

Symposium: Digital Archives: Navigating the Legal Shoals

Roundtable: Sound and Video Archives

Kenneth Crews: Well, thank you very much, and thanks to all of you. Thanks for coming back. I'm glad it's not a sunny day outside, so everybody will be happy to come indoors. Thank you for being here. Extraordinary conference. And thank you to June, Jane, everybody at the Kernochan Center for everything that you've done today; it's just fantastic. A real pleasure. A real pleasure. Our panel is on the subject of issues associated with video or sound recording, or for that matter a variety of other nontext-based formats. So we're looking at a rich variety of materials.

Now, why single out different kinds of formats or different kinds of media and separate them out from the text-based materials that we've typically talked about? And there are a variety of answers. These diverse media present diverse challenges, and they also come in many different variations. I mean, just on the example of audiovisual works, they could range from a simple home movie to a feature release film, or on the example of sound recordings they could be something as simple as an interview, as straightforward as an interview, or it could be ethnological field studies, or it could be, well, Girl Talk and mashups and a variety of other kinds of works.

And so why are we dealing with them differently in the law? And the simple answer is: because sometimes we have differences; sometimes there is distinct law. We heard reference to 1972 and sound recordings. What the heck is that all about? So, sometimes there is distinct law. These kinds of works often embody multiple, multiple layers of law. We've heard a lot of talk about copyright, privacy, publicity and the list goes on. These kinds of works often—because they can embody a mix and a gathering, an amalgamation of different kinds of contributions—also mean we have different types of works, from a script to images to art to music, all embodied in one single work. And each element of the work might have different rights attached to it and indeed may have different owners. Who owns the rights in that sound recording? Well, if there are multiple speakers we might have multiple owners. And so, we have an extraordinary state of affairs, legally and pragmatically, with respect to these kinds of works. And therefore we need to talk about them.

And so, let me introduce our panel; and again, you have detailed bios in the handouts. Just by way of brief introduction, I have lawyers right and left, so I'm well protected. Robert Clarida and Eric Schwartz are leading lawyers with leading law firms, and I know that both of them have addressed a rich variety of issues

related to copyright. I also know that they have represented parties who sometimes have different points of view with respect to this, so they're able to come at the issues from different perspectives. And I hope they'll have a chance to contribute those perspectives today.

We also have three panelists who are in the—however you might label yourself, sort of for today—the library archive world, but are also representing different kinds of works in their collections. Bob Wolven, I know, is involved in a major project involving the archiving and cataloguing and preserving of websites, and with a website comes everything else that's part of it: text, sound, video, images, the list goes on. Karan Sheldon focuses principally on film, and I guess the word “focus” is a bad pun but hey, we do it. And also Sam Brylawski, whose work is on sound recordings for the most part.

So, I would like to turn it over first to our library archives folks to give us some scenarios and examples of situations that you've dealt with. Where have you seen legal issues arise in the context of your work? So, whichever one of you would like to go first.

Robert Wolven: I'm at the end; I guess I'll start and I'll try to bring up just two or three examples. I'm told there's this bright red card that's going to appear in about three minutes if I haven't stopped talking, so this will be short. As Kenny said, we've started at Columbia a project around the harvesting and archiving of websites and some mention was made of that this morning. And there are a couple of issues. There are many issues covering that whole range and a couple that are probably more specific to the audiovideo content out there.

We've been working initially in the domain of human rights—human rights organizations specifically. Now, we're obtaining permission from the website owner to harvest, to archive the site. There's always a question of what that owner really has the right to give us permission to do, and to what content they have the right. And some of them are explicit about that and many of them are not, themselves. They're probably not aware of it. The person filming policemen beating political protestors on the streets of some foreign city is probably not that concerned with obtaining the necessary releases and passing them on to the human rights organization that is doing that. That person who is doing the filming may themselves be working for an organization doing work for hire, or may not and so forth. So, at the point where we're acquiring this content we often don't really have a very practical way of knowing those rights and what's involved. On the other hand, the chances that the person filming that video is going to sue us are probably fairly minimal as well. So, there's that calculated risk aspect of the whole project. Working at scale, this is not the sort of thing that we can do—investigate in depth and actually accomplish anything—so we have that question again.

But then there are a number of other questions aside from copyright law that apply. Much of the content we're getting is sensitive. There are statements made that could be considered defamatory, certainly, or we would guess that that might be. Some of those statements are in languages that we may or may not understand ourselves. If we're acquiring video that was filmed in one country, posted to a website in another country, harvested in a third country and hosted on a server in

the United States, which of those many national laws apply to this content is another question. There's content that may be taken down and removed from the website after we've archived it, either by the owner of the website because it might expose the people depicted to prosecution or other retribution, or by the government that is in that country because they don't want some of this content to appear. So, at that point, we've got the content that is no longer available. That content may be subject to legal action. Again, it might be used even as evidence in legal prosecution. What responsibilities and rights do we have that come along with the fact that we've obtained and archived this content?

