

HERITAGE COLLECTIONS AND PRESERVATION CONVERSATION

With RINA PANTALONY,¹ BRIAN O'LEARY,² DAVID SUTTON,³
TREVOR REED,⁴ AND MARGARET BODDE⁵

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Rina Pantalony, co-author of this issue organized this panel with the focus being on the interaction of copyright law, digital preservation and the role of libraries, archives and museums in that mission. The World Intellectual Property Organization commissioned and recently published a Toolkit on Preservation⁶ with the purpose of examining copyright law in the context of the preservation of complex library, archive and museum collections that include complex 20th and 21st century media. The Toolkit served as a departure point for this discussion.

Rina Pantalony: The recording is now in session. And I want to welcome all of you to a conversation about libraries, library collections, archives, and archival collections and what they mean within the preservation context. And before we start the substantive conversation, if each of you could introduce yourselves so that we, the folks who will be reading this transcript, have an understanding of who you are and what you bring to the conversation. That would be great. Brian, I'm gonna start with you because you're at the top of my screen.

Brian O'Leary: I'm Brian O'Leary, the executive director of the Book Industry Study Group. We've had a periodic and ongoing interest in preservation.⁷ We worked with

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⁵ Executive Director of The Film Foundation, the non-profit organization created by Martin Scorsese in 1990 to protect and preserve motion picture history. Since 1991, she has led the foundation and helped to build partnerships resulting in over 1000 films restored to date, including over 60 films restored and distributed as part of the foundation's World Cinema Project. The foundation's educational program, *The Story of Movies*, teaches the language of film to middle and high school students and is a free curriculum utilized by over 150,000 US educators. Ms. Bodde is also the award-winning producer of several of Martin Scorsese's documentaries, including "Rolling Thunder Revue" (2019), "George Harrison: Living in the Material World" (2011), "Public Speaking" (2010), and "No Direction Home: Bob Dylan" (2005).

⁶ Rina Elster Pantalony, Kenneth D. Crews, & David Sutton, *Toolkit on Preservation*, WIPO (Sept. 2024), <https://www.wipo.int/documents/d/copyright/docs-en-toolkit-on-preservation.pdf> [hereinafter *Toolkit on Preservation*].

⁷ The Book Industry Study Group ('BISG') was founded in 1976 and is composed of a variety of publishers, manufacturers, wholesalers and distributors, libraries, retailers, and industry partners. BISG has worked to improve standards, research, and information for the publishing industry through its focus in five core practice areas- metadata, rights, subject codes, supply chain, and workflow. *About BISG*, BOOK INDUSTRY STUDY GROUP, <https://www.bisg.org/about>.

Professor Matthew Kirschenbaum,⁸ then at the University of Maryland, and now at the University of Virginia, to look at preservation of essentially pre-publication materials in the commercial space in 2018 and 2019. And we've kept up with it since in our working groups, including our workflow committee.

Rina Pantalony: Thank you, Brian. David.

David Sutton: My name is David Sutton. I'm a specialist in literary archives in particular and I've done quite a bit of work on that topic within the International Council on Archives.⁹ I'm also the British editor of a project called WATCH, which is a joint project of the University of Reading and the University of Texas. It stands for Writers Artists and Their Copyright Holders.¹⁰ And we trail around like detectives trying to trace copyright holders for authors and artists of all different types. In recent years, somehow or other, I've been chosen by WIPO,¹¹ the World Intellectual Property Organization, as one of their "experts", contributing to a series of toolkits. Very strange to be designated as an expert, and I'm not completely comfortable with it. And I'm certainly not really an expert on copyright. I'm a generalist. But I've very much enjoyed participating in the copyright projects at WIPO and I hope to continue to do so into the future.

Rina Pantalony: Thanks, David. Trevor?

Trevor Reed: Thank you, Rina, it's wonderful to be here. My name is Trevor Reed, and in my Hopi language, Nu Paahuwaytewa yan maatsiwa.¹² I'm currently a Charter Professor of Law at Arizona State University, and I direct our university's Indigenous Innovation Initiative.¹³ But at the time that this is published, I'll be transitioning to a new

⁸ Matthew Kirschenbaum is a Distinguished University Professor of English at the University of Maryland where he focuses his work on writing technologies across media history and media theory. *Matthew Kirschenbaum*, UNIVERSITY OF MARYLAND, <https://english.umd.edu/directory/matthew-kirschenbaum>.

⁹ The International Council on Archives ('ICA') was founded with the mission to advance the effective management, use, and preservation of records, archives, and data in all formats as part of humanity's cultural and evidentiary heritage. The ICA seeks to foster international cooperation through the exchange of professional experience, research, and ideas on archival management and organization. *Our Mission and Objectives*, INTERNATIONAL COUNCIL ON ARCHIVES, <https://www.ica.org/discover-ica/our-mission-our-objectives/>.

¹⁰ Writers and their Copyright Holders ('WATCH') is a research project jointly run by the Universities of Reading and Texas. WATCH was originally created as a database for copyright holders of English-language literary authors, but has expanded to include information on visual artists, photographers, sculptors, non-literary authors, celebrities, and authors in all the major European languages. *WATCH Project*, UNIVERSITY OF READING, [https://www.reading.ac.uk/library/about-us/research-projects/watch-project#:~:text=WATCH%20\(Writers%20and%20their%20Copyright,from%20Austin%20are%20being%20uploaded](https://www.reading.ac.uk/library/about-us/research-projects/watch-project#:~:text=WATCH%20(Writers%20and%20their%20Copyright,from%20Austin%20are%20being%20uploaded).

¹¹ The World Intellectual Property Organization ('WIPO') is the United Nations agency that acts as a forum for addressing IP issues and provides services that protect and promote intellectual property across borders. *About WIPO*, WIPO, <https://www.wipo.int/about-wipo/en/>.

¹² The Hopi language is a Uto-Aztecan language spoken by the Hopi Native American tribe, located primarily in northwestern Arizona. Elizabeth Mohn, *Hopi Language*, EBSCO (2022), <https://www.ebsco.com/research-starters/language-and-linguistics/hopi-language>.

¹³ Arizona State University's Indigenous Innovation Initiative was established to foster Indigenous expression and advancements through collaboration with Indigenous, Indigenous-allied scholars, and community and industry leaders. The Initiative's mission is to advance global transformation

post at UC Irvine School of Law as Professor of Law. I also serve as an Associate Justice on the Hopi Tribe's Court of Appeals.¹⁴ And I do the bulk of my research at the intersection of intellectual property law and Indigenous rights. And in particular, I work a lot with repatriation of archives and sound recordings, and on Indigenous issues involving copyright, though I'm transitioning into areas of trade secrets, right of publicity, and privacy law. Excited to be here with everyone.

Rina Pantalony: Thanks Trevor. Margaret.

Margaret Bodde: Hi, I'm Margaret Bodde, executive director of The Film Foundation, a nonprofit organization that Martin Scorsese and several of his fellow directors created in 1990.¹⁵ I was fortunate to start working for Marty in 1991, so I've been able to help the foundation evolve over the past 34 years. The foundation's core mission is to raise awareness and advocate for the urgent need for film preservation. The foundation raises funds for restoration projects at our partner archives; and we work with rightsholders, from the major studios to independent filmmakers/producers (and their heirs). Some projects are orphan films, with no rightsholders.¹⁶ To date, the foundation has helped to restore over 1000 films, and we have created the World Cinema Project and the African Film Heritage Project to highlight films from around the world that need restoration and rediscovery.¹⁷ The foundation also develops and distributes a free educational curriculum, *The Story of Movies*, to teach the language of cinema to middle and high school students across the US.¹⁸

Rina Pantalony: Thank you, Margaret. And as moderator today, my name is Rina Elster Pantalony. Until recently, I was the Director of Copyright Advisory Services at Columbia University Libraries and I have just transitioned to the UCLA Library where I'm Senior Advisor Library Policy and Intellectual Property. I co-chair and I'm president of a nonprofit initiative called OCEAN, the Open Copyright Education Advisory

and elevate the role of Indigeneity across all fields of study. *Indigenous Innovation Initiative*, ARIZONA STATE UNIVERSITY, <https://law.asu.edu/indigenous-innovation-initiative>.

¹⁴ Res. H-024-2025, Hopi Tribal Council (Mar. 6, 2025) (appointing Justice Reed to the Hopi Court)

¹⁵ The Film Foundation is a nonprofit that was established in 1990 with the aim to protect and preserve motion picture history. The Foundation works alongside archives and studios and has helped to restore over 1,000 films. *Mission Statement*, THE FILM FOUNDATION, <https://www.film-foundation.org/mission-statement>.

¹⁶ Under its narrow definition an orphan film is a motion picture that has been abandoned by its owner or caretaker. However, the term can also be used more generally to refer to all manner of films that fall outside of the commercial mainstream, such as public domain materials, unreleased films, newsreels, or found footage. *What's an "orphan film"?*, NYU, <https://wp.nyu.edu/orphanfilm/what-is-an-orphan-film/>.

¹⁷ The World Cinema Project ("WCP") is a program within The Film Foundation that was created in 2007 by Martin Scorsese to preserve, restore, and prove access to films from around the world. The WCP includes the African Film Heritage Project, which was launched in 2017 to preserve the legacy of African cinema. *World Cinema Project*, THE FILM FOUNDATION, <https://www.film-foundation.org/world-cinema>.

¹⁸ *The Story of Movies* is The Film Foundation's educational initiative that aims to create a free curriculum to help students understand the language of film. The educational programs developed by *The Story of Movies* are rooted in the National Film Study Standards. *About The Story of Movies*, THE STORY OF MOVIES, <https://www.storyofmovies.org/about>.

Network, which brought me to this conversation today, where we provide copyright and copyright related education to professionals working in libraries, archives, and museums.¹⁹ So to start off this conversation, David mentioned having been designated as “expert” at WIPO. There’s a recent publication that was just released by WIPO last September called *The Toolkit on Preservation*, and David and I are co-authors together with our colleague Kenneth D. Crews.²⁰ And I was wondering if you could start us off, David, to help us understand how we define preservation in a contemporary context and, in fact, how it is suggested in the document that preservation take place in this contemporary context.

