PRESERVING DIGITAL PUBLIC TELEVISION
A PROJECT FUNDED BY THE LIBRARY OF CONGRESS

Intellectual Property and Copyright Issues Relating to the Preservation and Future Accessibility of Digital Public Television Programs

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1. Introduction: Public Television Preservation & The Obstacle of Copyrights

In less than a decade, television production, distribution and preservation have undergone a radical shift. Today, programs are nearly all shot, edited, and shared as digital files. Video recording and editing systems are now well within the means of most members of the public, and the ubiquity of media on the Internet, coupled with the mass deployment of hand-held devices, have transformed not only the medium of television but the entire environment for creating and watching video. Distribution and transmission have been equally transformed, as all over-the-air U.S. television broadcasting is digital (as of June 2009) and tape-based program distribution is rapidly being replaced by digital file transfers.

What do these changes mean for television archives? Practices to conserve and protect videotape recordings are well established, and the cost for maintaining and storing physical media are easily calculated. However, in an age of digital files, the requirements for preserving television programs are far different from the analog days of storing videotape. It isn't enough to close a digital file and put it on a virtual shelf. For video in particular, acceptable practices to save and access very large files, manage ever-changing file formats, maintain rich metadata, and protect file view-ability into the future are just now emerging.

Preserving Digital Public Television, a project funded by The National Digital Information and Infrastructure Program (NDIIPP) of the Library of Congress[1] set out to explore some of these difficult problems by designing a model repository for public television preservation. In the process, the project also examined other issues closely related to repository operations, such as sustainability, selection, and how to make digital archives more accessible and usable.

This report is the result of research conducted by the *Preserving Digital Public Television* Copyright Working Group. It explores the particular set of copyright and intellectual property (IP) issues that govern – and often limit – the use of digital public television programs when the broadcast permissions have expired. It also explores the connected question of how the existing copyright laws restrict the ability of archives to adopt functional practices for digital preservation.

1 http://digitalpreservation.gov

The NDIIPP Project: *Preserving Digital Public Television*

In the Public Broadcasting Act of 1967, Congress authorized the Corporation for Public Broadcasting (CPB) to "establish and maintain, or contribute to, a library and archives of noncommercial educational and cultural radio and television programs and related materials."[2] However, until 2008, CPB had never allocated any funds to support this charge nor implemented any program for system-wide preservation.[3] Currently, public television allocates very few resources for preservation. Only a few stations and PBS have formal archives in place, which leaves program preservation largely as an afterthought to be performed locally on an *ad hoc* basis.

In 2004, public television stations Thirteen/WNET in New York and WGBH in Boston, in partnership with the Public Broadcasting Service (PBS) and New York University, organized ***Preserving Digital Public Television*** (PDPTV)[4] as a collaboration to introduce digital preservation issues and practices to the public television system. The project is funded by the National Digital Information Infrastructure and Preservation Program (NDIIPP) of the Library of Congress.[5] It has been aimed specifically towards preserving *born-digital* program files, and has not been engaged in the digitization of analog materials. It is scheduled to be completed in 2010.

The goals of the PDPTV project were to:

- Design and build a prototype repository for born-digital public television content;
- Develop a set of standards for metadata, file and encoding formats, and production workflow practices;
- Recommend selection criteria for long-term retention;
- And examine issues of long-term content accessibility and methods for sustaining digital preservation of public television materials.

In keeping with these goals, along with designing a content repository, the PDPTV project has also analyzed the questions of what is required to keep digital content usable and accessible, particularly in regard to intellectual property issues. The primary methodologies used to prepare this report included: documenting the experiences of the PDPTV team in building the prototype repository; examining production and distribution contracts and documents; conducting IP audits on target programs; reviewing current research and commentary on relevant technology and copyright legislation; and monitoring parallel efforts by our colleagues in various fields, such as publishing, higher education, information technology, and broadcast television in the US and around the world.

Public television's far-reaching influence and irrefutable cultural, educational, and entertainment value makes it a critical component of the American broadcasting landscape. The need for long-term preservation and access to public television's programming is

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2 Public Broadcasting Act of 1967, US Code Title 47 (1967), Sec. 396. "Corporation for Public Broadcasting." http://www.cpb.org/aboutpb/act/text.html. Accessed 19 April 2010

3 In 2008, CPB launched the American Archive initiative, which is developing a system-wide program preservation plan.

4 More information is available on the PDPTV website, http://www.ptvdigitalarchive.org

5 More information is available on the NDIIPP website, http://digitalpreservation.gov.

obvious. Unfortunately, preserving and providing access to this content is complicated by a variety of technical, material and legal problems.

By analyzing the overlay of copyright permissions and legislative proscriptions that apply to using and preserving digital program content, the research contained in this paper aims to elucidate issues that may serve as impediments towards achieving system-wide preservation and access of digital content.

This report:

- Identifies the context of rights agreements, procedures and economics by which public television programs are produced;
- Provides a detailed explanation of the many types of rights and permissions that can exist for any individual program, particularly the critically important issue of underlying rights;
- Discusses the technology sections of the copyright law and their impact on digital preservation;
- Looks at current efforts to amend the laws;
- And presents case studies of two different public television series that had to address major copyright issues before they could be reissued for re-broadcast and non-broadcast distribution.

This report is focused on the issues associated with U.S. intellectual property and copyright law that can compromise the archiving, preservation and future access to public television content. We present this discussion to support efforts within the public broadcasting system and elsewhere to solve the complex IP issues which can keep content locked up and inaccessible, despite the expanding opportunities to reach totally new users made possible by the technology of today.

Dissecting the IP Issues of Television Production

With the immediacy and ease of use of digital technologies, the opportunities for viewing video online have grown exponentially. Users now expect that both recent and older broadcast content be easy to find and viewable. However, apart from the cost of transferring older analog video into digital files and preserving the new digital content, there are significant intellectual property and related issues that both complicate and restrain long-term access to public television content.

In its examination, PDPTV has found two major areas relating to intellectual property that have a direct impact on the ability and interest of public television to preserve digital content and make it accessible to current and future users.

- **Constraints on usage based on complex expired permissions** – Public television programming can incorporate elements from a broad range of sources, governed by a wide array of license agreements and contractual obligations. These rights permit *broadcast* distribution by public television stations for a limited period of time, but most of these program contracts do not include permission to make the materials available for non-commercial use after the broadcast rights expire.

It can be very burdensome to make this content available again after the initial broadcast period has expired (such as to put them online), because renegotiating new permissions can be time-consuming and prohibitively expensive. Broadcasters may not see the point of investing in preservation if they can't reuse or provide access to the material, and may be reluctant to even continue incurring the ongoing costs of storing the material. Not having clear permission to re-use older productions is a major barrier that leaves the majority of the broadcasters' archival content largely inaccessible after broadcast.