Just one more example before we move on and then carry it forward. Oral histories were mentioned earlier as well. Some of the issues that come up are fairly well documented. Who was the original donor and the original interviewee? What rights did they give at the point that the interview was taken? Does that include the right to publish it over the Internet? But then, the act of making it available over the Internet raises questions about the content—content that that might be controversial, sensitive or defamatory again. In the context of someone coming and reading a transcript it's different when it's published over the Web. And these issues can converge. We have Armenian people doing oral histories who may refer to events that in certain parts of the world, like Turkey, are seen very differently. So, a number of these same issues can come up in the context of publishing something over the Web.

Kenneth Crews: Excellent. Karan?

Karan Sheldon: OK. I'm from Northeast Historic Film and have been involved with moving image archiving, primarily of nontheatrical works, for about twenty-five years, and I recognize among us today some members of the Association of Moving Image Archivists, which was founded in 1991. We wrestle with a lot of these issues, but I'm going to start picking up with the oral history question because recently on the Association of Moving Image Archivists listserv there was a discussion that was prompted by the JFK Library about donative intent and where, when there was no signed deed of gift, was there an implied intent to donate? And it was picked up quite quickly among other repositories including the Archive Center of the National Museum of American History. And so, I would say that that's clearly something that there's a lot of energy around and no clear answers at this point. What is the intent to donate, and does that have any real legal standing?

Going directly to personal materials: a lot of my work life has been around home movies, and those are unpublished materials that come to the archives with a deed of gift from one member of the family or from a number of family members. But as we heard today, it's not clear what the downstream consequences are, particularly outside of the United States, for those descendants and when those materials are posted online. We have not yet had any difficulties, but we do anticipate that this is going to be way more complicated than we see now in the beginning of the twenty-first century. We do stock footage, so we are making materials available for reuses not anticipated by the original donor, and that again is quite an area of complication. As these stock collections are described in digital

libraries and then surrogates appear as clips online, what responsibility do we as repositories have for tracking those clips? And it's a question I asked at a cataloguing and description workshop held at New York University a couple of years ago where I had taken note of something called the International Standard Audiovisual Number ("ISAN"). An ISAN—you might look it up if you're not familiar with it—depends on a national authority. And in the United States—somebody may correct me—but I believe we do not yet have a national authority for the assignment of ISAN. And I really do argue that we should have more discussion about persistent unique identifiers for these materials outside of our institutions because we all are wrangling unique identifiers, but being able to identify that particular clip as belonging to something that we know and are custodians of is something we really haven't done anything about yet. And so I think it's one of the most urgent things in front of us.

And then finally a little current project, funded by the Institute of Museum and Library Services, Northeast Historic Film with WGBH-TV, Boston Public Library and Cambridge Community TV: "The Boston TV News Digital Library: 1960-2000," which is a two-year Boston TV news digital library. And we have the desire to describe 70,000 items: TV news, sports, public affairs stories from commercial and noncommercial TV stations. But just to say right at the outset: sports is a nightmare, even and especially in Boston. Because we love it, we know there's audience demand, we know people want to see it, but how do we unscramble the rights connected to holding the physical materials? WGBH has to raise the match, and they've been unsuccessful so far. So, we're still looking for \$380,000 just to begin this really exciting project. So, obtaining the resources to be able to solve these problems, even when you have this terrifically great collaboration, is not easy these days. And then, it's been pointed out, the guild agreements are really important, and we have terrific things, including the assignment sheets with the foulest language by the news gatherers, which I believe really should be made known to everyone. But there's a lot of work to do before we can get to that digitization. Thank you.

Kenneth Crews: Thank you. Can you post that language? Is there—

Karan Sheldon: I have an example here. I brought one because I love them so much.

Kenneth Crews: We'll just turn off the camera and read it out loud.

Sam Brylawski: What they said goes. My executive summary: I mean, actually, I think some of the biggest problems in sound recordings are the trail going dry on these rights issues, if there was a trail at all. Two or three quick case studies. I worked with the Library of Congress with sound recordings for a long time, and there we had an enormous radio news archive, for which we attempted to put up broadcasts from World War II—daily broadcasts, five or fifteen minute roundups on the Web for each day of the war. We'd have a calendar you'd click on. And NBC donated this collection of transcription disks to the library. And the way they contract, that gave them rights, or at least we had to go to them for permission to do anything. So, there's a case of a donor agreement superseding any kind of law, so to speak; and I mean, it was their material.