David Sutton: Yes, thank you, Rina. I think it’s fair to say that the launch of the Toolkit on Preservation, which took place in Bogotá in September of 2024,²¹ was a real highlight, not only for us as authors and for people who’ve been discussing various aspects of exceptions and limitations to copyright at WIPO over very many years, but also for the people in WIPO themselves. I think everybody felt here is something that’s actually in existence, that’s been achieved, that is going to now take things forward in respect of people working on the intersection of copyright and preservation. So, it was a very nice event in Bogotá with hundreds of people in the audience and hundreds more online. But above all, it was a sign that we started doing things.

And I think over the years, WIPO has really struggled with— it’s been somewhat blocked, I think, by an obsession with working on model treaties or model clauses for copyright in preservation and other areas. And now that we’ve moved on to this notion of a toolkit, which can help people to think for themselves about what’s right for their particular country in terms of exceptions and preservation, I think we’re on a road to real progress here. And we started the process with a number of very rewarding and consensual worldwide meetings.

The first took place in Singapore in 2019, the second in Kenya, and the third in Santo Domingo in the Dominican Republic. So, a very wide range of participants and locations. We identified four main areas where more work needed to be done on copyright exceptions and limitations and cultural heritage institutions. And the four areas were preservation, access, cross-border working, and making copies to assist research, the general backup to research. And there was a very clear consensus in those meetings that preservation was a good subject to start with.

There was a feeling that there was a really strong level of consensus amongst rights holders, curatorial professionals, archives, museums and library professionals, and that we could really make progress fairly quickly on a preservation toolkit. It took us a lot longer than we anticipated, but nonetheless, I think we have now produced the document,

¹⁹ The Open Copyright Education Advisory (‘OCEAN’) is a non-profit educational organization dedicated to copyright education for professionals working in libraries, archives and museums. OPEN COPYRIGHT EDUCATION ADVISORY NETWORK, <https://www.oceancopyright.org/>.

²⁰ *Toolkit on Preservation*, *supra* note 6.

²¹ The *Toolkit on Preservation* was launched at WIPO’s International Seminar Safeguarding Cultural Heritage in Libraries, Archives and Museums through Copyright Law. The Seminar took place from September 2nd to September 3rd, 2024, in Bogotá, Colombia. *Launch of the Toolkit on Preservation*, WIPO, https://www.wipo.int/meetings/en/details.jsp?meeting_id=84433#:~:text=Venue:%20Biblioteca%20Luis%20%C3%81ngel%20Arango,Contact.

which does contain a lot of widely accepted premises, and which brings together right holders and custodians of cultural heritage in a very positive way.

One key part of the notion of preservation that we built into this tool, this first toolkit, is the idea of anticipatory preservation. And through the workshops in Singapore, Kenya, and the Dominican Republic, we had to work quite hard to explain that preservation can't wait, that preservation has to be pre-planned before things are actually in a state of deterioration. And therefore, anticipatory preservation is a vital part of the way that cultural heritage professionals work. And it's been very pleasing to see that notion widely accepted in the discussions about the toolkit.

People now generally in this world of copyright and preservation accept that preservation is not just about dealing with deteriorating or deteriorated cultural heritage items. It's about anticipating within collections those items which are going to need preservation in the near or medium future and then resolving copyright issues which make that preservation possible. So, we're going to move on from the preservation toolkit to an access toolkit, and maybe a cross borders toolkit and maybe a research toolkit in the future. But for the time being, I always believe that when you've completed something, you should take a little moment to rest on your laurels and to reflect on a job well done. And I really do feel that the toolkit on preservation is something that both sides of the discussion and the debate can be quite pleased about.

Rina Pantalony: Thanks, David. I think maybe what we want to start with here is to really get from each of your perspectives a notion of what you had in mind as constituting preservation. Margaret, you mentioned restoration projects on over 1,000 films in your opening. Brian, I know this issue came up within the Book Industry Study Group. Trevor, there are very specific preoccupations that rights holders and other constituents who have interests may have within the concept of preservation that is currently circulating. And that was certainly part of this toolkit, this notion of not just anticipating, but it was this notion of backup copies, digitization, mass digitization as collections enter the institutions or as a catch up on legacy collections. So many of these suggested processes raise rights issues from very many different perspectives. And Brian, if I could start with you so that we could talk about sort of the industry perspective, what constitutes preservation activity within the publishing industry, because I think it will lead very nicely into all sorts of questions about everything from curatorial work to defining legacy, to then looking at markets, market issues as well.

Brian O'Leary: I think this is an important topic because the commercial end of the business and many nonprofit publishers, university presses included, are struggling with these issues. But it's not a big area of inquiry for commercial publishers. The study that we did in 2019 started with Matt Kirschenbaum asking, "How do publishers preserve the marginalia of editorial comments, the directions, because scholars will at some point go back to a work." One of his examples was *Infinite Jest* by David Foster Wallace, published in the mid 90s.²² There are two different endings to that book, one in the US version and one in the UK. And he was curious, how did that happen? And there is a record that you can go to where the editors and materials are preserved. But he was

²² *Infinite Jest* is a novel published in 1996 by David Foster Wallace set in a futuristic version of North America. *Infinite Jest*, DAVID FOSTER WALLACE WIKI, https://infinitejest.wallacewiki.com/david-foster-wallace/index.php?title=Infinite_Jest.

wondering now that things are fundamentally digital first and much of the communication is done digitally, where does all that information reside? The answer is, and this is probably alarming to anyone in this conversation, “It’s in email.”

An email in most cases has a shelf life of about seven years, sometimes shorter depending on the institution. So much of what we have either has to be extracted from email in some planned way, which is not happening with any great regularity, or it has to be printed, which also is not happening. Maybe we’re happy about that, but it’s still not happening. In the conversations with commercial publishers, and there were some larger players involved in Matt’s work, the people in the room said, “You know, we’ve never thought about this.” Publishers turn to libraries to maintain a physical record of all the different books that they published. They didn’t have one of everything in most cases, even the physical books. And they had no real mechanism and they’re not really thought through the mechanism for what happens when digital standards change, because digitization is not preservation.

You can create something in one format. And if you think you’ve got it forever, the reality is you don’t. Digital readers age, the technology that you need to support the readers goes out of existence, et cetera. There are solutions or workarounds for it, but it’s still not the same as just preserving the record. Matt came out of that conversation, and we did too, sobered by the idea that a generation from now, scholars looking back on the 2000 to 2030 period might not be able to access material and records that were relatively common for works published 100 years ago. We haven’t quite figured out how to solve that. I’m hoping that my participation in today’s conversation gets me closer.

Rina Pantalony: Thanks, Brian. Margaret, I could imagine that issues such as format development and evolution have absolutely touched the industry, the film industry. And with respect to restoration projects, you’re dealing with the evolution of format over the course of more than 100 years in a way that perhaps the book industry is not, correct?

Margaret Bodde: The digital era has transformed the way that we take in all media; films, books, audio materials, etc. Film is an inherently technological creation, whether a work was made over 130 years ago at the beginning of the invention of cinema²³ or something shot on an iPhone or another kind of digital camera today. It requires technology and collaboration to make a film. Even someone who picks up a camera and makes a film “on their own” usually has a person in front of the camera, someone to edit the film, add music, etc.

The evolution of technology²⁴ has dramatically impacted film preservation and restoration as well. When The Film Foundation first started in 1990, the archives carried out preservation using the same format and the same material that the film was created on; it was film to film. Things changed in the 2000s with digital technology. Digital scanning and restoration tools had improved to the point where you could intervene and improve image quality significantly. In the case of films photographed using the

²³ Nitrate film is a form of early motion picture film stock that was made from cellulose nitrate, which was widely used from the late 1800s to the early 1950s. Bryony Dixon et al., *All about...nitrate film*, BRITISH FILM INSTITUTE (Aug. 26, 2022), <https://www.bfi.org.uk/features/all-about-nitrate-film>.

²⁴ See the Digital Intervention/Restoration section of Robert Byrne et al., *The Digital Statement Part III: Image Restoration, Manipulation, Treatment, and Ethics*, INTERNATIONAL FEDERATION OF FILM ARCHIVES, https://www.fiafnet.org/pages/E-Resources/Digital-Statement-part-III.html#_ftn4.

Technicolor three-strip camera,²⁵ digital tools could for the first time register those records perfectly.²⁶ At that time, there was a good deal of promotion that digital technology would allow for a great reduction in restoration costs, but that has not necessarily been the case.²⁷ Equally important to film preservation and restoration is access. Preservation is only one step towards the ultimate goal of allowing audiences greater opportunities to see these works in the best possible condition. The challenge is daunting because there is so much material in need of preservation and resources are limited. When the archives submit their annual restoration project proposals for grant funding, there are always many more received than the foundation can support.

Rina Pantalony: Your comments really set us up very nicely to talk about who the constituents are in preservation and the fact that there's a distinction between restoration and preservation. And I'll want to turn back to Brian in turn, but Trevor, I'm going to ask you to put on multiple hats now because I want to talk about this idea of collaboration. In the book industry, there is collaboration ongoing as well, because there is author-publisher collaboration, correct? And so, Trevor, could you start giving us your perspective about this notion of collaboration and what interests and issues may be brought to bear in whether it's a restoration project or it's a preservation project.

Trevor Reed: Well, so I'm going to try to answer broadly first and then try to narrow that down a bit to capture the perspectives of some of the communities that I work with. I think for a lot of creators, partnering with an archive or with somebody who's doing preservation work is part and parcel to who they are. If you're an artist, a composer, a scholar, or even a political figure, you want to establish a particular oeuvre or legacy. So, partnering with an archive is vital to making sure that that legacy continues and that your work continues to have an audience. Archival preservation and anticipatory preservation are critical to making the long-term impact that the artist desires.