- **Legal limits on making copies of programs for preservation purposes** – U.S. copyright laws forbid making unauthorized copies of any copyrighted materials, with a few very narrow exceptions. Copying by libraries and archives is one such exception, but the current law allows a maximum of only three copies to be made for preservation purposes, and only by libraries or archives that are open to outsiders.

  As such, it can restrict digital archives from following proper contemporary archival protocols, which require routinely creating multiple copies of files through basic operations, and relying on file redundancy to assure long-term digital survival. These restrictions have potential to impact a repository's preservation mandates, and add further complication to legal questions around providing access to archival materials.

When archival collections are made available for online access and other uses, the value of preserving the materials becomes evident. Overcoming the obstacles to providing access is central to expanding support for program preservation across public broadcasting, not only for the long-term survival of public television's collections, but also to strengthen the commitment of public television to protect its substantial body of work for future use.

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2. Ownership of Public Broadcasting Programs

Intellectual property is broadly defined by the World Intellectual Property Organization to be, "The legal rights which result from intellectual activity in the industrial, scientific, literature and artistic fields."[6] Intellectual property rights allow those who contribute to the creation and production of intellectual works to retain some rights to and control over their creative work for a determined amount of time.

In public broadcasting, permissions to use a program (or a clip within a program) are generally granted for a finite period of time, and when such rights expire, the entire program is taken out of circulation unless the expired segments are renewed (or replaced.) If the program can no longer be used, it then becomes a direct challenge for public television to justify the costs and effort to preserve it or maintain it in an archive. Consequently, addressing copyright and intellectual property issues are priority concerns for television archives that are committed to keeping programs and making them available.

It is legally allowable, under most circumstances, for individuals to view archived programs for research or other purposes and in general, if an individual has made arrangements to visit an archive in person and the program is in a viewable format, there are no legal obstacles to screening the production on site.

The problems arise when the expectation is to make the program available for broader access, such as by sending a copy to another site or through online viewing or other public display, as different copyright conditions apply that can limit such uses.

In television, the complex web of intellectual property rights related to each program can form costly and time-consuming encumbrances that public broadcasters must confront in order to offer the level of intellectual access that both they and their users expect. For example, PBS holds no rights to any programs except permission to distribute them to public television stations. Once productions are out of broadcast rights, PBS cannot make them available online or for other public uses despite possessing the broadcast copy. Only the producing entity or copyright holder of the production has the legal right as owners to retrieve these materials.

In contrast, as content producers, public television stations WNET and WGBH control their own production units and must manage a wide range of conditions regarding copyrights and licenses for the materials they produce and distribute. Their respective Archives protect their own materials and make them available by licensing clips and segments; partnering with commercial operations for home viewing and similar sales; and seeking dedicated funding to clear archival materials for special projects.

But even when when a station produces a program itself, ownership of the production may be very complicated because there can be many contributors each holding an underlying right (see below). Consequently, it is rare that a public television producer outright owns a total production in perpetuity. Lacking such ownership can make it difficult to provide broad

6 WIPO Intellectual Property Handbook: Policy, Law, and Use. WIPO Publication No. 489. Chapter 1, pg 3. http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch1.pdf Accessed 11 April 2010.

access to the items held by the archives. As a result, public television archives struggle to provide public access in whatever limited ways they can, while taking acceptable risks within the current laws.

Program Sources

Television programs are inherently complex creations. One or more entities can own the copyright to the finished program as a whole, but at the same time, because each program can be a multi-layered amalgam of many elements and contributions, often many parties can claim intellectual property rights or contract obligations for each element. These are the *underlying rights holders*. Most productions, therefore, represent a nested collection of rights, all of which must be satisfied before the program can be broadcast or used publicly in other ways.

The issues of ownership and underlying rights are important because program distribution is governed by permissions that must be granted by *all* the various parties who have copyrighted materials used in a production.

Ownership of a finished program depends on the source of that production. Programs for air come from three basic sources, and each source entails different rights arrangements:

- Program acquisitions that come from outside producers;
- Co-productions made between the station and other parties;
- Programs produced by the station itself.

Acquired Programming

Acquired programming is programming in which the public television broadcaster is involved primarily as the presenter. Another company produces the content, and the public television broadcaster is granted the right to broadcast the program for a limited window of time. This might also include rights to re-version the program as necessary for length, audience or content, and possibly distribute the program in limited markets. Acquired programs can come from a wide range of sources, including programs cleared for national distribution by PBS or from international sources.

In these instances, the local broadcast station is not a major rights holder, nor does it share any profits from the content.[7] Consequently, because the station holds no inherent financial or ownership interest in the program and has no rights for reuse, the station is unlikely to undertake the costs necessary to preserve the material.

Co-Productions

In a *co-production*, the station works with another producer or multiple partners to create the programming. In theory, each producer has equal financial and production responsibility and will subsequently share the copyright and distribution terms equally. In reality, the balance of rights usually depends on the financial investment of each partner.

Co-productions in public television are common and often involve both national and international partners. At WNET, a co-production arrangement might involve working with a British producer to create a program together. Following production, WNET may retain all

7 There are examples where the station may receive a small profit share from the program; however, this profit will be very small in the larger context of the program's overall profit.

North American rights, and the British producer might receive distribution rights for the rest of the world.

Co-productions are typical among news, public affairs, history, and science productions as a way of sharing the high cost of producing these types of television programs. As co-producer, a public television station could have limited or extensive rights to use or distribute the completed material after broadcast. This provides an incentive to preserve the program, but there might also be conditions on uses or access.

Internal Productions

An *internal production* is a program produced in-house by the station itself, or contracted out by the broadcaster as a paid work-for-hire. In either production scenario, the broadcaster owns full copyright to the finished work as a whole. Such a production presents the fewest problems relating to preservation and access. But even a "wholly-owned production" is subject to contract terms, (union) collective bargaining agreements, and underlying rights, which can limit rebroadcast or non-broadcast program uses and the long-term interest in preserving the production.

Acquiring Rights to Air Programs on Public Television

As the discussion above indicates, for copyright purposes, the *owner* of the completed work is determined by who has produced the program. But the ability to use or re-use the program is not determined solely by who holds the copyright to the *finished* program. It is also subject to various contract terms that spell out the allowable uses for a program, the period of time that applies, and the types of underlying rights that are in effect.

To get a program on the air, public television distribution rights must be granted from both the owner of the program itself, and from each underlying rights holder. Generally, the producer of a television program or series is responsible for clearing all these permissions and rights for the content used in the program, including each element that comes from another source.