But, so NBC gave a limited license to the Library. They said, “OK, we’ll go ahead with it, but you need to get the other right holders.” Well, those were great challenges. Who are the other right holders? This is commercial radio in many cases. The radio network isn’t necessarily the owner. The sponsor might be the owner, and, as Karan said, there are guilds involved. The newscasters themselves—the journalists—are members of certain guilds that have rights. As you well know, when a radio or television show does a live broadcast—and everything in the ’40s on the networks was live—the contracts with your talent is payment for live work. There’s no ancillary market. There were no audiocassettes or something that they were going to sell later to anyone. It went out live and that was it. So, really that left open all the rights. And the Library began to pursue it. But for various reasons, it didn’t go up on the Web. I think it could eventually.

One of the biggest problems was NBC really only wanted to give the Library a limited license—that is to say, a certain number of years. And the Library had to assess the amount of research to clear each broadcast, or each group of broadcasts, and was it worth it to do that for a five-year license? I think they’d go back and do it. And I think they will go back and do it eventually, and I think NBC would probably agree, but at the time the person in charge was rather impatient about it. It wasn’t a person in collections; it was someone else in another office. So, that’s one case, but it’s a case of the trail going dry and sitting back and trying to figure out who to go to.

Now, with that: a quick commercial announcement myself. I worked with a library and continue to work for the National Recording Preservation Board, which has commissioned a number of legal studies, and about three of them—well, actually they’re all about pre-1972 recordings. But the one that I think would be most interesting to you as a group, whether you have sound recordings in collections or not, is the second study that June Beseke and her students did on pre-1972 noncommercial recordings.¹ And why it might be relevant to you as archivists, no matter what you have, is that it covers things like publicity rights, things other than copyright.² Publicity rights, and what rights might be in oral history, or a news conference, and things like that.³ It’s available on the CLIR website, Council and Library on Information Resources—that’s clir.org.⁴ It’s free as a download, as a .pdf, but June and the students here at the university did a fabulous job. It’s really readable by people like me and it’s very detailed.

The other quick case study is another case of a commercial record company, that of the Edison Phonograph Company. Edison’s Phonograph Company went out of business in 1929 and there are enormous amounts of Edison recordings held in lots of archives throughout the country. Two archives, the Library of Congress and the University of California, Santa Barbara, two of the places I’ve worked,

1. JUNE M. BESEK, COPYRIGHT AND RELATED ISSUES RELEVANT TO DIGITAL PRESERVATION AND DISSEMINATION OF UNPUBLISHED PRE-1972 SOUND RECORDINGS BY LIBRARIES AND ARCHIVES (2009), available at <http://clir.org/pubs/reports/pub144/pub144.pdf> (last visited Oct. 14, 2009).

2. *Id.* at 30–64.

3. *Id.* at 46, 49, 50.

4. Beseke, *supra* note 1.

coincidentally, have each put a lot of Edison recordings up on the Web for streaming and/or downloading. Because there was the feeling that it was—let’s put it this way—it was an acceptable risk. But there is no paperwork of exactly what happened to the Edison Company. There was this rumor that it was given to the government by the heirs, or a foundation, but no one’s found the piece of paper for it. But as I said, this is the case of acceptable risk. However, the U.S. Parks Service, which runs the Edison Historical Site in West Orange, where there are many thousands more recordings, doesn’t want to put them online. Their counsel is afraid to do so because there’s no paper to say exactly who owns it. Now, I would argue—and Santa Barbara and the Library of Congress have had them up now for fifteen or twenty years and no one’s complained—it’s even more of an acceptable risk. But this is the Parks Service’s prerogative, and they don’t have the piece of paper and they don’t know what to do.

Kenneth Crews: Excellent. And we will have a roundtable too that will have a chance to explore some of these issues about what do you do when you’re faced with uncertainty, and so on. We’ll be able to pursue those issues more fully in another roundtable this afternoon, but we can get to them here.⁵ So, I would like to take all of these observations and turn them over to the lawyers. And Bob, do you want to go first? I think you just got nominated.

Robert Clarida: OK, I just got nominated. I will pick up on a number of things that Karan said that I would like to talk further about. One is about this idea of having a responsibility to track a piece of content as it moves through the Internet. And I’ve had this discussion with a number of my clients who have been thinking, “Should we be doing that?” I think this is something that people in that world are concerned about. It could be a good idea not to do that from a liability perspective, though, because you could have secondary liability by making something available, even if what you are doing is not a copyright infringement and no one would ever sue you for it. If it ends up in the hands of someone who does use it for an infringing purpose, and you made it available to them, under copyright theories of secondary liability you could have some kind of secondary liability for having provided it to someone else, either with knowledge or with, you know, actual or constructive knowledge that it could be used for infringing purposes.

Kenneth Crews: Is Bob personally liable?

Robert Clarida: I have no idea.

Kenneth Crews: Uh, oh, he’s down the hall from you.