Even for some marginalized creators that I've worked with, archival materials may be the only documentation we have about their contributions to humanity. And so, from a social justice perspective, it's critical that we anticipate the preservation needs. The challenge is that not all creators intend that their work be preserved, especially in our time where big data has harvested so much information about us and AI can now recreate us and maybe even displace us at some point. It can directly compromise our agency. I know, at the advent of film and audio recording, Indigenous peoples and other

²⁵ Three-strip Technicolor was a color motion picture process developed in the 1930s that produced some of the most vibrant and enduring color images in cinema history. The reason three-strip Technicolor films still look so vivid today is because the process produced dye images, not color-sensitive emulsions that fade easily. *Technicolor Three-Strip Camera*, GEORGE EASTMAN MUSEUM, <https://www.eastman.org/technicolor/technology/three-strip-camera>.

²⁶ See The Film Foundation, *THE RED SHOES* (1948, dirs. Michael Powell & Emeric Pressburger), YouTube (Jul. 16, 2015), https://www.youtube.com/watch?v=hD75xHkOS1k&list=PLH9eR1Ob8abBC8MmPxY_fm2yUBXSuMYra.

²⁷ While digital methods are valuable tools for restoration, preserving digital films has a longer-term cost due to constant migration. In contrast, films on film have a heavier upfront cost but celluloid is much more stable than digital formats. Jim Hemphill, 'No Longer a Matter of Film Versus Digital': What Film Preservation Means Today, THE FILM FOUNDATION (May 3, 2024), <https://www.film-foundation.org/film-preservation-indiewire#:~:text=For%20restoration%2C%20digital%20methods%20can,You%20can%20still%20project%20it..>

marginalized peoples were often subject to preservation practices against their will. And at certain times, Indigenous peoples were forcibly sent away from their communities to residential schools where they couldn't access their cultural archive—their community. Meanwhile, anthropologists and other documentarians were sent into their communities to preserve a kind of a snapshot of their culture at a moment in time. And the problem is that mechanical, disembodied preservation likely was not part of that cultural framework that they were living in. Some may have preferred that their culture could die so their communities could live, right? So, they could continue to regenerate, perpetuate culture on their own terms.

I know, while it's been important for many communities to have those snapshots in the archive, many I think are finding that those snapshots are kind of problematic. They're being used as a benchmark for who they should be, bronzing them, maybe marbleizing them, as Erika Brady has said.²⁸ And, you know, it's following this European descended understanding of preservation rather than adopting the standards of care that the Indigenous communities have for their own preservation and perpetuation. So, I think what preservation means to me, getting back to your original question, Rina, is that we're caring for collections, but essentially we're giving those collections a lifespan that the creator, and maybe even their constituents, their communities, desire for those materials, giving them the life that they hoped that those materials would have.²⁹

David Sutton: Could I just intervene to say that there's a deep irony here. As the materials become more digitally preserved, it doesn't mean that they're easier to look after. Brian has already raised some of the difficulties about whether things get collected at all. But even if they do, archivists in particular are often struggling to know exactly what to do. With the materials that they are bringing in, you see more and more adverts for a post of digital archivists in various institutions. But digital archivists have to grapple with all sorts of issues around data protection, about how to preserve non-compatible hardware and software, and about making available materials in circumstances where all sorts of privacy and other considerations can make things quite difficult to manage and also where there are very few users.

So far with personal papers in digital form, the archival institutions are finding that very few people are coming into the archives to study poetry on hard disk or whatever it may be. And because there are very few users yet being established within higher education, it also means that those collections are very difficult to value. Because what are you going to do with them? Are people going to pay large amounts of money for a collection when nobody quite knows what's going to happen to it? So, what's happening is that the best archivists are actually going back almost to 19th century practices, which is they are collecting and they are preserving the digital collections as best they can, but they're not yet very much making them available because they don't know how to and

²⁸ Erika Brady employs the metaphor of “bronzing” or “marbleizing” Native Americans in her book, *A Spiral Way*, to discuss the cultural implications of early phonograph use. For a full understanding of how and why she uses this metaphor see generally ERIKA BRADY, *A SPIRAL WAY: HOW THE PHONOGRAPH CHANGED ETHNOGRAPHY* (1999).

²⁹ For a more detailed exploration of this argument, see Trevor G. Reed, *Indigenous Dignity and the Right to be Forgotten*, 46 *BYU L. REV.* 1119 (2021).

they haven't got many users.³⁰ So, archivists are having to preemptively make decisions, to decide what we will collect because these materials are the cultural heritage of the future. But nobody's coming into the archives or very few people coming into the archives just at the moment in terms of literature, personal papers, and historical studies to study digital collections.

Brian O'Leary: I imagine that makes anticipatory preservation difficult because you don't know what the use cases are.

David Sutton: Exactly. I'm just going to say one thing referring back to what Brian said, a lot of publishers don't know how to handle this material either, and so there are some outstandingly good examples of archivists who are collecting digital holdings, but they're coming in in a total mess where the personal emails of the publisher are all combined with the emails of the publishing firm and so on. All sorts of privacy difficulties and so on. To make those available to the public, an archivist has to sit down a week before and do a whole redaction regime on a particular piece of their collection before they can make it available. So, the publishers as a profession are puzzled by this, the archivists are puzzled by this. The one thing that we know is that we must collect. We must collect for the benefit of the future. But just at this moment we're collecting without making very much available to the public, which is a strange place for archivists to be.

Rina Pantalony: David, I have to absolutely agree because you go back to what Margaret said earlier with "you preserve to provide access." That's the whole purpose of preservation. I want to save that for the very end of our conversation today because I think it's the thorniest of all of the issues that we're going to try and manage throughout the conversation. But Brian, I'm curious from an industry perspective, and Margaret, you may have some thoughts as well. How do you make decisions? If, let's say, a publisher wishes to try and create an offering that can be monetized and generate revenue sufficient to be worth the investment to enable libraries to rely upon it for the purposes of preservation. How are these decisions made and are these even feasible?

Brian O'Leary: Right. I think it is feasible, but I don't think there are a lot of examples of it. Maybe there are three things that I can put out in quick succession and see how they resonate in answering your question. The first is that it is still fundamentally a frontlist driven business model³¹, meaning that the new books are the things that get the most attention. The second is that over time, some of the larger publishers have maintained very deep and extensive backlists. They're not preserving it in the sense of what we're talking about, but they're still keeping them commercially available, with backlists now representing in the range of 60 to almost 70 % of the sales of those publishers with extensive backlists. Smaller and newer publishers, that's not the case because they don't have the history and so they don't have enough time. They're still more front-list driven. But the growth in the sales of the backlist, which parallels pretty much

³⁰ Richard C. Berner, Historical Development Of Archival Theory and Practices in the United States, 2 THE MIDWESTERN ARCHIVIST 103 (1982), https://beatleyweb.simmons.edu/~watkins/historical_development.pdf.

³¹ The term frontlist refers to the collection of newly released or forthcoming books that publishing houses are actively promoting and marketing. This is in contrast to the term backlist, which refers to the collection of older titles that have been in circulation for a longer period. Laura Carpenter, *What is Frontlist*, HARPERCOLLINS PUBLISHERS (Apr. 20, 2024), <https://harpercollins.co.uk/blogs/glossary/what-is-frontlist>.

the access that's available online to books, probably in the range of 60 % of all books now are sold or purchased online.

So, the long tail comes into effect. You can get access to a lot more books. You can also get access to second or used books in some cases that are not accruing revenue to the publisher or to the author, but in the US market, but are still out there. So, there's a lot more opportunity to monetize that backlist. And I think that's a chunk of why it's growing in importance.

And the third thing is that there's no thinking about this other than a defense of rights. There are very few business models where someone says let me look at the archive. You see this sometimes in the newspaper business, the New York Times, for example, has digitized its archives and you can subscribe and look at some of the history and they'll put some of it outside the paywall on occasion. That doesn't really exist in the book publishing business to the same extent. O'Reilly Media has done a fair amount in making digital access to a specific type of book, technology, computer books available.³² But the archive there is a relatively shallow one because the age of computers is 50 years old. And I don't think they've thought, well, let's go back and go to Babbage and figure out how to create an archive of the works, all of which would be related to computing. I think it's going to come back to bite us at some point somewhere in the midterm, maybe a little bit longer, depending on how much interest there is in books, because we're not thinking about what happens 50 years from now.

Rina Pantalony: Margaret, what can be said here about choices to preserve in the film industry? What are the sort of problematic issues? Because as Brian said, the only time we think about it in the publishing industry is with respect to the defense of rights. Is that exactly the same case in the film industry? And do some of what Trevor was identifying as certain issues come up, because you talked about the fact that you have a world cinema initiative, and I can certainly see where some of the issues that Trevor raised would all of a sudden become part of what you're trying to manage in projects and what has been the response from the industry?

Margaret Bodde: The response to the World Cinema Project?

Rina Pantalony: The response if we look at it through the perspective of rights holder interests. Is it also a defensive rights argument that is made? Or what is it?

Margaret Bodde: Generally speaking, with the major studios the impetus for preservation is primarily commercial. So, if there is a licensing opportunity from streaming, DVD, television, etc., the restoration costs can potentially be offset by that income. This is, of course, very different from how a non-profit organization like The Film Foundation or an archive functions. When evaluating films that need restoration, there are practical considerations, such as when there may only be one surviving element that is rapidly deteriorating. There is also a priority to reflect more diverse voices and represent filmmakers who have been overlooked in the past. This expansion of the canon

³² O'Reilly Media has an extensive digital library with over 35,000 book titles and thousands of hours of video, interactive tutorials, audiobooks, and conference presentations. The titles available in the digital library primarily focus in the area of technology or computers. Bruce Rogers, *How O'Reilly Media Helped Change The World By Sharing Knowledge*, FORBES (Sept. 21, 2023, 10:44 AM), <https://www.forbes.com/sites/brucerogers/2023/09/21/how-oreilly-media-helped-change-the-world-by-sharing-knowledge/>.

is something we have been focused on for some time. With the World Cinema Project specifically, the foundation is locating, restoring, and distributing films that have had very limited exposure outside their country of origin. These are real discoveries for many of us. We work with partners like Janus Films,³³ The Criterion Collection,³⁴ and MK2³⁵ and other distributors around the world to give these films a wider audience. For example, *Chess of the Wind*, was made by Mohammad Reza Aslani in 1976 and was eventually banned after the Iranian revolution.³⁶ It was considered lost, but the original camera negative was miraculously discovered in an antique store.³⁷ The idea that a film, perceived lost and suppressed by a government, is rediscovered because of its restoration is a perfect example of why we do what we do.