To pursue these permissions, rights clearances and contract negotiations begin during the earliest part of the production process and dictate the long-term conditions of program use and access. In public television, these rights are primarily specified to allow the program to be broadcast on non-commercial television for a limited number of times during a defined period. However, other program uses, such as home video, educational or theatrical release, are also often included in the rights packages that are negotiated.

The goal in negotiating these contracts is to secure as broad a rights bundle as possible, for as long a window as possible. Securing rights in perpetuity is the most desirable, but most rights contracts have a fixed term of ten years or less. It can be particularly difficult to secure broadcast rights for an extended period for acquired productions that feature 'high-profile' content. In these cases, there might be a shorter broadcast window of only three to four years, with a cap on the number of broadcasts allowed during this period and no other distribution rights.

Historically, broadcast rights have also been defined by geographic region, so that another element often specified in a production contract is the program 'market' or geographic

boundaries where the program is allowed to be shown. [8] Today, even though the dominance of the Internet calls into question the entire issue of a geographic 'program market' as a factor to limit distribution, permissions to air a program in a *local, national* or *international* market currently remain part of nearly all current distribution agreements. *National programming* has permissions to be distributed nationally across the public television system, while *local programming* can only be aired in a station's local market. Similarly, additional permissions have to be secured for any programs that will be shown outside the U.S.

Most programs seen on the air are subject to such terms, which specify the conditions that allow a station to air or show the production. When these rights have expired, the station has no further ability to broadcast the program. Authority to preserve the materials for future or additional uses rests not solely with the broadcaster or distributor, but in the hands of *all* the program copyright holder(s). It can be a disincentive for public broadcasters to preserve materials if it the tangle of underlying rights seems to daunting to make the effort worthwhile, or the preservation role amongst stakeholders is not clear.

Acquiring Rights to Distribute Through Other Channels

Public broadcasters have become increasingly aware of the expansive potential of their content to reach audiences far outside actual broadcasts. Emerging online channels offer a new impetus for preserving and safeguarding programs. To take advantage of this opportunity, public television is exploring how to factor new and unexpected online uses into its rights contracts well beyond the broadcast terms. But digital technologies have far outpaced the legal world of rights agreements, and movement in this direction has been slow.

Viewer expectations, coupled with advances in distribution technology and viewing devices, are forcing broadcasters to conduct business and reach their audiences in radically different ways than the long-established practices. Most significant is the rapid popularity of web-based video distribution that encompasses interactive and social media features and other multi-media content, coupled with the widespread adoption of hand-held devices. In a study released in July 2008, Integrated Media Measurement Inc. found that "up to 20% of episodic broadcast content viewing occurs online"[9] and as more broadcast programming is being made available online, this percentage is growing rapidly.

The impact on archives is evident, as viewers want to see not only current television programming online, but are enthusiastic about older materials as well. In response, both WGBH and WNET have online portals that include both new and archival programming, with select older programs attracting high interest and popularity. For example, when WNET put a few episodes of the African-American performance program *SOUL!* (1968-1973) online, the website garnered more than 75,000 visits in 2 months, a very high figure for a public television website not associated with a program on the current national lineup.

8 Here the term "market" refers to the population within the geographic signal area reached by a public television station.

9 Integrated Media Measurement, Inc. "Online Viewership Brief" 30 July 2008. http://www.immi.com/pdfs/OnlineViewership.pdf. Accessed 19 April 2010.

What content can be included in these portals, however, is determined not only by what has been saved and preserved by each station over the years, but also by the contract terms dictated by rights agreements negotiated years — or decades — before such distribution could be imagined. Consequently, in many cases the rights agreements are silent on the non-broadcast digital distribution outlets available today.

WGBH began explicitly integrating new media, digital and online rights into basic contracts for many programs nearly ten years ago. At WNET, the specific clearance of web rights for streaming and downloading only emerged in 2007. For contracts prior to this period, web rights are included only if the phrasing in the contract is broad enough to be interpretable as permitting web use, even if the terms were drafted decades before the Internet existed. A contract might cover content, for example, "…in whole or in part for broadcast purposes, for audio and/or visual tape, cassette, 16mm theatrical and closed-circuit exhibition purposes and all other non-broadcast purposes in any manner or media in perpetuity, throughout the world."[10] Such flexible and broad distribution terms are highly desirable but increasingly rare.

The Constraints of Underlying Rights

While there is usually only one copyright owner for any given program as a whole, the production can contain a range of diverse elements that come from many other sources and rights-holders. These layers of *underlying rights* can belong to any number of individuals and entities, and each may have different terms or windows of use associated with it.

For example, familiar content used widely in public television documentaries is newsreel footage and old photographs, both of which are generally licensed from third parties for use in programs. Literary rights and rights to use music, as well as performance rights and various agreements put in place by union contracts and crafts agreements, are also common types of underlying rights that might apply. **Appendix A** provides a detailed outline of the many types of underlying rights one might find in a public television program.

Agreements with these underlying rights holders can be simple or complex, and can specify costs, conditions, limitations, length of the agreement, and similar terms for use. Consequently, a single program can potentially have hundreds of rights holders who each control a small piece of the completed work. Once initial distribution agreements expire, the program cannot be re-broadcast, put online, or used in any other way until the program producer or distributor re-negotiates new terms with each of these same rights holders. This is what kept the acclaimed civil rights documentary *Eyes on the Prize* out of circulation for well over a decade (see Appendix B, Case Study II).

This is often a very difficult task. Identifying, and researching all the various elements, and then locating all the underlying rights holders included in any program, can be extremely labor intensive and is not always successful. Added to that is the significant time and expense that is generally necessary to renegotiate and pay for new distribution permissions themselves.

10 Resnick, Sarah. "Rights Evaluation: Executive Summary: The Adams Chronicles, 1750-1900, Episode One." Unpublished Report. 10 Dec 2006.

Depending on the circumstances, it is possible that a single rights holder amongst hundreds can prevent re-use of a program by asking for an extremely high fee or by refusing to grant new permissions. In some cases, the rights holder is not available or can't be found at all because of death, lost records, entities no longer in existence, or other conditions. In these latter scenarios where the rights holder is not available, the embedded element is known as an "orphan work," which is discussed in more detail in the following section.

Older programs can be filled with a broad assortment of materials that might be orphaned, or just missing documentation, that add extra layers of effort and cost before the rights can be cleared for the program to be reused. Given these conditions, it becomes evident why the complexity of underlying rights is considered the most daunting obstacle to making archival programs available for public access. **Appendix B** presents two case studies that illustrate how complicated and difficult rights clearances for archival programs can be.