Robert Clarida: But having your own license plate on that piece of content as it moves through the Web, if it ends up in some sort of infringing use, it could link you to the infringing use in a way. And if that license plate isn’t there, that will be as a practical matter impossible, I would think, after it passes through the Web for a while. So, I have had that conversation. I have had clients who have looked at this issue and said, “You know what? I don’t want to identify this content for that reason, because there is no legal advantage in doing it.” There may be an archival

5. June M. Besek et al., *Roundtable: How Do You Make a Decision When the Legal Answer is “Maybe”?*, 34 COLUM. J.L. & ARTS 95 (2010).

advantage, an informational advantage in doing it, but strictly as a matter of trying to limit your legal risk it doesn't help you to identify the content that way if it's not your content, if you don't have a very clear chain of title to be putting it out there if it's risky. Better just to sort of let it fly, and have its life and have its wings.

The other question I had was about the donative intent point, and I just wanted you to flesh out a little bit more what that entails. This is where materials come to an archive without a deed of gift or without a gift instrument.

Karan Sheldon: In some instances, I believe they were materials that were actually created by the archive, but they never received the release back from the person who gave the oral history directly to them. And so, it would have been from programs at the JFK library or at the National Museum of American History, for example.

Robert Clarida: So, it's where people are participating in an oral history project, sitting for an interview, or that sort of thing.

Karen Sheldon: Yes.

Robert Clarida: Certainly as a copyright matter I think you would have a very strong argument for an implied license arising out of conduct, and I think that gives you the right to do whatever it is that was within the contemplation of the parties sitting down having that interview. If it was a long time ago putting it up on the Internet was probably not something that they contemplated, although they may have contemplated, "Just make it widely available to the world," and that's an uncertainty that you really probably could never get to the bottom of in any conclusive way. But certainly, that happens very, very frequently. There's a lot of case law involving people who make materials available with the intention that they'll, you know, be published or something—the recipient will do something with them—and that's a perfectly valid copyright license, even though there's no document for that.

Eric Schwartz: Well, thank you. First, I, like others, want to thank Jane and June and the Rockefeller Institute for inviting me. And here at the Kernochan center, having worked with Jack Kernochan in particular, I am taking notes all morning with the total 360 degree view because, though I am sitting here, I guess that we clumped the copyright lawyers or the lawyers in the center here so that you could hit us with spit balls more easily. I actually have spent twenty-something years as a copyright lawyer. I have also spent the same twenty-something years as an archivist and preservationist working for the libraries, film preservation board, recording preservation board and the national film preservation foundation. So, I think that I understand that.

The first thing that I would say to the students, the law students in the room: as you've heard throughout the morning, the legal issues, however draconian they are described as ghosts and goblins, they are real, and what you can do is to donate your time to the archives because oftentimes the greatest obstacle to the archives is that they just don't have the resources—that being money, donate money as well by the way—but they don't have the resources and the legal fees for that obstacle. And if they can't get past that, they just won't do it. No lawyer ever got fired for saying no; that's my experience in the archives, and, alas, the counsels in institutes,

often just hitting the first hurdle, without a real risk analysis, just say, “There’s some risk, don’t do it,” and that is not the right answer. Maria Pallante referred, you know, in the choices of where to go, to analysis and assumption of the risk. I live in the world of analysis and assumption of the risk, whatever I am working on, as I do, as Bob does. For production clients working now on a \$15 million production, we have 1,200 clearances, 136 interview subjects; and you know, I’ll double-up my malpractice insurance, but I understand the assumption of risk because it’s mine.

I think that we all would like to be in a place legally where there’s clarity, where there’s certainty, but that’s not the world in which we live. We might all hope for § 108 changes that would update § 108 into the twenty-first century, for changes in orphan works legislation that would do the same.⁶ If you’ve paid any attention to what’s gone on in Congress for the last two years you’ll recognize that the legislative process doesn’t necessarily work, not only well but at all sometimes, and copyright law is a very low priority, as others have said. So, that’s not the solution.

Negotiation and collaboration: it does work. The film preservation foundation has produced four box sets of materials that we’ve distributed. We’ve also broadcasted them on TV, Turner Broadcasting. We’ve also given copies to all the state libraries. We’ve never had any pushback in all of the titles, all of the things that we’ve done; and you can do that. Some is by collaboration; some is by the analysis of the risk. For the archives, preservation and access—you know the mantras—but preservation first and foremost if in the legal questions. And I am not telling the archivists anything you don’t know—I don’t believe any archive has ever been sued much, and I would bet that anything Fred would say wouldn’t have any real teeth for simply retention of material.

Access is a different story, and there, when I work with archives, when I work with any users, I triage the problem. You can’t say that there’s any simple one solution that fits all. I look at the age of the material. I look at the nature of the material—commercial, noncommercial. I look at published and unpublished.