Rina Pantalony: David and Trevor, I want to bring you both into this conversation again, because you can hear the sort of industry preoccupations are still very much driven by commercial interests. David, I could just imagine your comments relating to how you choose what to preserve. As you said earlier, we're collecting, it's not access driven, it's collections driven. I'd love to hear your comments about making choices from a strictly archival perspective. And Trevor, I want to bring you in right now to talk about sort of defense of rights proposition. The idea that found works, whether they're film or print or otherwise, are then brought back into circulation. Are there other interests that need to be taken into account?

Margaret Bodde: I would just like to add that when we obtain rights for World Cinema Project titles, proceeds from distribution go back to the filmmakers and/or their heirs.

Rina Pantalony: Thanks, Margaret. Trevor.

Trevor Reed: One of the challenges here is that I'm not really an archival expert. I know there have been long and ongoing conversations about archival ethics,³⁸ and I think that conversation has been evolving over many decades. And it's been wonderful to see a

³³ Janus Films was founded in 1956 as the first ever theatrical distribution company dedicated to bringing international arthouse films to U.S. audiences. JANUS FILMS, <https://www.janusfilms.com/>.

³⁴ Since 1984, the Criterion Collection has published important classic and contemporary films from around the world. THE CRITERION COLLECTION, <https://www.criterion.com/>.

³⁵ Founded in 1974, MK2 Films is a collection of over 1,000 titles in the fiction, animation, and documentary genres. The works that MK2 has partnered with the World Cinema Project for can be found at *The Film Foundation - World Cinema Project*, MK2 FILMS, <https://mk2films.com/en/collections/the-film-foundation/>.

³⁶ *Chess of the Wind* is a 1976 Iranian film set in a period atmosphere that follows the story of a murder mystery. Mohammad Reza Aslani et al., *A Conversation about Chess of the Wind*, WEXNER CENTER FOR THE ARTS (Feb. 27, 2021, 12:00 PM), <https://wexarts.org/film-video/conversation-about-chess-wind>.

³⁷ Mitchell Beaupre, *Mohammad Reza Aslanion the Miraculous Resurrection of His Long Lost Masterpiece Chess of the Wind*, THE FILM STAGE (Oct. 28, 2021), <https://thefilmstage.com/mohammad-reza-aslani-on-the-miraculous-resurrection-of-his-long-lost-masterpiece-chess-of-the-wind/?>

³⁸ For the Society of American Archivists's Code of Ethics for Archivists see *SAA Core Values Statement and Code of Ethics*, SOCIETY OF AMERICAN ARCHIVISTS, https://www2.archivists.org/statements/saa-core-values-statement-and-code-of-ethics#code_of_ethics.

lot of changes happening on that front.³⁹ You know, certainly, preservation and making sure that materials are available as assets for future uses are really important. And especially when folks have invested in those assets, you want to make sure that the material is there so it can be monetized. Otherwise, why invest? And so, theoretically, preservation ends up being driven by economic interests very similar to that of copyright. The two are partners in preserving and making our creative industries flourish. In that respect, they're also critical for maintaining our democracy—if we don't have access to important ideas from the past, how are we supposed to move forward and develop our interests politically, socially, economically, et cetera?⁴⁰

At the same time, we also have to consider some of the other forces at play here. And I brought up social justice earlier: I think that's an important piece here as well, that the preservation apparatus that we have isn't necessarily equally distributed, nor does it reflect the interests of all the folks that are implicated by archival materials. And certainly, corporate interests won't always recognize those interests or bring them into account. I can share a few lessons on this point that I've learned from our archival repatriation practices with Indigenous communities here in the U.S. that may be of interest. Archival repatriation is essentially bringing home materials back to their communities of origin. So archival repatriation, when it began in earnest in the 1970s, we saw some really interesting things happen.⁴¹ Folks hearing the voices of their ancestors from long ago, using songs to relearn ceremonies or revitalize languages. What's been interesting to see in the years since is that big push toward repatriation is that, despite the excitement, in some cases, these materials that were originally repatriated just ended up gathering dust on the shelves of an archive in the community of origin, as opposed to actually circulating. So, it's become clear that repatriation of archives is really a very challenging process of not just bringing one copy and putting it back into the hands of the source community, but, you know, actually figuring out what to do with it to make it relevant for the community.

I think this goes back to what Brian and David were asking: what is the appropriate use case for some of these materials? How can we anticipate? I think one of the big things that we've learned from these repatriation efforts is that archivists perhaps may not be the best people to make decisions about the value of archival material and for what purposes to preserve them. That actually requires a lot of consultation with communities and audiences, and it's a very expensive process. In our experience.

Most of the cost for repatriating indigenous materials has been in figuring out what on earth was captured. The people that captured the material, they were capturing what they thought was interesting. They weren't thinking about what the community would think was interesting or what would be important for them in the future.

³⁹ One important change has been the *SAA Council Endorsement of Protocols for Native American Archival Materials*, SOCIETY OF AMERICAN ARCHIVISTS (Aug. 13, 2018), <https://www2.archivists.org/statements/saa-council-endorsement-of-protocols-for-native-american-archival-materials>, which provided a framework for incorporating Indigenous rights considerations to archival practices.

⁴⁰ See Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996).

⁴¹ Archival repatriation is the process of returning archival materials to the communities, individuals, or nations from which they originated. *Repatriation*, SOCIETY OF AMERICAN ARCHIVISTS DICTIONARY, <https://dictionary.archivists.org/entry/repatriation.html>.

And then the second piece and also equally as expensive has been figuring out how to recirculate these materials along the lines of the community's laws, protocols, and standards rather than those of current archival practice or copyright law. So we started to think about archival practice as a community partnership as opposed to a transaction. And shifting the mindset from transaction to partnership means that we have more community-based archives that are grounded in community needs and future uses. They set priorities. They filter out what's important and what's not. They establish the standards of archival preservation and care. They're also more likely to innovate with their own archives and tailor those innovations to the community's needs. So, this is kind of the area that we're working in right now. I've been working on an Andrew W. Mellon Foundation funded project, what we call the *Firekeepers Initiative*, working with tribal communities in Arizona to establish their own archives and then figure out what to do next.⁴² And it's been a very rewarding way of thinking through this challenging problem, which I think all of us have been grappling with.

Rina Pantalony: How do we understand a process that gets us from the notion of archivists, librarians' idea of consultation or permission to one of collaboration. And David, I'd love to hear you chime in here.

David Sutton: I agree very much with what's just been said that ultimately the collections will be built by archivists, but they shouldn't be built by archivists sitting in a scholarly ivory tower just taking the decisions that they think are best. And there are some bad examples of that in the past where libraries collect on the basis of what they call preeminence. And the British Library, for example, has been teased in the past, not least by me, on the basis that its idea of preeminence is white, boring, male writers whose names begin with B: Bridges, Blunden, Bottomley, J. M. Barrie, Hilaire Belloc, and so on.⁴³ And they just decided that those people are the canon and they're the people that they'll collect.

And even as they move beyond that, you move towards, well, what we must preserve is the stuff which has got high monetary value. And that's no solution either. So, there's some dispiriting examples in some of those worlds, but some examples that have given me great enthusiasm in recent years have been working with archivists in Namibia and in Cameroon and setting out programs by which they could collect the archival papers of both publishing houses and eminent authors and public figures in their world. And there we try to lay down some different sorts of criteria on the basis of consultation. So, we started off with big meetings in Namibia and in Cameroon where creators and archivists and people who had a clear interest in the cultural well-being of the countries would all turn up and give their thoughts. And in the case of Cameroon where they were really starting from scratch, we identified a few types of cultural creators whom one should always look to collect. One obvious one is pioneers. So, the people in Cameroon who are the first people to get works published in France or whatever it was, they're pioneers. One

⁴² The Labriola Center's Firekeepers Initiative aims to support and aid tribal nations in archival data sovereignty and establishing archival collections. Marilyn Murphy, *Labriola Center receives \$1M from Mellon Foundation for 'Firekeepers' initiative*, ASU NEWS (Jan. 24, 2023), <https://news.asu.edu/20230124-arizona-impact-labriola-center-receives-1m-mellon-foundation-fire-keepers-initiative>.

⁴³ For more information on each of the 'B' authors see HARRY BLAMIRE, *A GUIDE TO TWENTIETH CENTURY LITERATURE IN ENGLISH* (1983).

thing that's quite easy working with African countries is looking for prize winners. So, the African nations collectively quite often award literary and other prizes for outstanding publications. Authors that have won prizes would naturally be added to the list of people that one will want to collect. Authors who've been translated into other languages provide another category. And then I must admit that we engaged in some socially proactive decisions and impetus to collecting. So, in countries with traditions of macho activity, going out to collect the authors of women writers on both literature and social commentary, who are controversial authors, authors who'd argued against the government. When I was in Cameroon, one of those authors was actually arrested at the time that I was there, a very fine author called Patrice Nganang, and I asked them, would you collect the archive of Patrice Nganang if it became available? And they said, "We couldn't keep it in the National Archive, but the university could probably take it." So, we were building up a set of thoughts about how you establish what is cultural heritage. And of course, there are elements of subjectivity within that. But the more that you consult and the more social groups that you bring in, the more the archivist has the opportunity to engage in building really rich, varied and representative collections, which is what you want to do.

And one of the most moving things for me when we were setting up the exhibition of what we'd done. When the ICA actually held its conference in Yaoundé in Cameroon in 2018, we were setting up the exhibition of all the archives that have been collected throughout the country in the past 12 months.⁴⁴ And as we started setting up, the electricians who were setting up the exhibition got really excited because their favorite books were, *L'homme de la Rue*, because *L'homme de la Rue* is a book about street life in Yaoundé, Cameroon, and the electricians thought it was a brilliant book and we'd got this literary manuscript where the author had written day by day what he was thinking as he wrote his novel.⁴⁵ So you've got the manuscript of the novel *L'homme de la Rue* and you've got his running commentary on writing his novel. Classic, beautiful, brilliant, literary archive and there it is now through these initiatives in the National Archive of Cameroon. So I don't think there are rules but there is best practice and best practice with the help of organizations like the International Council on Archives is getting better.