"Orphan Works"

Defined by the U.S. Copyright Office as "the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner," orphaned material is a huge concern to people creating and using audio-visual and photographic works.[11]

As discussed, public television uses a great deal of acquired materials and other content where the copyright is held by a third party or by multiple parties. Over time, the ownership of many types of such materials can become 'orphaned'; that is, the copyright owner can no longer be identified or found due to death, entities merging, being transferred or going out of business, incomplete or inaccessible records, and other legal or actual conditions.

It can be difficult to determine if copyrighted material has become orphaned. Moreover, once it has that status, it can be impossible to obtain proper permissions to use the material. Consequently, libraries, archives, and organizations like public broadcasters are very reluctant to use orphan works or make them available because of potential financial liability. If a previously unlocateable copyright holder were to emerge following the use of an assumed orphaned work, the copyright holder could claim back profits from the use of the material that they did not authorize. This could result in huge costs to the organization that used the work.

This potential for liability often has a chilling effect on preserving materials, and especially on making content with unknown owners available except in the narrowest of circumstances. At the same time, given the tremendous amount and variety of copyrighted materials used in programming, and often poor tracking of rights over time, it is impossible for public television archives, along with many other cultural institutions, to avoid dealing with orphaned works.

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11 "Section 108 Study Group Report." The Section 108 Study Group. 31 Mar 2008. Pg 24. http://www.section108.gov/docs/Sec108StudyGroupReport.pdf. Accessed 19 April 2010.

3. Digital Preservation and the Limits of the Copyright Law

All these issues relating to ownership and control of creative work, intellectual property rights of elements used within programs, and contract obligations of people engaged in making or appearing in programs, are the basic agreements that must be in place in order for public broadcasters to re-use programs and make them broadly available through avenues such as online distribution. Understandably, during the production process, broadcasters are not focused on these future requirements, but on obtaining contracts and agreements that meet their immediate broadcast needs.

When combined with budgetary constraints, this need to secure initial broadcast rights has historically produced relatively short broadcast windows and limited terms of use. The result is that public television programs contain a great deal of copyrighted material that broadcasters do not own or control, but nonetheless are integral to the creation of the completed work. Apart from the issues of reuse and access, these many copyrights also add complications to the mechanics necessary to carry out preservation practices.

Preservation and the Need to Make Copies

Administered by the U.S. Copyright Office under the Library of Congress, copyright law in the U.S. originated with the Copyright Act of 1790. The law was intended to support the creation of "works of authorship," which would benefit the public. Granting 'authors' exclusive rights to their works to copy and exploit, but for a finite period of time, was thought to provide incentive to create new works. Over time, there have been numerous amendments to the law, enacted in response to shifts in the creative landscape and the introduction of new technologies. In the context of public television preservation, the most important stipulation affirmed by U.S. copyright law is that only copyright owners themselves are granted the exclusive right to "reproduce the work in copies or phonorecords" and "to distribute copies of phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending."[12]

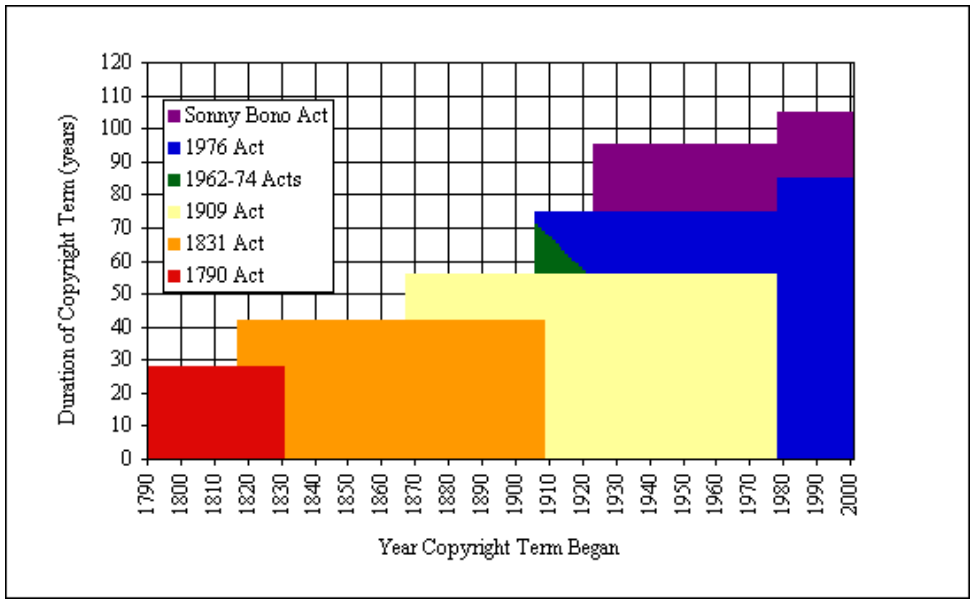

Figure 1: Copyright Term Chart by Tom W. Bell (http://www.tomwbell.com/writings/(C)_Term.html)

12 Copyright Law of the United States of America, §106. http://www.copyright.gov/title17/92chap1.html#106. Accessed 19 April 2010.

However, preservation of both analog and digital media materials inherently requires that copies be made – for safety and back-up copies, viewing copies, and reformatting, not to mention digital files that are copied just by virtue of being managed by digital systems. Because the playback of these materials is dependent on technologies that are certain to become obsolete, it will also be necessary to create copies that are always accessible on current platforms. Maintaining multiple copies of digital materials is standard IT practice to protect against threats such as deterioration, disasters, and mishandling.

However, with a few very narrow exceptions, U.S. copyright laws forbid making unauthorized copies of *any* copyrighted materials. These conditions apply as much to copyrighted material used *within* a public television program as to the completed, copyrighted program itself, which means that technically, there must be permission from every underlying rights holder before a viewing or back-up copy of a program can be made.

One such exception in the law allows libraries and archives that are open to outsiders, under certain conditions, to create new copies of works they do not own. But this exemption is inadequate when the preserving entity does not own the copyright to the entire work, and it falls far short of supporting preservation needs in the digital preservation environment.

As already outlined, public television programs involve numerous intellectual property rights that may be controlled by a wide variety of individuals and entities and are cleared primarily for a specified broadcast window. This not only limits the potential uses, but as long as the broadcaster does not control these rights, it also constrains the ability to copy and preserve the materials.

Unless addressed in the initial distribution agreement, this restriction on making copies of copyrighted material can hinder or even prevent public broadcasters and other stewards of public media from making necessary and relevant copies of works to which they may own the completed production as a whole, but not the copyright over each piece of content in the program.