By the way, we’ve gotten through discussion of all the legal issues and no one mentioned § 108(h). So, as someone who drafted it, I’ll mention it.⁷ Section 108(h) refers to published works, as a way of letting steam out of the Term Extension Act in 1998, the provision that says that for published works—this is a quick, two part, jump through test—if they’re not otherwise being made available, a qualified library or archive under § 108 can do that.⁸ And I realize it’s only published material and for a lot of what we’ve been discussing it’s unpublished, but at least for material from 1923 to 1943, the whole notion there was that it would free that material up, for the archives to make it available. And having drafted it, I can tell you there are no limits on commercial exploitation by the archives, with the expectation and hope that the archives would, with some commercial savvy sense,

6. 17 U.S.C. § 108 (2006).

7. *Id.* § 108(h).

8. Copyright Term Extension Act, Pub. L. No. 105-198, 112 Stat. 2827 (1998) (codified at 17 U.S.C. §§ 108, 203(a)(2), 301(c), 302, 303, 304(c)(2)); 17 U.S.C. § 108.

make the material commercially available and pour any money made back into preservation and access of other material. That's what the foundation does.

Last is the nature of the use. I know there are a lot of broad discussions about uses and just posting material, but you know there's access and then there's access—where and how is it going to be used and by whom and for what purposes. Not all users are the same; there's a reason why Congress created special provisions for libraries and archives, because they are users and they do serve, you know, an essential role.

And then you have the special problems Sam alluded to. I mean, the pre-February 15, 1972 sound recordings are a whole different universe. It would be nice if in the recording board preservation work, which Sam, Peter Hirtle, I and others are working on, we could come up with some solutions to try to address those problems because they are real and, again, there's total uncertainty there.

And then last but not least is the response. I think archives just have to be if you are going to assume the risk. And, you know, some of the things Peter said, some of the things Jane said, I would concur with: you can't just throw up your hands and say, "It's difficult" and then not do it. You do it because you assume a risk and it's a low risk. It's unregistered material. Statutory damages and attorney's fees won't pertain. If you're a state university, the Eleventh Amendment will prevent any monetary damages period, so it's only injunctive relief. But if you are wrong and if your counsel is wrong—including if I were your counsel—you have to have a response. Most of the time taking the material down or attribution where it's material that wasn't properly attributed seems to take care of—I won't throw a statistic out—90% of the cases, but I would say 99% of the cases. And that's that. And there are no statutory damages, and the most difficult people to convince of that are the counsels within the institutions who don't want to assume any risk at all. And when I work, you know, with film producers or anyone else—look, the biggest users of the material are the film studios or book publishers or others, so they understand assumption of risk. They also understand being the biggest targets for suits. And they are, for seven-second fair use cases and everything else. Blurry photos in the background—*Seven* is a Brad Pitt movie—exactly.⁹ So, they know that and they understand that.

And guess what? Either with insurance or just some lawyering—so law students, pay attention, help the archives—you can do it and you can make material available. It's not the best system in the world. Yes, § 108 would help; yes, orphan works would help, but it's the system in which we live and we've got to work with it.¹⁰

Kenneth Crews: Thank you. Thank you very much. And Eric, you know, in the years since § 108(h) has been on the books, I have struggled with it, and you are the—you wrote it, so maybe that's part of the issue.¹¹ You're the first person I have ever heard say anything nice about it. So, I thank you for changing the

9. *Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409 (S.D.N.Y. 1997).

10. 17 U.S.C. § 108.

11. *Id.*

conversation. We'll see what we can make of it. But, good.

So, now let me throw a simple, simple, simple scenario in here that weaves, I think, all of us into it. In as simple terms as I can, see where we go and then we want to pop it out for questions from the audience. I mean, you know, Bob's over here archiving websites, and suppose his website—one of the websites that he's archiving and making available, publicly available—includes a video, so we're going to get to the film issue, and the video is of a 1940s Big Band era song that was a good seller at that time. So, we've got music and musicians and people and they're on the screen and it's video and it's historic footage and it's on a website, and suddenly all of you are involved and you're the two legal counsel, Robert Clarida and Eric Schwartz. You're not taking opposite sides. These folks come to you as a group and say, "This is what we've just done, or want to do." How do you begin the conversation? Not so much frame the law because that could take all afternoon. How do you begin the conversation?

Robert Clarida: I would begin the conversation by asking to see the clip, and to determine what it is we're talking about here because somebody might tell me that it's a video of a Big Band performance from the 1940s, but if I look at it I might say, "Gee, that's nicely lit. It looks like it's from a feature film; it's not from somebody who had their home movie camera." So, until I see it, I really don't know what questions to start asking.