Rina Pantalony: So, this is for the [Journal of the] Copyright Society. We're here to talk about what are inherently rights and interests in this preservation space. And what really struck me in a lot of the comments that were being made was the sort of push and pull: what the role of the rightsholder is in this space. Because the industry perspective is very much driven by what is going to generate revenue, right? And then the industry perspective, when it comes to archiving and preserving, looks at it really through that lens of defending rightsholder interests, because Brian in the publishing industry, it may not necessarily be the case with trade fiction all the time, but it is the publisher that holds sort of the lion's share of rights.

Brian O'Leary: Publishers would negotiate those rights if it could be in perpetuity, or at least until they no longer are working to exploit the value of the work, in which case the rights might revert to the author or contributors. But what rights to acquire is

⁴⁴ *SLA Yaoundé, November 2018*, ICA (Nov. 2018), <https://www.ica.org/sla-in-yaounde-november-2018/#:~:text=This%20year's%20annual%20ICA%20conference,to%20attend%20the%20ICA%20conference.>

⁴⁵ *See generally* PABÉ MONGO, *L'HOMME DE LA RUE* (1987).

fundamentally a publisher decision, and you're exactly right, that's driven by anticipated revenues.

David Sutton: One of the things that follows from that though is that, and it's been a real privilege working with WIPO, enabling us to study the different copyright legislations from country to country. There should always be an element, and whether it's called not-for-profit or whether it's called non-commercial, or in some of the more evolved cases, even the reference to the public good or the social good. So, you've got the idea of not-for-profits and the idea of non-commercial, which should form the basis for uncontroversial limitations and exceptions, because they don't harm anybody's interest, but they make important cultural materials more freely available. As I say, in some countries, they go beyond the idea of non-commercial and not-for-profits and go into public good or social good within their copyright legislation. And so the first thing that we advise everybody to do is to go into your own national legislation and see what it says about exceptions in cases where the activity or the creation is clearly going to be not for profit or non-commercial. So, although there is this commercial focus, of course, in the world of rightsholders, it does leave this other space where you can create a whole set that most countries do of some form of exception and limitation for public benefit activities which are not for profits.

Rina Pantalony: So Trevor and Margaret, I want to now turn to you. David said something very interesting here, right? He said there are limited exceptions and limitations that may allow for further reproduction and distribution for the purposes of preservation that "don't harm anyone's interests." So how do we define this space? In your circumstances where you are most active, Trevor, it's this issue of authority that sort of translates further. And it goes back to this whole comment I made earlier about collaboration versus consultation, right? How would you play in this space?

Trevor Reed: Well, so it's a little bit challenging in part because, you know, on the one hand, the person that holds the copyright, we want them to have the freedom to be able to get that material out there in the world. The copyright is almost a vehicle for getting it into industries or getting it into different spaces where it can be used productively. So, on the one hand, the rightsholder is critical. Their ability to mobilize and to take advantage of opportunities, if they were limited by law, might prevent some great opportunities for creative innovation from being taken advantage of. At the same time, the rightsholder in some ways could be thought of as like a fiduciary or a trustee in some cases.⁴⁶ The only person that has a government recognized right, the rightsholder also represents those other contributors to creative work (the film costume designer, the studio sound engineer, the book copy editor) that are likely expecting that the rightsholder is going to exploit the material for profit, or they're going to get this material out into the world in a respectable way, or they have some other expectation for the work. These expectations need to be realized, especially for those individuals or groups that don't have a government grant of rights or don't have recognized power to make decisions about the work they contributed to.

With the indigenous communities I work for, the rights frameworks they espouse and their standards of care and preservation that recognize and address these kinds of

⁴⁶ See *Bulun Bulun v R&T Textiles Pty. Ltd.* (1998) 86 FCR 244 (Austl.) 579 n. 62

contributions to a creative work may or may not be legally enforceable within the nation state within which they reside because of colonization. And so, what do we do to ensure that those interests are being upheld? Do they become kind of a counter exception? Or do we just recognize multiple sets of rights?

Here in the United States, you have sovereign indigenous tribes that have the authority to make laws and regulations for archival materials. According to Angela Riley, about fifty tribes now have their own intellectual property laws.⁴⁷ Do we try to enforce both sets of rights at the same time? I think some of those questions become a little thorny. But at the very least, I think a lot of folks are saying, “Well, you know, maybe there's space for moral rights to work here. Maybe there are certain standards that the creator has set forward that maybe should be upheld in this process as well.”

Of course, this fights against what I was talking about at the beginning, where the rights holder needs to have a certain degree of freedom to be able to make decisions quickly. It's not always easy to be able to get a whole host of folks involved in saying yes to a particular idea. You invite potential political challenges as well. So, I'm not saying it's an easy thing to do to have a partnership, but I certainly think if we move away from one rightsholder being in charge to a rightsholder who, while they might be in charge, they also are a fiduciary. They owe a duty of care to other folks that have been part of the process of creation or development of the thing that they're protecting. I think we might get a little bit closer to a more just intellectual property system and a more equitable preservation scheme.

Rina Pantalony: Thank you, Trevor. Margaret, I'd love to hear from you about the sort of practices that have been brought to bear on your preservation projects with respect to the kinds of issues that Trevor has brought up, because I'm absolutely certain you face these kinds of issues.

Margaret Bodde: Yes, the issues Trevor raised are relevant to the work that we do. And the reality is that there are very complicated issues regarding rightsholders, whether it's a commercial studio/distributor or an independent filmmaker/producer. There are also works held in film archives, in addition to materials that are part of larger collections at historical or municipal institutions. And then, of course, there are home movies and other orphan works. So, there are many types of places where film material is held and not distributed or easily accessible.

We share the belief that film materials should ideally be available, whether it's for scholarship, research, or general interest. But unless something is an orphan work where there is no identified rightsholder or if material has come into the public domain, the idea of free distribution is something that is difficult because, whether the rights to films are with studios or filmmakers/producers or their heirs, those entities determine how their film is distributed.

⁴⁷ Angela Riley, a Professor of Law and American Indian Studies at UCLA, gave a keynote address at the “Indigenous People, Traditional Knowledge and Intellectual Property in International Law” conference in 2024. In her address, Riley noted that while the concept of “data sovereignty” barely existed in 2005, about 50 tribes in the United States had established some of their own intellectual property laws by 2020. See Angela R. Riley, *The Ascension of Indigenous Cultural Property Law*, 121 MICH. L. REV. 75 (2022); see also Brett Milano, *Protecting Indigenous peoples' knowledge*, HARVARD LAW TODAY (Feb. 26, 2024), <https://hls.harvard.edu/today/protecting-indigenous-peoples-knowledge/>.

In our experience, particularly with the World Cinema Project and the African Film Heritage Project, the rightsholders are looking to receive revenue from works that they believe have been undervalued. These programs are serving the interest of audiences by allowing these films to be available around the world, in some cases for the first time. By restoring and distributing these works, The Film Foundation is remedying a situation where a filmmaker hadn't received their due for creating that work.⁴⁸ For example, The Film Foundation and the Academy Film Archive⁴⁹ undertook a 10-year restoration of a documentary film entitled *The Memory of Justice*, directed by Marcel Ophüls.⁵⁰ The documentary was inspired by *Nuremberg and Vietnam: An American Tragedy* by Telford Taylor, which explores whether the framework of the Nuremberg trials could be applied to the US for their actions in Vietnam.⁵¹ The film is over four and a half hours long and contains more than 300 archival clips, photographs, and music cues, all of which needed to be identified and relicensed. The film is owned by Paramount Pictures and to their credit, they allowed The Film Foundation access to restore the film and obtain all the necessary clearances in order to make it available for a limited term. So that is one example of how the Foundation works with rightsholders to make films available when they might not otherwise be accessible.

Rina Pantalony: Margaret, you have just brought up so many issues that I think we need to address. I think we need to tackle moral rights. I think we need to tackle orphan works. And then we're going to go down the road of defining access which is probably one of the most thorny, thorny issues of all, because it has to be connected to preservation. Brian, I want you to lead off though, given what we've heard thus far about some of the complications, are you still on the same page about whether or not it's feasible? I think that's the term you used for the industry to actually create an offering that is a preservation offering to libraries.

Brian O'Leary: Part of this echoes what Margaret was describing in terms of film or cinema. The book business, particularly the US market, generates a million new works a year. About 350,000 of those are through traditionally published channels and about twice that many are coming from independent authors and smaller startup houses. The total backlist is the total number of ISBNs in print right now is over 40 million. So, when we think about preservation, I mean, obviously you're making choices. The open questions are: how do you make those choices and how do you make them culturally sound?

⁴⁸ *Mission Statement*, THE FILM FOUNDATION, <https://www.film-foundation.org/mission-statement> (last visited Sept. 13, 2025).

⁴⁹ The Academy Film archive is dedicated to the preservation, restoration, documentation, exhibition, and study of motion pictures. *Academy Film Archive*, ACADEMY OF MOTION PICTURE ARTS AND SCIENCES, <https://www.oscars.org/film-archive>.

⁵⁰ *The Memory of Justice* is a film directed by Marcel Ophüls that was originally released in 1976. The film explores the nature of war crimes and justice by comparing the Nuremberg Trials with the conflict in French Algeria and the war in Vietnam. Mike Hale, *Marcel Ophüls's 'Memory of Justice,' No Longer Just a Memory*, THE NEW YORK TIMES (Apr. 21, 2017), <https://www.nytimes.com/2017/04/21/movies/marcel-ophuls-memory-of-justice.html>.

⁵¹ TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* (Lawbook Exchange ed.)(2010).

Right now, we have kind of a default book depository role for traditionally published works that go to the Library of Congress. Many countries have similar depository rules. But a number of countries, and it feels sometimes like the United States is becoming one of them, are becoming somewhat prejudicial about the books that they include in libraries. So that preservation rule for libraries is no longer a given. It's not clear that every book that goes to the Library of Congress will be kept in perpetuity and preserved in a way that this group would find acceptable. And I think that there's no one commercially that's making these choices on behalf of the industry.

