Symposium: Digital Archives: Navigating the Legal Shoals

Questions and Answers

June M. Besek (Moderator): We are going to take just a couple of minutes of questions before the break. I would just ask if you do have a question raise your hand; we will call on you. There is a microphone in front of you and, if you could, press on it when it’s your turn to speak. I urge when you are done speaking to turn it off for a whole host of reasons. I will stand here and be the moderator, if you have any questions for anyone on the panel. Yes?

Question: I guess one question would be: what are the prospects for the legislation? This is just sort of following up on where you left us. We saw the barriers, and then what?

Maria Pallante: I thank you for the question and I did not say anything about that. I did not mean to imply that the legislation died because of contentious issues. In fact, it was very, very close. It died essentially because we had a presidential election and Congress left two months early, otherwise it might have very well gone through. It has not been introduced for a couple of reasons this Congress. First, because there is no IP subcommittee in either the Senate or the House, so it makes it very difficult to get the attention of the judiciary committee when they are focused on things like healthcare and wars and other things. Also, through the informal discussions we have had with them, there is a feeling that they wanted to wait and see what happened with the Google Book Settlement. They did not want necessarily to have a very diligent, responsible search procedure for everyone including non-profits when perhaps a for-profit company would not have to do a search at all. The question became: would there be pressure to replicate the settlement and how would that intersect with orphan works, § 108 and international obligations? So, I do not think you are going to see anything introduced this Congress. That would be my guess. What you may see is another series of roundtables or reports possibly coming out of our Office, possibly with Hill staff asking some of the questions I asked today: should there be an overlay for mass digitization projects that’s different?

One thing in the E.U. that really struck me is that they are there on digitization. They start from the premise that mass digitization of entire libraries and archives is

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a fundamental necessity. I do not experience that in Washington. People immediately ask, “Why? Why would we do that? There is much more focus on the intended purpose. What is the use going to be? What is the goal? Is it to digitize all libraries? Just big ones? Only research institutions?” I would look first for Congress to ask more questions and engage in more public debate before we see new legislation.

**Question:** You ended your talk asking what do archives think about collective licensing. And I think the only relevant question is: what does Google think about it? Four to five years ago, I was told by representatives of Google that they were looking for an East Coast site for a scanning facility that would do high-speed, archival scanning without any damage to the material. I have not heard anything further about that, but clearly Google Books is thinking about Google Archives. The question is: what is Google’s legal strategy? And I have had one law professor say that he thinks that it lies in § 108 reform, that Google could pull that off and perhaps collective licensing is the way they could pull that off. I’m curious as to the panel’s thoughts. Is there a legal strategy that Google can pursue given that the number of copyright holders is infinite in archives and there are no organizations that represent the copyright holders, unlike the author’s league or the book publishers?

**Mary Rasenberger:** I do know that Google is capable of doing high-speed, high-quality scanning. For instance, the Library of Congress is scanning brittle books, which are all in the public domain. So, what you are saying is that they are considering scanning all archives?

**Question:** Well, that is my understanding. With whom can they negotiate the copyright issues? Can we conceive of meeting here in three years to discuss the Google Archives Settlement?

**Mary Rasenberger:** I do not think so. I think it is a lot more complicated because: one, how would they obtain the archives? Remember with Google Books, they had agreements with a handful of large, academic libraries and that’s where they got the books. I do not know if there are any archives that have as complete a collection in that sense as some of the major academic libraries. And I do not think there is a current § 108 exception that would allow them to scan entire archives without permission. In the first place, Google does not qualify as a library or archives under the current § 108, and with respect to § 108 reform: I still don’t see it. If they qualified for the exception, scanning for what purpose would be the question. Preservation? Yeah, I mean you could imagine reform that would allow mass scanning for preservation, but it wasn’t recommended by the study group. I do not think that you would see a § 108 reform that would allow them to scan everything and then make it available on the Internet, for instance, although maybe available at the Library of Congress for patrons, who actually come into the library.

**June M. Besek:** Any questions? Yes.

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4. Id.
5. Id.
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**Question:** Just a follow up on the Google Archive. We talked to them a year ago about our collection. What really stopped them is the applying metadata per page because they realized that even in an archival collection the variety of material would not allow for complete OCR and search by document type. They had not really figured out that was the direction they were going to go. We did not even get to the point of what the copyright issues were in our case because really we see our whole collection as work for hire. But they were still having problems on how to do the search through an archival collection versus books.

**June M. Besek:** I think we’re going to stop there.