Kenneth Crews: And then Bob says, "That's great, you can watch anytime, and by the way I've got 10,000 more just like it."

Kenneth Crews: Are you going to look at all 10,000 of them?

Robert Clarida: If they want a legal opinion, I would have to look at all 10,000 of them. But I could look at a couple, and if I get a representation that they're all just like this, you know, I would take them at their word on that. But there's so many layers of content in a clip such as the one you're talking about, and that's obviously why you introduced it.

And, you know, you have to look at—there's somebody who took that film and that cinematographer has some rights, arguably. There's the owner of the composition who has some rights. There are the musicians in the band. There's a section of the copyright law now, § 1101, which is the musical bootlegging, the so-called musical bootlegging statute, which deals with the sounds of a live musical performance or the sounds and images of a live musical performance, and there's nothing in the statute that indicates that it doesn't go all the way back.¹² And it has to do with "trafficking in" those images and "trafficking in" is defined very broadly, and certainly putting them out on the Internet might qualify.¹³ And if that's the case, you know, there's a whole other layer of complications because those are rights that belong to the performers. So, even if you have the filmmaker who says, "Yes, I made this film, here you go," and gives you a release for it, there are those performers who haven't signed those releases. So, those are just throwing up more possible problems with using this material.

12. 17 U.S.C. § 1101.

13. *Id.* § 1101(b) (defining "trafficking" with cross-reference to 18 U.S.C. § 2320).

Still, in all, I might come out and say this is a very low risk thing to do, as a risk analysis, but you have to start by saying, “What are the possible hurdles to overcome?” And you know, you can make an informed decision at that point about whether it’s worth going forward.

Kenneth Crews: Eric, how would you deal with that?

Eric Schwartz: Well, little to disagree with, with Bob as usual, but a couple of other considerations. Well, the story of course would be, “Yeah, I want to see it myself,” because material either gets misidentified, or clients are positive they know where they got it, but the source may not be right. A few other things would be, of course, how long has it been up because if it has been more than three years, at least for the copyright under the ’72 sound recording, arguably the statute of limitations has run. So, that could end that risk analysis to some degree. Was it published or unpublished material, at least the underlying sound recording? Was it registered? Was it renewed? And who are the parties? I mean, a lot of times understanding who they are, either by a publisher, a composer or an artist that is very litigious, is a different risk analysis than for a lot of the others in terms of oral histories and other families where first of all you assume that most of it is unregistered, and I think that is generally a safe assumption. Or, you know that it was a club performance by an unknown group, as opposed to by a group of very reputable artists, and you know that that estate will come after people. That’s a different risk analysis.

Kenneth Crews: Good. Let me bounce it back out to our three archivists. And Bob, I saw your hand shoot up.

Robert Wolven: I just wanted to ask another question of Mr. Clarida. Would that conversation be different if the website that we’re talking about has a button on it that says “Legal,” as many of them do, and you click on that button and it says something to the effect that, “We represent that we have obtained and we have the necessary rights for all of the content on this website.” Would that make any difference? And is there particular language beyond that one sentence that I gave—and of course, I’m assuming that you’d also say, “What is this site and who’s making that statement?” So, how would that change the nature of the conversation, if at all?

Robert Clarida: I don’t think it would if you’re putting the content out. I mean, it could change it if you were only going to be secondarily liable, but because you’re putting the content out yourself you’re directly liable. And whether you knew it or not, intended or not, believed it to be cleared or not, if you put infringing material out you have liability for it. I mean, you might have some kind of claim over, against these other people for misrepresenting the content to you, but—

Robert Wolven: They’re gone.

Robert Clarida: Yes, they’re gone, and that’s cold comfort for you.

Eric Schwartz: The secondary liability difference for those who don’t know the difference—I mean, this is at issue in YouTube’s one billion dollar lawsuit with Viacom, among other issues—is whether it’s posted directly by YouTube employees, as is alleged, in which case there’s direct liability because YouTube or

the website owner are the parties who are reproducing and making available the material.¹⁴ Different if you are a hosting site and a third party's posted, and—at least without knowledge of infringement—you then respond to the copyright law's notice-and-takedown and avoid any monetary damages. So, that's the difference. If you're posting, though, that's your liability. And simply saying, "We think we've done everything correctly" shows some good faith but doesn't minimize liability.

Karan Sheldon: I think—first of all, I'd like to kick it over to Sam because when I hear 1940s Big Band, I say I'm not going to touch it with a ten-foot pole.

Kenneth Crews: Sam, you're up, you're up. Then you can change the facts, Karan, to something else.