When we talked about today's conversation, Rina, you asked me if works ever get withdrawn? And they do. I mean, it's not a common practice, but there's a mechanism in providing metadata to say this book is no longer available. Sometimes it's pre-publication, when the author doesn't deliver a manuscript or the publisher receives it and decides that this is not a book we want to publish. But other times as things come out after a book is published, following what could be allegations of plagiarism, matters of fact, et cetera.

There are also culturally insensitive works. I mean, books, particularly for children's audiences that made sense or maybe never made sense, but they were published 50, 60, 80, 100 years ago. They're important to preserve though, because for the record, you want to be able to have access to that content. And sometimes those books are just simply being purged. I mean, they're withdrawn or taken back or republished with different illustrations or different texts. And that undercuts the purpose of preservation, which is to give you a sense of what we were.

I think Trevor has made some really good points, particularly as we closed the first hour on how important it is to do that in concert with the communities that have a responsibility for that. And when the communities are asking, "Can I make money on this or do I just want it to go away?", those decisions are truncated. It's not a robust conversation. The thing I'm particularly concerned about as somebody who works with commercial publishers is whether we ever get past this moment where we're producing millions of works, many of which may become culturally important, but we're not doing anything really to preserve and protect them or provide access, which we'll come to later in this conversation.

Rina Pantalony: Do you think there's an opportunity for the development of sort of collaborative efforts between, let's say, commercial publishers and an archive? Because, you know, the impetus on the commercial side, of course, is always going to be the revenue piece. But how do you ascertain and determine what and who and when something should be archived? And is this even a good conversation to have from your perspective?

Brian O'Leary: I think it, well, one of the reasons I was eager to join today's conversation is because I do think it's an important conversation. The Book Industry Study Group is supposed to be working on behalf of the industry on topics that affect two or more parts of the supply chain. So, it's a natural fit for us. But I think we also want a cooperative conversation with organizations in the US market, the Authors Guild for the

author community, for the independent community, the IBPA,⁵² and others. I think it's important to talk through what preservation issues we can address.

I think though, beyond those organizations, you have to change practices at commercial organizations. They're not preserving the things that you want right now. And the clock is ticking. There were emails that were written in 2003 that don't exist anymore. They're long gone and so that part of the track record is gone. The formats are difficult to track. And once books are withdrawn, they're fundamentally deleted. So, I think that we're really relying on something that was printed, given to a holding institution like the Library of Congress, as our preservation pathway. Columbia University Libraries, which was where you and I first met, preserves a number of different publishers' archives but it's closer to storage than it is actual preservation.⁵³ You can go in and do the work there. While there are examples, I think we need a better conversation about both what is preserved and who will pay for it.

Rina Pantalony: Margaret, do you think the Paramount model that you mentioned earlier is one that could obtain traction in the industry? Because it is a real collaborative model from at least the strict rights perspective that would be necessary. As you mentioned, every musical work, every composition, every recording that was used in that film, if it was based on a book, then you needed the film rights to the book and sync rights and on and on and on. And it takes 10 years. Could you see that model being replicated or is it just so time intensive?

Margaret Bodde: We're enormously proud of that project. I think with that particular film, all of the elements aligned in the sense that the studio was unlikely to exploit that picture because it was not perceived to have commercial value. The fact that the third party rights needed to be cleared created a huge expense upfront before we could even try to make it available. So, I don't think it's a model, but, in principle, being able to speak with commercial rightsholders and advocate for these films to be made available in some way is of tremendous value from a cultural and historical standpoint.

The other issue the Foundation has been focused on is the number of films entering into the public domain. I believe films from 1929 become eligible this year.⁵⁴ So, we're now starting to see films from the Golden Age of Hollywood, which have more commercial value to the rightsholders, becoming PD.⁵⁵ The Foundation is discussing this

⁵² The Authors Guild is the United States' oldest and largest professional organization for published writers. The Authors Guild advocates on behalf of writers for fair contracts and compensation, enforceable intellectual property rights, and protection of free expression.. *About the Authors Guild*, THE AUTHORS GUILD, <https://authorsguild.org/about/>.

⁵³ *University Archives At The Rare Book & Manuscript Library*, COLUMBIA UNIVERSITY ARCHIVES (last visited Sept. 13, 2025).

⁵⁴ This conversation took place in 2025, and so all published works are in the public domain after 95 years of publication. Many fell into the public domain before that due to lack of formalities or other problems. But the maximum term is 95 years. In 2025, this include works publish in 1929 and earlier. 17 U.S.C. §304.

⁵⁵ The Golden Age of Hollywood runs from the late 1920s to the early 1960s. *See generally*, Emma Fraser, *The Golden Age of Hollywood: Defining Films + Faces of the Industry's Most Glamorous Era*, BACKSTAGE (May 20, 2024), <https://www.backstage.com/magazine/article/golden-age-of-hollywood-movies-explained-77262/>.

issue with our partners at the archives and the studios, trying to address what this means for access. We haven't answered those questions yet, but discussions are ongoing.

And the other thing, just to make a left turn here, we're talking about all of this in the shadow of AI. And the fact that everything on the internet can be used to train AI and be repurposed is something that many of us are very concerned about, including the Director's Guild of America⁵⁶ and the U.S. Copyright Office at the Library of Congress,⁵⁷ to name two major stakeholders in this issue. The moral rights of filmmakers to not have their works used without license or changed/alterd using AI technology is a major preoccupation that we are all grappling with, so I think it deserves at least a mention.

Rina Pantalony: You're really starting us off with a great conversation. Trevor, I'm going to turn to you because what I'm hearing is impact on the marketplace, fourth factor, fair use, so much relies, at least in the United States, not just Section 108,⁵⁸ but Section 107 to enable preservation activities to take place.⁵⁹ And that fourth factor, impact on the marketplace.⁶⁰ Do you want to jump in here? Because I think we need to ground, you know, we're saying the advent of AI, but the fact that time is now ticking and what falls into the public domain is moving forward into what may still be considered commercially relevant to contemporary society and what constitutes the marketplace [when fair use will no longer apply]. I think these are going to be incredibly difficult issues and maybe you could talk a little bit about that.

Trevor Reed: Yeah, so of course we have section 108 that gives us a little bit of a leeway for archival preservation here in the United States.⁶¹ Given how short the life of archival media is, as Brian explained, the copyright in many cases outlasts the copy. So, in addition to calling for an update of Section 108 in light of the new preservation technologies with different life spans, a lot of folks have been thinking, shouldn't fair use also allow us a certain amount of leeway to do some archival preservation and also other related activities?

The four factors of the fair use analysis I think are quite useful in evaluating which preservation activities should be allowed and which ones perhaps cause more harm than good. Looking at the purpose and character of the use, I think the Supreme Court has been a little bit more precise now with the *Andy Warhol* case that was decided a couple of years ago, telling us that we're looking for a transformative purpose.⁶² And the more transformative the purpose, the less we are concerned about the commercial nature of the use.

⁵⁶ The Directors Guild of America has advocated that AI should not be used to cut jobs or save money, but rather solely as a creative tool. *DGA Continues to Speak Out on AI*, DIRECTORS GUILD OF AMERICA (Mar. 19, 2025),

<https://www.dga.org/news/guild-news/2025/april2025/dga-continues-to-speak-out-on-ai>.

⁵⁷ The Copyright Office has been reviewing copyright and policy issues affected by the use of AI since early 2023. *Copyright and Artificial Intelligence*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/ai/>.

⁵⁸ 17 U.S.C. § 108.

⁵⁹ 17 U.S.C. § 107(4).

⁶⁰ *Id.*

⁶¹ 17 U.S.C. § 108.

⁶² *See* *Andy Warhol Found. For the Vis. Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

And when we apply that to preservation, we might ask whether we are just preserving to create more copies of the original, or because every other institution is mass digitizing their collections and we want to keep up with trends? Or are we serving the purpose of preservation and strategically perpetuating future modes of access? I think that's a critical one. For the third factor, the amount that's being preserved, I think in many cases, knowing exactly what to preserve has been a bit contested. Do you preserve everything plus all of the outtakes, plus all of the emails, plus all of the—is that even feasible? And what is that amount that would be appropriate under the fair use doctrine to copy and preserve, even without the author's permission?

The market, I think we've talked about quite a bit. Is making preservation copies, whether physical or digital, potentially competing for the market of the original? Or is it actually, especially under the *Google v. Oracle* decision, a means of effectively harmonizing the public benefits of the work and the private interests of the copyright holder?⁶³ The thing that I point to most, though, in my scholarship recently has been the nature of the work itself. Historically, we haven't taken into account that factor very often. But I think it's critical when we're thinking about archival preservation to understand the nature of the thing that we're trying to preserve, especially from the perspective of the creator and the community that perpetuated it. Is this something that should be preserved or is this something that was never intended to be preserved? Is this something that if it were transformed into new media, ingested into an AI dataset, or circulated to cloud storage around the world, would potentially violate the rights and norms of the community that generated it? Or, would preservation potentially catalyze a new generation of material from this particular creative community? All of these things are critical.

We don't always analyze them under fair use, but I think for archival preservation, understanding the answers to all of these four factors gives greater insight. I don't know how many preservation cases we've really seen go all the way up to the appellate level or to the Supreme Court here in the US. So, I think it'd be interesting to see what our Supreme Court might do if faced with a preservation fair use case.

Rina Pantalony: Thanks, Trevor. David, why don't you start us off? Because while in the UK you have fair dealing, you don't have the fair use doctrine as it applies in the United States, but you do have moral rights.⁶⁴ And some of what Trevor was talking about earlier when he brought up the issue of moral rights and then in fact, in looking at the second factor under the Fair Use doctrine, the nature of the work, that's where we sometimes see what may be considered the moral rights or the rights or interests of others taken into account. How has moral rights played a role in managing preservation and to a certain extent access?