Section 108: The 'Preservation Exemption' for Libraries and Archives

Despite this broad prohibition against making copies without permission, the copyright law does include various limitations and exemptions to which the author's exclusive rights do not apply. For public broadcasters and others trying to preserve and provide access to public broadcasting programs, *Section 108* of the copyright law is the most important.[13] Added to the law through the Copyright Act of 1976, Section 108 is casually referred to as 'the preservation exemption.' It allows archives and libraries to make a very small number of copies of copyrighted work for the purpose of preserving the work.

Section 108 is divided into multiple subsections that define what duplication terms apply to specific types of materials. This includes:

- Allowing an organization to make up to three copies of an *unpublished work* from their collection if the copies are used for preservation or put on deposit with another

13 Copyright Law of the United States of America, §108 (b). http://www.copyright.gov/title17/92chap1.html#108. Accessed 16 March 2010.

organization for research use, as long as copies produced "in digital format [are] not otherwise distributed in that format and [are] not made available to the public in that format outside the premises of the library or archives."[14]

- Allowing a library or archives to make up to three copies of a *published work* if it has been *damaged, lost, stolen, or is on an obsolete format*. To enact duplication under this provision, the organization must put forth a "reasonable effort" to prove that a new copy could not have been purchased for a reasonable fee, and also adhere to the requirement of not distributing digital copies outside the organization's premises.[15]

In order for the Section 108 copy exemptions to apply, an organization must "be [a library or archive] open to the public or at least to researchers in a specialized field, the reproduction and distribution may not be used for any direct or indirect commercial advantage, and the library or archive must include a copyright notice on any copies provided, or . . . a legend that the work may be protected under copyright."[16]

Generally, libraries, archives and similar collections are covered by this definition, and the archives at PDPTV partner stations would likely meet the basic criteria and thus fall under the copy exemptions of Section 108. However, the issue remains that these exemptions are severely limited, particularly regarding the preservation requirements of works created in digital form.

More than Three Copies: The Necessity of Duplicating Digital Files

Before the advent of digital technology, when publishers feared that the advent of the Xerox machine placed their publications at risk of copyright infringement, Section 108 was added to the US Copyright Law to protect publishers but allow libraries and archives an exemption to create *a single copy* of a work for preservation purposes. The Digital Millennium Copyright Act (DMCA), introduced in 1998, amended Section 108 to increase the permissible number of preservation copies from *one* to *three*. The DMCA was designed to address more recent technological developments and has had the most significant effect on preservation activity since Section 108 was added to the Copyright Act of 1976.[17]

Although this was an improvement from being able to make a single preservation duplicate of a copyrighted work, preserving digital files requires totally different operations and technologies than preserving print materials. Three allowable copies of a work is simply not enough for archives, including public broadcasting archives, to adequately protect their materials in a digital environment. [18]

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14 Copyright Law of the United States of America, §108 (b). http://www.copyright.gov/title17/92chap1.html#108. Accessed 16 March 2010.

15 Copyright Law of the United States of America, §108 (c). http://www.copyright.gov/title17/92chap1.html#108. Accessed 16 March 2010.

16 "Section 108 Study Group Report." The Section 108 Study Group. 31 Mar 2008. Pg 17. http://www.section108.gov/docs/Sec108StudyGroupReport.pdf . Accessed 16 April 2010.

17 Ibid. pg 24.

18 For more details on how digital video works are "at risk" under the current copyright regime, see Howard Besser's testimony before the Section 108 Study Committee at http://www.section108.gov/docs/Besser_NYU.pdf. Accessed 1 April 2010

In her essay "Preservation Lay of the Land," Jane Johnson defines preservation as "slowing the inevitable decay" of materials through a variety of measures. The most common and important of these measures is duplication of materials. Writing about the analog environment, Johnson says, "Duplication is especially important for deteriorating older works that would otherwise not survive, but is also useful for making public access copies."[19]

In proper analog-to-analog videotape preservation, creating three copies of a work is the accepted practice: a preservation master, a duplication master, and an access copy. This duplication process is central to an analog preservation process, so that access is allowed while still protecting the original or highest-quality preservation master.

But with broadcasters shifting to recording and editing in tapeless environments that use only digital files, best practices for preserving analog tapes do not apply. Although standards for digital preservation of audio-visual materials are still being established, one of the most widely accepted policies adopted very early in the life of computers calls for *file redundancy* and *backup* – the requirement that to ensure survival, it is necessary to have *multiple* copies of files stored in *different physical locations*. Duplication may be an *option* for accessing analog materials, but it is *inherent* to the ability to reliably store, access and use digital files.

The fragility and as yet untested long-term behaviors of digital files necessitates the creation of numerous copies to ensure file integrity and to protect against loss over time. In his article "Digital Preservation of Moving Image Material", Howard Besser states that the process of repeatedly *refreshing* files onto new physical strata is critical to the preservation process.[20] Therefore, right from the start, the three-copy limit is not sufficient to support the practices required for digital preservation. For example, simply putting a single digital program file into a stand-alone computer system could easily generate more than three copies based on how computers operate — with caching, automatic back-ups, mirrored systems and the like. If the files are shared over a network or moved from one place to another, even more copies are created, and it may not be possible to keep track of the exact number of temporary copies made internally during even routine operations.

This can occur even before specific copies of programs are made for long-term storage. Unlike the case of analog materials, for which access is provided through making a hard copy, digital access is provided through the creation of new proxy and viewing files derived from the preservation 'masters.' Moreover, preservation practices require that files be migrated over time from obsolete to up-to-date formats, so that a new version of the file is created, even while the original is still maintained. In fact, best practices for digital preservation *require* that the original (obsolete format) file be kept, along with the newer more viewable format, in case errors are later discovered in the reformatting process. Consequently, for a digital repository, the nature of all these procedures over time will create many more than three copies in order to carry out even basic file preservation.

As illustration, in the model repository developed by New York University for the PDPTV project, the three-copy limit is reached even before any access copies are created. The NYU

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19 Johnson, Jane. "Preservation Lay of the Land." Moving Image Collections. http://gondolin.rutgers.edu/MIC/text/how/preservation_overview.htm. Accessed 16 April 2010.

20 Besser, Howard. "Digital Preservation of Moving Image Material," The Moving Image, Fall 2001, pages 39-55. http://besser.tsoa.nyu.edu/howard/Papers/amia-longevity.html. Accessed 16 April 2010

repository maintains *a minimum* of three copies of each file, on mirrored servers and offsite backups, all of which relate to the preservation process. (These copies are deliberately planned and don't include all the interim copies that the system makes automatically). Further, when the time comes to migrate file formats that have become obsolete to those compatible with current systems, more new copies will be created, while the older versions will still be retained in the repository. In addition, when an authorized institution makes a request to retrieve content, yet another new copy must be created and even more copies of the files will be generated.