Sam Brylawski: I think I would extract the video from the website and post it separately on YouTube and let them worry about it and let them pay for it. They'll either take it down or pay. And actually, my hope is that they do pay because I do think—going back to Bob's time and his client's resources to review 10,000 videos—it's not going to happen. Even if you had the time, your client probably can't afford it anyway. And the answer is, I think, some licensing solution. It's very easy for it to come across my lips, but this is my charge to the law students here: we can't either sue each other or just ignore the law. Those are the two things happening now. More often than not it's just the law being ignored and owners are ignoring it. I think there has to be some license systems as was mentioned this morning—something more efficient, something that would benefit everybody now. And best of all, have Google pay it, but I know that's not necessarily going to be the case.

But really, the answer is, in the terms of Karan, whether it's music or not, we all know there's a music right: there's a privacy right to the musicians; there's a musicians' union at a certain year; there's, as you said, the cinematographer, whether it's from a commercial film. We could just go down this row and back and name all the possible right holders. That's going to have a chilling effect. That's not going to go up. So, I hope there is a solution that's going to avoid problems.

Kenneth Crews: And actually, Sam, you got a good laugh line about posting it on YouTube, but I think it's a very serious suggestion.

Sam Brylawski: I meant it seriously!

Kenneth Crews: Yeah, that's good.

Karan Sheldon: May I take that on?

Kenneth Crews: Yes, because I actually was in a meeting recently where someone was asking about posting clips to a university server, and I said, "Maybe we should post all these on YouTube."

Karan Sheldon: How many people here have read the YouTube Terms of Service?¹⁵ I read on the Association of Moving Image Archivists' listserv

14. *Viacom Int'l, Inc. v. YouTube, Inc.*, Nos. 07 Civ. 2103(LLS), 3582(LLS), 2010 WL 2532404 (S.D.N.Y. June 23, 2010).

15. *Terms of Service*, YOUTUBE (June 9, 2010), <http://www.youtube.com/static?gl=US&template=terms>.

yesterday or the day before that they, at the Alaska Archives, have a new YouTube channel. And Dwight Swanson is here with us, and he is a moving image archivist of long standing and a past Alaska resident. And my personal feeling about seeing that they had a YouTube channel was distress. And I have distress because of a concern for specifically those Terms of Service.¹⁶ We had a glancing discussion of—I think you brought it up, Ricky—native issues, the kinds of things that are going to be on YouTube as part of that repository, and then the ownership and the ability of the person who put it up there to have any subsequent control, I think is really of great concern. One of my senses is I really don't like seeing the image quality and the degradation of the image. I think that does a great disservice for material that we care about when you see it in that diminished form. So, I'm really not happy about YouTube as being any part of the solution, but that's my personal thing. I have written to the Alaska Archives. Because of the time difference, I may not hear back today, but I did want to ask them how did they select what they put on YouTube. Just a cursory look—it does seem to have fewer people and more animals.

Karan Sheldon: So, maybe animal rights comes into this.

Kenneth Crews: Do animals have rights of publicity?

Eric Schwartz: I was just going to say, a work in progress for YouTube, besides the unauthorized uses, is also the collective licensing for the performing rights societies that are currently in negotiation on the licensing fees for authorized uses of materials.

Kenneth Crews: I would like, if I may, to throw it open for any questions from the audience. All right, panel members? Yeah, questions, please. I see your hand up right over here. Yes, sir?

Question: I have a question for the panel regarding secondary liability and notice. I assume that most archivists would like to track the use so they can see what are the benefits that come about from making their library available, digitizing it and so on, so they want to see where it ends up. But to what extent, if they know that it's been used for an infringing purpose, do they have an affirmative duty to do something about it?

Robert Clarida: Well, if you know that something's been used for an infringing purpose, and it had been used for an infringing purpose, knowledge and substantial participation are the two elements of contributory copyright infringement. And by making it available for people to make an infringing use, I think that would qualify as a substantial participation. And if you also have knowledge, then you've got potential liability for that. Whether you can do anything about it after the fact, you may want to reduce your liability by trying to pull the genie back into the bottle if you can do that, but it's probably too late by that point if the infringement has already happened. If it's out there circulating on the Web in some infringing form that you don't like, you won't be able to get all of that back in.

Question: Can I ask what constitutes "knowledge"? Because presumably that

16. *Id.*

knowledge resides on a Google server somewhere, and if you looked at the analytics you'd see it; but if you don't look, you won't actually know.

Robert Clarida: Well, no, that's a very good point. And there are a lot of Internet businesses out there that are trying to make themselves as blind as possible to what's happening with the content. And willful blindness is considered to be constructive knowledge. You cannot, you know, willfully ignore information that is readily available to you. But that's a very different thing, I think, than putting an identifier on a clip to specifically allow you to track it down. You're really affirmatively giving yourself more knowledge than many people would have about a clip that they put out on the Internet.