David Sutton: Not very much in the UK actually. There are other countries like, notably France, with much stronger traditions of moral rights and probably France is perceived as being at the origins of moral rights, which gives creators indefinite, extraordinary powers way beyond any copyright duration.⁶⁵ Nationally in France, the

⁶³ 593 U.S. 1, 35-36 (2021).

⁶⁴ Jill Bainbridge, *A guide to copyright and fair dealing in the UK*, HARPER JAMES (March 31, 2025), <https://harperjames.co.uk/article/fair-dealing-copyright/>.

⁶⁵ Charlie D. Peeler, *From The Providence Of Kings To Copyrighted Things (And French Moral Rights)*, 9 IND. INT'L. & COMP. L. REV. 423 (1999). We saw in the 1980s the issues that arose with

heirs of 17th century authors, Racine, Molière and others still retain moral rights over works created by those antecedents and what can be done with them. I'm not sure that Britain's a very good example. In my own experience, moral rights have rarely been adduced in this sort of discussion.

Rina Pantalony: No, it's interesting because while moral rights exist under UK law, it's really the practice then that sort of guides archivists. But Brian, I know the Book Industry Study Group, yeah, you're focused on the United States, but you have members of BISG that are not based in the United States, just curious to know what role, if any, those kinds of preoccupations have had?⁶⁶

Brian O'Leary: Sure, so we kind of presume goodwill, which might be a mistake, but I think it's not a bad place to start. And so, what we spend most of our time doing is trying to remove roadblocks that are in front of doing the right thing. So akin to David's work on the WATCH List, we've just recently released *Find a Rightsholder*, which has about 3,500 imprints, including some that are no longer available.⁶⁷ And it includes directory information to say email or go to this website and to seek permissions or solicit rights, acquire subbranch. And that's an example of just something that we think we have a perspective on the industry. We can bring that information to the public. And then that makes it easier for someone looking to clear permissions, those thousands of permissions that Margaret had to clear for the in her example, and to make it a little bit easier to at least know who to go to, finding the right person in the house. We don't have a clearly articulated point of view on moral rights, but we do feel like we try to make it possible for people to do the right thing throughout.

David Sutton: The notion of diligent search can be assisted by both WATCH and the new BISG database, but it's affected by what in the WIPO discussions we've called the Orphan Works Paradox.⁶⁸ The Orphan Works Paradox says that the less commercial value a particular cultural heritage item has, the more difficult it is to establish who is the copyright holder.⁶⁹ So, although it doesn't really matter very much, it's an incredibly difficult struggle to locate the copyright holder in all these low risk cases. And although we've got nearly 40,000 cultural creators in WATCH, we know that most of them are in there because they still have a certain amount of value, financial value. And I'm sure that the new database of BISG will encounter the same thing. It's much easier to find

the Houston film, *Asphalt Jungle*, which caused a great deal of worry in the US, and limited how the US applied moral rights in the Berne Implementation Copyright Act 1988 and the Visual Arts Rights Act 1990.

⁶⁶ *Membership Directory*, BOOK INDUSTRY STUDY GROUP, <https://www.bisg.org/member-directory> (last visited Sept. 14, 2025).

⁶⁷ Find a Rightsholder is a tool created by BISG to aid the publishing community in easily locating rights and permissions contacts for U.S. and U.K. publishers. Liz Bartek, *BISG Launches "Find a Rightsholder" - A Vital New Tool for the Publishing Industry*, BOOK INDUSTRY STUDY GROUP (June 3, 2025), <https://www.bisg.org/news/bisg-launches-find-a-rightsholder--a-vital-new-tool-for-the-publishing-industry>

⁶⁸ Yael Lifshitz-Goldberg, *Orphan Works*, WIPO (May 2010), https://www.wipo.int/edocs/mdocs/sme/en/wipo_smes_ge_10/wipo_smes_ge_10_ref_theme11_02.pdf.

⁶⁹ See generally Society of American Archivists, Comment Letter on the Notice of Inquiry Concerning Orphan Works, 70 FR 3739 January 26, 2005 (Mar. 25, 2005).

information about copyright holders where there's a commercial value than if there's absolutely none. And this is a constant headache for archivists who are asked to make judgments about what is the risk here. When you've got a collection of archival correspondence, for example, which might have 1000 separate copyright holders attached to that collection, all of them individuals, the great majority of them unknown, the great majority of them not even knowing that they are the copyright holders for a descendant who appears in a correspondence collection. And what do you do? So, databases like ours do make a strong contribution, but they rarely touch on this fundamental problem of authorship.

Brian O'Leary: We haven't figured out how to solve that. About every two years, somebody comes to one of our meetings and says that BISG should become a book rights registry. We shuffle those people out the front door and we wish them well.

David Sutton: I bet, quickly.

Rina Pantalony: I'm glad we're shifting to the whole conversation to orphan works. In relation to film, I had a conversation or moderated a conversation recently where the suggestion has been in even commercial contexts that the standard that's implied has been one of "reasonable commercial efforts." And different entities may have general counsel that identify different practices to reach that standard. But I'm curious to know how accepted is in fact reasonable commercial efforts? I know archives have not been working with this standard for years where if the work is orphaned, in so many cases, particularly with film, it's just too high a risk. And the risk really lies on the access side, but does it lie on the preservation side as well? Is this the case or is it that I've been working with archives that are incredibly conservative in their assessment?

Margaret Bodde: Speaking on behalf of The Film Foundation, we can only fund the preservation/restoration of films that will be made accessible to the public. This doesn't come up often, but sometimes an archive hasn't yet obtained a rightsholder's permission when submitting a proposal, but we need that to be in place before we approve funding for the project. More typically, The Film Foundation receives the grant applications from the archives after they have done that due diligence. We have found with the World Cinema Project, that process can be more complicated and time-consuming. Rightsholders can sometimes have an outsized idea of the revenue potential of the film that they hold and there is an expectation of more financial gain than is realistic. So that is one challenge but it's something that we address with rightsholders on a case-by-case basis.

Rina Pantalony: Trevor, David had mentioned something that we often discussed in the context of the toolkit on preservation, which is that Orphan Works Paradox. Is that always the case?

Trevor Reed: Yeah, one of the challenges is that in order for somebody who wants to use a copyrighted work commercially, they may have all the access they need to get to the work, but if they don't have the use rights, it's going to be pretty unlikely they'll take that risk unless they know for certain that that copyright owner is never going to come after them. Unless there's some sort of a safe harbor of protection that keeps them from liability. At the same time, there are many cases where the barrier between a work being an orphan and not being an orphan is really just in the metadata, and whether or not accurate descriptive materials have circulated alongside the copyrighted material.

In the indigenous context, a lot of times people either hadn't written down names correctly, or in the case of rights metadata, they didn't know who to ask for permission. Orphan Works legislation potentially provides an avenue for folks to at least get a piece of archival material out there. Some folks might say, hey, let's take a hard line and say no access without consent, no use without consent. But sometimes you need to marginally violate the rights of authors or copyright owners to discover who they are and what uses can be made of an archival material and to correct errant metadata, so it can circulate again under the authority of the copyright holder(s).

I know in our repatriation work, sometimes we have to get material out there into a community before we can actually find out who the owners are. This could also be justified under this fiduciary or trustee theory of copyright ownership, where perhaps one of those responsibilities or obligations of a copyright owner is that you have the obligation to keep yourself visible, to stay connected to the work. To be somebody that folks can come to if they want access or negotiate use. I think we don't really talk much about obligations in the United States when it comes to our creative rights, our intellectual property rights, but I think there should be at least some obligations on those folks that own them.

David Sutton: The key challenge is around risk really and the approach that people are going to take to risk. Who carries the risk? If an archivist makes materials available and they're employed within, for example, a university, will the university protect them against the risk? And what we tend to find is that different institutions have different tolerances for risk. So some institutions will take the view we're publicly funded, the default should be that we make material available to the public. And other institutions will take a much more cautious approach and say we can't afford for our institution to be subject to legal challenge. And so certainly in the countries where I know this problem is being discussed, mostly in Europe, there's no norm. It varies from institution to institution. And in the USA also, the last time I attended the Society of American Archivists, I heard Peter Hirtle, then at Cornell, urging archivists to be prepared to take risks more frequently and say, really, those risks are quite low for archivists.⁷⁰ The number of archivists in the United States who've been sued for making material available is almost nil. And so people have...people sometimes take too much legal advice perhaps and sometimes as a balance and we had this discussion in that particular seminar at the Society of American Archivists the balance between the law on the one side and common sense on the other and what was being urged was that people should if they felt that they reasonably could should go with common sense.

Rina Pantalony: It's an interesting perspective, David, that you brought up with respect to risk and individual risk as opposed to institutional risk. I'm going to go back to what Trevor was talking about earlier, which is about rights metadata and the growing importance of getting the metadata right. And Brian, you and I have had these conversations in the past, trying to marry up library systems with publisher systems. The two are not interoperable. And Margaret, I'd love to hear your perspective on getting the

⁷⁰ Peter Hirtle is a pioneer in information preservation and intellectual property, being among the first to advocate for the use of databases to preserve records. For more information on his career see *Peter B. Hirtle '74*, CARLETON (Feb. 27, 2024), <https://www.carleton.edu/alumni/council/news/peter-b-hirtle-74/>.

metadata right as you continue to engage in preservation projects. But Brian, why don't you start it?

Brian O'Leary: Our work on rights and rights management is somewhat separate from the topic of preservation, but we've been trying to figure out ways to make it easier to manage rights to effectively reduce rather than increase the number of orphan works and fully communicate that. And it's based on our belief that at least for the book business and certainly for the U.S. market, we think the growth over the next 20 years, maybe for a longer period of time, growth in the book publishing business will come fundamentally from effective exploitation of rights, which means that you have to assert them, as Trevor was saying a few minutes ago, and you have to defend them where appropriate. I don't think you do so blindly, but I think that if you don't actively court an audience for the sale and exploitation of rights and permissions, you're doing a disservice to your work. You also leave yourself vulnerable both to orphan works and in some cases piracy or inappropriate use. That's fundamentally where we spend our time and energy, improving the mechanics of rights. If you come to the BISG website, you can see the work that we're doing.