This model repository operation is not unique. In the digital preservation context, file duplication is not only critical, it is *unavoidable*. Moreover, because system failure can result in irretrievable loss of content, it is a well-accepted practice that preservation operations require at least two back up file storage systems be maintained in different locations just for basic protection. The saying in digital preservation, as popularized by the community initiative of the same name, is "lots of copies keeps stuff safe" (LOCKSS). The LOCKSS network recommends and creates *seven* copies of each digital file.[21]

In other words, the long-term security and preservation of digital files relies on creating and maintaining multiple copies. Unfortunately, U.S. copyright law in its current state does not recognize the need for making 'lots' of preservation copies, even for libraries and archives, but allows only three 'legal' preservation copies to be made.

Making Copies of "Damaged, Deteriorating, Lost, or Stolen" Digital Files

While slightly increasing the number of copies that can be made, the DMCA did not amend the provision in Section 108 that defines *when* authorized preservation copies are allowed. This language specifies that published work must be "damaged, deteriorating, lost, or stolen," or exist on an "obsolete format" before it can be legally duplicated. The Act defines "obsolete" as when the playback device is "no longer reasonably available in the commercial marketplace."

Obviously, this language was describing materials created in an analog environment. Digital files do not experience the same salvageable deterioration that analog materials do, neither does "obsolete format" relate simply to a "playback device."

The usability of a digital file is not solely dependent on the availability of a single playback device, as was the case with analog media. Digital files depend on an entire system of interconnected hardware and software for storage and playback. If any one component in a digital system becomes obsolete (a storage device, playback software, an index, an operating system…), the functionality of retrieving digital files can easily be lost. Additionally, the risk of file corruption is always present; an error in a digital file can render it permanently irrecoverable.

If preservation copies can be made only *after* damage has been set in motion or when the preservation environment can no longer read the file, it may be too late -- the ability to recover the file and play it back properly may already be lost. Consequently, with digital materials, it is impossible to wait until a file is "damaged" or "deteriorated" to make a preservation copy – by that time, the file could be unreadable or destroyed.

21 "Welcome." Lots of Copies Keeps Stuff Safe. http://www.lockss.org/lockss/Home. Accessed 16 April 2010.

Instead, the only realistic and affordable method to preserve digital files long-term is to make copies *before* they deteriorate, while the file is still readable and in a stable operating environment.

In his essay "Defining Digital Sustainability," Kevin Bradley points out that "little is lost forever. . . unless retrieving it is unaffordable."[22] Bradley outlines a matrix of factors that he sees as central to the long-term sustainability and preservation of digital files, where sustainability involves "layers of dependencies and interdependencies, standards, agreements, understandings, technologies, strategies, and workflows." The viability of files cannot be defined in such limited terms as "obsolescence," since "playback" is not dependent on one machine, but the interaction of systems and software capable of accurately locating, retrieving, and reading the file.

Successful digital preservation, therefore, requires a very different set of approaches than those allowed by the current exceptions defined in Section 108. Or, as Peter Hirtle states in his essay "Digital Preservation and Copyright,"

> "Good preservation practice has often existed in a legal gray area. Libraries usually made three copies when microfilming long before the law gave explicit permission for the practice . . . Digital preservation resides in an even murkier legal gray area because of the fundamental need to copy digital information (one of the exclusive rights of the copyright owner) in order to preserve it."[23]

Digital Rights Management and the Implications of Technological Protection Measures

The illegal physical reproduction of creative recorded works has been a concern for creators since the advent of player piano rolls. Due to the exact duplication inherent to digital files and the ease with which illegal copies can be created, copyright holders and content producers have deep concerns about how to protect their digital works from unauthorized copying and distribution, such as pirated DVDs or peer-to-peer file sharing.

One of the ways they have sought to do this is through digital rights management (DRM). DRM aims to define and limit reproduction of digital content by giving the content owner control over the *devices* that are used to access and reproduce the content. DRM uses technology as a gatekeeper by embedding digital signals in the content (or other means) that prevent playback devices from making unauthorized copies.

There are various types of DRM schemes applied to different forms of media. One of the most common forms of DRM is *encryption*. Encryption employs a mathematical process to scramble digital information, which can only be unscrambled by applying the correct key. For example, one common type of encryption is the Content Scrambling System, widely used

22 Bradley, Kevin. "Defining Digital Sustainability." Library Trends 54.1 (Summer 2007): 148 - 160. 158.

23 Hirtle, Peter. "Digital Preservation and Copyright." Stanford Copyright and Fair Use. Nov 2003. http://fairuse.stanford.edu/commentary_and_analysis/2003_11_hirtle.html. Accessed 16 April 2010.

on DVDs, which prevents users from copying the disc onto their computer or other duplication device.

Legal recognition for using DRM to limit unauthorized reproduction was incorporated specifically in Section 103 of the Digital Millennium Copyright Act, which states, "No person shall circumvent a technological measure that effectively controls access to a work protected under this title."[24] With a few narrow exceptions, this clause effectively makes it illegal to bypass or overcome DRM technology without the express permission of the copyright owner.

Not only does the DMCA prohibit circumventing DRM technology, it also prohibits distributing the *tools* that allow circumventing the technology. This prohibition shifts copyright infringement away from the *illegal use of the copyrighted content itself,* which has been the standard enforcement trigger for decades, onto the *illegal use of the technology needed to copy the content,* which has a very different impact.

DRM is one approach within the more general category of "technological protection measures" (TPMs) that tries to use the technology itself to control access to a work. Although the primary goal of the DRM provisions in the DMCA was to limit the opportunity for large-scale piracy of commercial films and similar content, apprehensions about DRM and other TPMs are far-reaching among archivists. Several issues of are particular concern to people involved in designing systems for digital preservation.

One serious problem is that TPM restricts *everything*. The existing encryption technology is unable to distinguish between content that is protected under copyright from materials that are allowed to be copied, such as content in the public domain, programs that have legal permission to be copied, or those that are covered by fair use. Because the technology can be applied indiscriminately, it creates a range of obstacles to making legal copies of TPM-protected materials. In addition, theoretically TPM-compliant devices can *de facto* extend copyright limits on content, regardless of the statutory term, by keeping anti-copying restrictions in place well after the term has expired.

