion I'm talking about. But especially when you get into the world of archival materials, as opposed to, if you will, the old category of manuscript materials, I think it's a nonissue. It almost sounds to me as if it's going down the same rabbit hole as the discussion of whether Google created a market value because they made it available. That's an interesting little logical argument, which is fun to play around with when you can't fall asleep, but I don't think that it provides much guidance for either side in that dispute, and it certainly doesn't help in this area either.

Weston: I think we have time for one more question.

Jill Strykowski: Hi, I'm Jill, and I'm a media and digital resources librarian up at Iona College in Westchester. I sort of wanted to bring the idea of technology and technology developers into this conversation because there's a certain point at which all the points everybody has made are kind of moot dependent upon whether the software and hardware is available and how much it costs. And I was wondering especially about Ivy's perspective on how that plays into even the ability to create these things and to have a discussion about them at all.

Anderson: Well, I think that gets into the question of reasonableness and the way the world really works. I think it was Eric who said something about how we make professional judgments every day and we do things that make sense and are appropriate, and that in a sense much of what we do is self-limiting, and it's self-limiting because of economics, because of practicality, because of potentiality. So,

I think the role of technology plays into that. If the question is whether, when we digitize stuff, it's going to be migrate-able, I think that's something as a profession we spend a lot of time worrying about and thinking about, but to the extent that there's a cost of technology and that's a limiting factor, that's just something that plays into the equation. So I don't know if that was really the thrust of your question, but I think those things tend to work themselves out in real practice. Some of the doomsday scenarios that get developed aren't really doomsday scenarios—they don't happen because the limiting factors come into play long before those things ever happen.   I think that's true with authentication mechanisms, and I think that's true with the issue of hacking. It's sort of a fringe issue. Yes, it does happen, but somehow we live in a very robust marketplace despite those issues. So I think there's a lot of opportunity for self-regulation in all of what we do, and the professional practice of libraries is all about how we make those judgments and make good decisions that inform good practice. We all do work together; libraries spend a lot of money with publishers, and publishers rely on us to be part of that dialogue. So I think there's a healthier ecosystem here than is sometimes recognized.

   Weston: I'm sorry, but I understand that there was actually one more question that we had. You had raised your hand before.

   Audience Member: This is somewhat complicated, but I wanted to follow up. I work in film and media, and I don't think it got covered as well as print here. In particular, film is much more expensive. Howard's right, it's very expensive to preserve a film, except I think that we've sort of muddled together preservation and just copying because when you take a half-inch video and digitize it to "preserve" it, you're getting a vastly inferior copy. And the big issue for me has been that it costs a right holder about twenty or thirty thousand dollars, depending on the film, to be able to make a digital copy that's good enough to sell as a DVD or as a stream. It's been very frustrating that libraries have said, "Well, we can't wait, and we'll just make our copy, *and* we're going to let it go off premises," which is a big issue. I don't know how many of you know, I know Mr. Crews does, the situation with the GATT Treaty,[18] which I want to give people just a really quick thing on. Most European films had fallen into the public domain for a very complicated copyright reason. They were retroactively copyrighted by the United States in 1998 and the academic community was up in arms. They said it would be the end of public domain as we know it, and that films would not become available. It got upheld by the Supreme Court, so it was the law.[19] And instead of things not being available, because the rights holders now have the rights in their films, they invested the money in putting out superb copies of these films. We're not talking about rare archival films; we're talking about feature films, particularly independent films, films from Europe, where the copyright holders are completely known, you can find them, and libraries make copies of them. If people take

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   18.   Uruguay Round Agreements Act, PL 103–465, § 514, 108 Stat 4809 (codified as amended at 17 USCA § 104A (2002)).
   19.   Golan v. Holder, 132 S. Ct. 873, 894 (2012).

something that just happens to be out of print, it's very frustrating, and I'd like you to comment on that. They just happen to not be in print on DVD.

Crews: You named me in your response.

Audience Member: I don't think you were involved in that.

Crews: I was not, but I am in general very concerned about that whole dynamic of restoration. But I will in the interest of time just say that I like your point, I like your point tremendously, and I think it underscores the general notion that we tend to lump works together into gigantic categories, and then apply the same rules. You're making the point that there's a very important class of films that had a very different market experience because they're different from a lot of the other stuff that was also swept under copyright in the name of restoration. Tying that together with the point that I made earlier about the lack of formalities—and I know it's almost a go-nowhere issue because we're locked in by treaties—in principle the lack of formalities is what has swept everything under the same headings. In an ideal world I'd like to be able to have a conversation that says: This is great, what you just said is great, and where there's economic value, or personal value, or privacy concerns or whatever else: Formalities. Claim your rights. *Claim* your rights. If you're going to spend twenty thousand dollars on restoration and digitization, what's another fifty or a hundred dollars for a kind of a registration system that would claim your rights? And then I would say to you, thank you.

Audience Member: That's what happened under GATT, is it not? They were reregistered.

Crews: They could, but they didn't have to be.[20]

Kaufman: So, restoration for a copyright lawyer always seemed a little bit odd, but I think your story points to the importance of maintaining the proper economic incentives. Because everyone had the right to make these copies, but no one did. All of a sudden, someone's got an economic incentive, and great copies get made. And that's, I think, what copyright is supposed be about: it is about narrowly crafting around the economic incentive. That is about finding a way to in some ways collaborate, because you got what you wanted—a really great quality—and maybe it in some ways required the right holder, in a sort of strange case, reclaiming their rights. So, again, I could pick apart, as anyone could, my three categories, but at the end of the day you've got legislation, you've got licensing, and you've got a goal. And the goal is to solve a problem, and the best way to solve the problem is usually somehow tied to economic incentives. And it could be a right holder's incentive, or a library incentive. I'm not even taking sides there. But I think, again, that just reinforces the importance of getting it right, not sweeping out exclusive rights too broadly, and also just focusing on that maybe the economic incentive isn't the worst way to skin the cat. Thanks.

Weston: Okay, I think on that note we're going to end this panel. I want to thank all our panelists, and I want to thank all of you for coming out today.

June Besek: I just have a couple of closing remarks. Obviously I want to thank this panel, especially Mary because she stood in at the last minute. And I'm

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20.   Uruguay Round Agreements Act § 514.

grateful for all of our panelists today, who were really flexible in our trying to make the day more compact so we could get you out of here earlier. I want to express appreciation to the Copyright Office, with whom we organized this twice. And I also want to thank our sponsors, and the Columbia staff who have been really good, especially with all these last minute changes that we had to make. So Pippa and Cindy really get a lot of credit for that. I hope we've succeeded in getting you out the door before the worst of the weather hits us, and I hope you'll all be very careful going home or wherever your destination is this afternoon. Thank you.