Rina Pantalony: Margaret.

Margaret Bodde: I completely agree that rights must be protected. When we see a film we've helped restore streaming for free on YouTube, we let our distribution partners know. But it is difficult to police because just as one work gets taken down, another one pops up. And it's a double-edged sword to some degree, because as someone who does a lot of research on films, sometimes I find things on YouTube that I couldn't find anywhere else. That access is helpful, but copyrighted works need to be protected from piracy and unauthorized exploitation.

Rina Pantalony: This brings us to the access issue, right? And I'm going to use that point to sort of conclude the conversation today among all of you is to just touch upon access. And the role that rights metadata may play in enabling access, whether it's metadata that's added in the processing of archival collections based on knowledge. There's a growing international standard called RightsStatements.org that is trying to continue to sort of develop international rights statement standards for libraries, archives and museums.⁷¹ You know, we have Local Contexts⁷² as a project for indigenous tribal collective rights and identification of interests that may exist outside federal copyright. The whole issue of access is obviously more fraught than preservation to a certain extent, because that's where more significant harm could take place. Is the use of rights metadata and standards, could that in part solve some of the issues that we're facing to enable access? So that, for example, if it's clear in rights metadata that the community takes no issue, it broadens access. So it's the unknown that is causing the real barrier.

⁷¹ RightsStatements.org provides different right states for use by cultural heritage institutions to communicate the copyright and re-use status of digital objects to the public. *About RightsStatements.org*, RIGHTSSTATEMENTS, <https://rightsstatements.org/en/about.html>.

⁷² Local Contexts aim is to increase Indigenous involvement in data government by integration of Indigenous values into data systems. The mission of Local Contexts is to legitimize local decision-making and Indigenous governance frameworks for establishing ownership, access, and culturally appropriate conditions for sharing cultural heritage and Indigenous data. *Mission & Governance*, LOCAL CONTEXTS, <https://localcontexts.org/governance/>.

Trevor Reed: Yes, thank you for that point. It certainly lessens the risk, the more information that we have, and especially the clarity of the information. I feel like rights metadata frameworks and standards, especially, are still developing. We're still trying to figure out what terms and what information to put in the rights metadata fields to be able to help people really make decisions about the risk that they want to take on when they're using materials, especially as it pertains to access. And so I think clarifying precisely what a copyright holder or a community is willing to allow speeds up the process of making things more accessible to the public. That's one of the positive things that has come about because of Creative Commons,⁷³ for example: the rights holder declares a set of rights that they're willing to put out there to answer a set of perceived requests from potential users. As you say, we've also seen this to some extent in the indigenous space with Local Contexts creating metadata labels that help clarify and give folks a sense for the terms under which a community might permit access to a kind of archival material, and many archives utilize that framework, including the Library of Congress. I think the challenge now is to ask what happens next, right? Metadata is very helpful and helps people evaluate decisions, but it's not necessarily legally binding. In the absence of a framework like this, some people might say, well, hey, if it belongs to a particular community and we think it may be culturally sensitive, we're just going to restrict access to it. We're going to take it off the shelf. You can't search it. You can't find it. I think that's also a disservice to a lot of communities who actually do want to provide access, but just on their terms.

Rina Pantalony: Thanks, Trevor. David, the practice of adding rights metadata and your perspectives on Trevor's comments.

David Sutton: It's the absolutely best practice. Best practice now is when accruals arrive in a cultural heritage collection, that there should be a set of rights metadata with them. When we did the fieldwork in Namibia and Cameroon, one of the things that we were asked to do, that we did at the end, was to work with the partners in those countries to draw up templates and standards where and it helped that we were working with artists, photographers and writers in the workshops that we were running there. So they helped us to formulate the questions about rights and future use that they thought were right for the cultural creations that they'd made. And so it was not that long a document, maybe a four or five page document, but we tried to cover all the possible ways of balancing access with future protection and exploitation by the author or photographer and so for example we gave an option where free access could be made freely available inside the National Archives of Cameroon or inside the National Archives of Namibia but not by digitization and universal publicizing in that way. And certainly in the particular experiences in Namibia and Cameroon, a lot of the authors felt that that was what they wanted to do. They wanted their materials to be studied. They wanted people to make a little bit of an effort to travel to the...

⁷³ Creative Commons is an international nonprofit that helps build capacity and practical solutions for sharing knowledge and culture that serves public interest. Creative Commons aims to overcome legal obstacles that stand in the way of sharing knowledge and creativity worldwide by offering free products such as CC licenses and public domain tools. *What We Do*, CREATIVE COMMONS, <https://creativecommons.org/about/>.

Rina Pantalony: Brian, why don't you pick it up from here and give us your parting remarks on the importance of rights metadata, both from an access perspective, from an industry rights management perspective, and protection perspective.

Brian O'Leary: Metadata falls into three buckets. There's bibliographic metadata that characterizes the book, there's commercial metadata (I would consider access and rights to be part of that), and then there's marketing metadata that is the information that helps qualify the book for the audiences that you're trying to reach. We have spent a lot of our time trying to create relatively standard vocabularies building upon others' work in the rights category. Things like open access are fully supported by the metadata standards that we use. So those are good use cases.

I think Trevor, if I'm interpreting your remarks correctly, and I have concerns that transactional agreements between parties are really hard to capture in systems. So if you've decided that you can use this work for these purposes under these conditions, if there's not something that says OA CC BY,⁷⁴ then it has to be interpreted in different ways in metadata. And that's not happening right now. I mean, those private agreements are not making their way into queryable databases. They're effectively the kinds of things that writers, professionals, and folks working in archive and preservation roles then have to consult each time. And that slows things down and becomes particularly problematic for the industry, not just the book industry, but for the practice of preserving and providing access. And then you fall into that bucket of, well, if it's really hard to tell you yes, then I'm going to tell you no. That's not a good outcome either. So we're still working on the vocabulary piece, but we want it to be queryable in the ideal circumstances.

Rina Pantalony: Margaret, I'm picking up on what you were talking about earlier about piracy and YouTube. We do have case law in the US that says that stripping metadata out of a digital object that is then made available on a platform, for example, is considered a violation of Section 1201 of the U.S. Copyright Act.⁷⁵ Do you think that greater prevalence of rights metadata on projects will enable access from your perspective? Should it be a standard that should be employed in preservation projects from the get-go to ensure that the metadata continues to follow the object throughout its sort of ecosystem, you know, because we preserve for a purpose.

Margaret Bodde: Obviously, it would be ideal if it was the streaming platform's responsibility to adhere to copyright law and copyrighted works were taken down immediately based on the rights metadata, rather than it being left up to the rightsholder to request the work be taken down. That might prevent a great deal of popular cinema from being on streaming platforms after a user uploads a film. So the rights metadata is

⁷⁴ The term 'OA CC BY' refers to acronyms used in open access publishing. 'OA' stands for Open Access, 'CC' stands for a Creative Commons license, and 'BY' stands for attribution. If a work is licensed as 'OA CC BY' that means it holds a creative commons license that permits absolutely any use of the content without permission, so long as the author and source are cited. Jennifer Zerke, *CC-What? What's behind the Creative Commons licenses used by OA journals?*, SIMON FRASER UNIVERSITY (Oct. 22, 2018), <https://www.lib.sfu.ca/help/publish/scholarly-publishing/radical-access/creative-commons-licenses-open-access-journals>.

⁷⁵ Section 1201 of the Digital Millennium Copyright Act prohibits circumventing technological measures that protect access to copyrighted works and trafficking in technologies that facilitate such circumvention. 17 U.S.C. § 1201.

important, but placing the responsibility of protection and enforcement of rights onto the platforms would be more impactful.

Rina Pantalony: So we've come to the conclusion of our two hours of conversation. I'm curious to know if anyone has any parting remarks that they wish to leave us with before we close out, or I can turn to all of you one at a time and ask you if you have any remarks or you wish to leave it as is. David, I'm going to turn to you to provide us with some final remarks or you can pass if you wish.

David Sutton: Just one thing that I was going to say that I didn't bring into any of the remarks earlier. When we did a webinar on copyright for archivists last week, we looked at the most frequently held myths and misconceptions about copyright in the world of archives. And everybody was agreed that the biggest single myth and misconception related to the confusion of ownership, confusion between the ownership of the materials on the one hand and the ownership of the copyrights on the other. And both archivists and users found themselves confused and sometimes the archivists were trapped but with angry users who wanted to proceed as though the archivists were the copyright holders when they were the archivist was not the copyright holder and did not know who was the copyright holder and so had to try to help the person navigate that situation, but it happens again and again and again. There's separation between the ownership of the physical document and the ownership of the copyright in that document, and it's a really important part of our world. It's a challenge that archivists face every week of their working lives.

Rina Pantalony: That's a great point. Brian.

Brian O'Leary: I think this conversation leaves me inspired to give renewed thought to how we could cooperate and maybe even lead an effort to talk about preservation in the book business, at least in the US market.

Rina Pantalony: That's very gratifying to hear. Thank you. Trevor.

Trevor Reed: I'm really grateful for this conversation and I feel like there's so many nuances. It would be wonderful to continue the conversation, especially as the next toolkit involves access and future iterations will touch on a lot of the topics we've discussed. I hope this is just the first opportunity to have this discussion. But yeah, thank you very much, Rina, for organizing and for everyone here for your wonderful thoughts.

Rina Pantalony: Thanks, Trevor. Margaret, you get to carry us out.

Margaret Bodde: That's all folks!⁷⁶ But seriously, thank you, Rina, for inviting me to talk with this incredible group of experts. I've learned a great deal and seen things from many different perspectives during these two hours, so I appreciate being part of this discussion. I hope we can continue the conversation with this group of stakeholders. The issue of access at this current moment is deeply crucial when there are efforts to rewrite or hide certain parts of history. It's essential that we resist those efforts and remain steadfast in our commitment to preserve the past.

Rina Pantalony: Thanks, Margaret. Thank you so much, everybody!

⁷⁶ Gary Lobster, "*That's All Folks!*" - *Porky Pig*, YouTube (2021), <https://youtu.be/FkHCf6sjBgo?feature=shared>.