Eric Schwartz: The willful blindness case, the *Aimster* case, was a Seventh Circuit case.¹⁷ You know, you can't put a technology on something that essentially prevents you from seeing what was being used. So, it was clearly an intention to cup hands over eyes and ears and say, you know, "Not our problem; we wouldn't know."

Question: Yeah, I'm curious how fair use plays into these kinds of determinations. I noticed the factors that Eric outlined sounded kind of like the fair use factors in the risk analysis. But I just wondered, how do you think fair use plays in, explicitly rather than sort of implicitly, in terms of risk analysis?

Kenneth Crews: And I would like to be sure we hear from lawyers about the fair use question and about the archivists. How do you struggle with fair use, in response to your question?

Eric Schwartz: Let me just say something about fair use just to start off, and then I'll stop talking. The only reference in the House Judiciary Report of a use of an entire work—I believe the 1976 House report—as fair use was the reference saying that copying pre-1942—I think it was a typo and meant '52—nitrate films to safety stock was fair use.¹⁸ So, interestingly, at least the House Judiciary Committee, the authors of the '76 Act, thought preservation copying of entire works for the purposes of moving from nitrate to safety stock was fair use.¹⁹ I just mention that because in addition to what § 108 does, by way of preservation copying and everything else that was discussed, it is the reference.²⁰

Otherwise, the answer I would say on fair use analysis is the same that I would say to my clients when I do any fair use analysis. I mean, I watch movies for film producers and do the errors and omissions insurance letters and looking at the music cues and make a fair use analysis. And when I turn it in to them I tell them that I have a fifty percent chance of being right. I think that's accurate. I weigh the four factors as I think should be done, and critically would be done. I look especially at the transformative use, of what is being done. So, throwing it out: is the use fair? In the example of some material that was being used, how much is the archive making additional material available surrounding the work and

17. *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003).

18. H.R. REP. NO. 94-1476, at 73 (1976).

19. Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541.

20. 17 U.S.C. § 108 (2006).

transforming it and putting it into context, historical context or some other context? And the more transformative the better. *And* the less taken the better. How much do you need to take to make that historical context, and how much then just becomes entertainment? But, you know, that's two of the four factors.

Sam Brylawski: The only thing I would say about fair use is: forget the access initiatives of archives. But I think that fair use is being leaned upon to get around the restrictions on preservation that are in § 108.²¹ Section 108, as you heard this morning, is basically still analog, and things about making more than three copies. In the case of sound recordings, § 108—I don't think this was mentioned this morning—is really crazy.²² The material actually has to be deteriorating under fair use before you can make a preservation copy—under § 108, I'm saying.²³ Yeah, I'm sorry, thank you. In the case of a sound recording that's actually deteriorating, you've lost sound or there's a gouge through it, you know. So, preservation is being made anyhow, and I think if you were to corner an institution's attorney or counsel about this, they'd say, "Well, we're doing it under fair use." So, I'm not saying about access. I'm talking about getting around the things in § 108 which really restrict pure preservation.²⁴

Eric Schwartz: It's such a low risk analysis for simply making copies, I believe. I mean, I would love to see a show of hands of anyone who knows of or has been the subject of a threatening letter for simply the retention of material.

Sam Brylawski: That's right, but it's illegal.

Eric Schwartz: Yeah, the law—

Sam Brylawski: By the law, it's illegal, except under fair use.

Eric Schwartz: In its historical context and everything else.

Question: My question is just—Eric had raised it, and this is something that's come up recently in a project I've been working on. It's a really hard area, because you're talking about music from the teens and '20s. So, Eric, Sam: I mean, how do you deal with it? Do you rely on fair use even for, well I'm thinking for access, but also preservation?

Sam Brylawski: I mean, I think preservation, as Eric has pointed out—we aren't aware of anyone who's been impeded for doing pure preservation. That's really preservation. In terms of pre-'72 recording, you can't really ask me how I deal with it. Some archives are just putting things up. I mean, to go back to YouTube, it's amazing the number of sound recordings where you go to YouTube and you just see somebody's turntable spinning or a picture of the artist. I mean, I don't think there's much that's legal about that, I mean, because they're copyrighted musical works. So, I think that some archives are liberally putting things up for streaming. Otherwise, you saw the case of the Florida Atlantic University this morning, and there are a number of them like that, but some don't do it at all. Eric or Ken?

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

Kenneth Crews: Well, actually, I can tell you, I'm getting a signal that our time is up. And I can also tell you that *exactly* some of these last few points are in my notes for maybe the roundtable at the end of the day.²⁵ So, there's a good chance we'll pick them up. And if not, you can ask—including YouTube, including '72, including a lot of issues. So, thank you. Big round of applause for the panelists.

25. June M. Besek et al., *Roundtable: How Do You Make a Decision When the Legal Answer is "Maybe"?*, 34 COLUM. J.L. & ARTS 95 (2010).