Another issue that worries archivists is that the DMCA explicitly prohibits the sale of TPM circumvention technology. Title I of the Act states that "the manufacture, importation, sale or offering for sale any technology, product, service device, component or part that (a) is primarily designed to circumvent technology of a copyright owner that limits access to a work, (b) has only limited commercially significant purpose other than to circumvent, or (c) is marketed for use in circumvention" is prohibited.[26]

There is an exemption for libraries and archives in the DMCA, which states:

> "The prohibition on the act of circumvention of access control measures is subject to an exemption that permits nonprofit libraries, archives and educational institutions

24 "Anti-circumvention." Wikipedia. http://en.wikipedia.org/wiki/Anti-circumvention. Accessed 16 March 2010.

26 Lutzker, Arnold P. "Primer on the Digital Millennium: What the Digital Millennium Copyright Act and the Copyright Term Extension Act Mean for the Library Community." ALA Washington Office. 8 Mar 1999. www.arl.org/bm~doc/primer_digital_millennium.pdf. Accessed 16 April 2010.

to circumvent solely for the purpose of making a good faith determination as to whether they wish to obtain authorized access to the work."[27]

However, this exemption in the law is murky, and may not address issues such as the ability to legally copy orphan works, unpublished works, and other unique or unavailable materials.

Perhaps the most serious preservation implication of DRM use is what Howard Besser calls "the Scrambling Problem".[28] DRM encryption adds significant complexity to trying to read a file, and this will become more problematic over time, as it is likely that the appropriate decryption software will be increasingly more difficult to obtain and use, or even become obsolete itself.

All these conditions leave copying restrictions based on TPM unresolved and highly problematic for digital preservationists. As TPM continues to evolve technically, it will become increasingly important for libraries and archives to lobby to expand legitimate and permanent exemptions allowing necessary preservation tasks on technologically protected digital materials. This will require amending the laws further to reflect new functional conditions and the growing volume of digital materials at risk.

The practical implications of these technology-based anti-copying laws on television and video archives are unclear. Historically, though, technology locks have been imperfect and merely short-term deterrents in reducing unlawful digital reproduction. Generally speaking, only distribution copies of audiovisual programs are encrypted, not the master files, as encrypting these could jeopardize the producing entity by keeping it from be able to reuse their own materials if, for example, the encryption key is lost or the technology becomes obsolete. In such circumstances, if external digital repositories cannot confidently or legally preserve encrypted digital audiovisual files, in most cases they will not commit to preserving these materials.

Because it is often unclear in the chain of stakeholders involved in creating and disseminating public broadcast programs who is responsible for preservation, this may mean that many programs will fall between the cracks and not be preserved at all. If the past is any indicator, we can expect this to happen with alarming frequency in the digital era.

It remains to be seen, then, what sort of long-term impact these restrictions will have on television and video archives, as file-based production, preservation, and access continues to increase. However, there are already indicators that neither the three-copy limit for preservation purposes, nor the anti-circumvention laws are being strictly followed.

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27 "The Digital Millennium Copyright Act of 1998." U.S. Copyright Office. Dec 1998. www.copyright.gov/legislation/dmca.pdf. Accessed 16 April 2010.

28 Besser, Howard. "Digital Longevity," in Maxine K. Sitts (ed.) Handbook for Digital Projects: A Management Tool for Preservation and Access, Andover Mass: Northeast Document Conservation Center, 2001. pages 155-166. http://www.nedcc.org/resources/digitalhandbook/ix.htm. Accessed 1 April, 2010.

4. Initiatives to Improve Copyright Laws for Digital Preservation

At the time this report is being written, there are two key preservation issues under consideration for legislative action that, if pursued, have the promise of improving the copyright laws to better support preservation of and access to digital media such as video. But given that the content industry (commercial music distributors, book publishers and movie studios), is heavily lobbying Congress for highly restrictive copyright legislation in an effort to stamp out piracy, changes favorable to non-commercial and public uses may be difficult to attain.

The first issue is the critical need to improve access to Orphan Works. The second area that urgently requires new legislation is to update Section 108 of the Copyright Act and strengthen the 'Preservation Exemption.'

Orphan Works Legislation

The U.S. Copyright Office considers the problem of orphan works to be "pervasive,"[29] and a serious challenge to publishers, film makers, museums, libraries, universities, and private citizens, among others. To support new legislation, the Copyright Office set up a special website specifically on Orphan Works [30] and invited testimonies and comments about the impact of not using orphan works and how to reduce the risks.

Based on such documentation, Congress has recognized the need to amend the copyright laws to allow the use of orphan works, yet still protect the copyright holders. This has led to a number of legislative initiatives proposed to improve policies for use and compensation of orphan works.

Each house considered legislation in 2008; the Senate passed the *Shawn Bentley Orphan Works Act of 2008*, and the House of Representatives introduced *The Orphan Works Act of 2008*. These bills are similar, proposing that if an entity puts in a "reasonably diligent/ good faith" search to find a copyright owner to seek permission to use the material in question, the entity would not be responsible for providing unreasonable back payment should an owner emerge following its use. Both bills also call for the Copyright Office to create and administer a database listing copyrighted visual works and for the database to be made available online.

Neither bill has yet made it into law, but at some point, Congress will take up these bills or introduce new legislation to address the orphan works problem. When this occurs, we hope there will be strong participation by public broadcasting institutions and active engagement to advocate for positions that will support digital preservation, reasonable conditions for being able to use orphaned works, and allow access to orphaned public television materials.

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29 Marybeth Peters. "The Importance of Orphan Works Legislation." 25 September 2008. http://www.copyright.gov/orphan/. Accessed 19 April 2010

30 Ibid.

Section 108 Study Group

During the planning phase of the National Digital Information Infrastructure and Preservation Program (NDIIPP), the Library of Congress "identified copyright as a potentially serious impediment to the preservation of important digital collections and recognized that solving certain copyright issues was crucial to achieving long-term preservation of important digital content."[31]

In response, the Library's Office of Strategic Initiatives (which oversees NDIIPP) launched a large-scale review of copyright legislation with a particular focus on Section 108, the 'preservation exemption' section referring to libraries and archives. Comprised of 19 representatives from fields including libraries, archives, museums, law, commercial rights-holding entities, and academia, *The Section 108 Study Group* was convened by the Library in April 2005 and charged with "reexamining the copyright exemptions and limitations applicable to libraries and archives in light of the widespread use of digital technologies."

The Study Group was asked to draft recommendations to transform Section 108 into a set of new policies reflecting a contemporary understanding of digital archiving. It collected a broad array of comments and conducted a range of activities, all of which are available online.[32] The Final Report of the Section 108 Study Group was released in 2008.[33]

The Study Group was comprised with the intent that it be evenly divided between the content industry and the public interest/library communities, and because members represented diverse stakeholder groups from major publishers to large academic libraries and non-profit organizations, they held many opposing positions and disagreements on basic concepts relating to control, distribution and value of intellectual property.

To minimize stalemates, the Study Group agreed to make recommendations only on those positions on which they could reach consensus. In this context, they did not reach a high level of agreement, and much of their effort was presented as discussion and not as recommendations. Even so, they did concur on several specific recommendations that could bring aspects of the law into compliance with actual conditions required for digital preservation.

- They agreed the three-copy limit was no longer practical and instead should be replaced with a more open-ended stipulation that would allow libraries and archives to make a "limited number of copies as reasonably necessary to create and maintain a single replacement copy, in accordance with recognized best practices."[34]

- To accommodate digital works, they also agreed to add "Fragile" to the list of conditions that may trigger replacement reproduction of a physical work. "A fragile copy is one that exists in a medium that is delicate or easily destroyed or broken, and cannot be handled without risk of harm."[35]

31"Section 108 Study Group Report," pg 3.

32 Findings and updates are viewable on the group's website at http://www.section108.gov/.

33 "Section 108 Study Group Report." http://www.section108.gov/.

34 Ibid page v.

35 Ibid

If adopted, both of these amendments would represent a significant legislative recognition of actual practices that archives and libraries now follow to protect their digital assets.

- The Study Group also recommended adding a new exception to apply to websites that are being preserved by a variety of non-profit and academic organizations, as a new class of digital-only content. This recommendation would, "permit libraries and archives to capture and reproduce publicly-available online content for preservation purposes, and to make those copies accessible to users for purposes of private study, scholarship, or research. [36]

- A final recommendation worth noting seeks to strengthen the requirements that a library or archive must meet in order to be eligible for the Section 108 exceptions:

> "Not only should the current requirements for Section 108 eligibility be retained, but libraries and archives should be required to meet additional eligibility criteria . . . [which] include possessing a public service mission, employing a trained library or archives staff, providing professional services normally associated with libraries and archives, and possessing a collection comprising lawfully acquired and/or licensed materials."[37]

The Study Group also discussed, but did not agree on, "whether it is premature to determine if virtual-only libraries and archives should be covered by section 108."[38] Consequently, their recommendations appear to support allowing more flexibility in the actual practices used to preserve digital collections, at the same time suggesting more rigid criteria for determining those institutions that would fall under the new rules.

Although the final report of the Section 108 Study Group reflected consensus on a small number of broad issues, the group was unable to agree on recommendations for many key concerns. The report will undoubtedly provide important guidance to the Copyright Office in drafting new legislation for Congress, but the spirited debates and opposing philosophies reflected in the Study Group are certain to be raised again during the legislative process whenever the Copyright Office proceeds, and the stakes will be much higher. Until then, archives and libraries will continue to refine best practices for digital preservation, some of which likely fall outside the current limits of the law.

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36 Ibid page viii.

37 Ibid page 34.

38 Ibid page 113.

5. Legal Implications for Preserving Digital Public Television

Because production and dissemination are the immediate goals of public media producers, stations and distributors, it is understandable that they often do not place high priority on preservation. With a segmented distribution chain, limited resources and no preservation mandate, it is not clear where this responsibility lies within the system.

Consequently, it is not uncommon that original production materials remain (un-cataloged and un-organized) with the producer or production unit; the broadcast version of a program will be kept by the distributor (with some cataloging for distribution purposes); and access copies might end up at a library or archive outside the public broadcasting system altogether. This leaves the different quality copies of a single program in the hands of unrelated entities.

In this scenario, the production unit has the highest quality version of the program and is also probably the copyright holder of the completed work. It has the legal right and potentially the greatest incentive to preserve its own productions, but most likely does not regard preservation as a high priority nor does it have the time or resources to catalog or apply proper practices to preserve them. As a result, the original production materials are often lost, either through deterioration, obsolescence, or because the content has become unidentifiable.

The distributor is likely to hold onto a broadcast quality version of the program and keep a record of it in its catalog, as it might be needed again for re-broadcast. But apart from the broadcast rights window, the distributor likely holds no other use rights to the material, nor do they have an agreement with the producer to provide preservation services. Therefore, investing in preservation is a very low priority — tapes are shelved in a warehouse, and copies of digital files are kept in an equivalent low-maintenance storage cache.

Because their mission is to preserve and provide access for scholars, researchers, and public programs, a library or archive is likely to support preserving the program, catalog it, and store it according to archival best practices. But they will have the lowest viewing-quality copy, possibly a DRM-protected version of this program. They may want to preserve it so it will remain available for use, but they have no legal authority or agreement with the rights holder to perform preservation. They can only provide access on-site, and will have to use the exemptions in the law to make the maximum of three copies for preservation purposes and possibly circumvent the encryption technology as well.

None of these scenarios alone provide adequate support or motivation to preserve US public television. For many producers and stations, there is little incentive to preserve materials in the face of costly rights clearances to re-use materials, and virtually no resources to implement preservation practices. In cases where the distributor or outside library/archives becomes the long-term steward, any digital preservation they perform could be putting them at legal risk. And in all these circumstances, there is little chance that the content will ever make it online to reach potentially millions of viewers without significant effort of time and financial investment.

The end results are that one way or another, archival public broadcasting materials can end up in a stalemate: alive but effectively inaccessible given today's expectations and demand. This is not acceptable – the system needs to be involved with changing the legislative and regulatory landscape so that institutions will be willing not only to save their content, but also to make them accessible without an unreasonable investment in funding or personnel.

One necessary element is to provide some clear incentives. The Blue Ribbon Task Force for Digital Preservation and Access[39] recognized this clearly, stating that "Copyright laws have worked somewhat efficiently with analog materials but are perpetuating unintended negative consequences for digital materials. No responsible institution will preserve materials to which it has no legal right."[40] Instead, they "… urge legislative and regulatory bodies to revise copyright code preservation rights to make them effective for digital preservation." [41]

The Blue Ribbon Task Force also raises a related issue of particular concern regarding preservation of digital audio-visual materials: many digital assets such as DVDs of films or television programs are not purchased outright by libraries or archives but are only licensed for specified use. Further complicating matters is that distributors are now simply offering subscriptions to databases of digital works, providing libraries and archives with only streaming video and audio.

This means that a library couldn't preserve the content even if it wanted to, as it wouldn't actually have a copy to work from, and any copies it did have would be restricted by operative licensing conditions and agreements. Copyright legislation does not apply in such cases, and unlike the laws that apply to owning and preserving a book, an archive or library can claim NO rights to preserve materials that are merely licensed.[42] The right, incentive, and physical ability to preserve rests solely with the copyright holder(s).

Such relatively recent shifts in controlling copyrighted digital content points out not only the more tenuous rights an archive might have to preserve at-risk content, but also the compelling need to update copyright laws to reflect actual current practices and needs.

Public Television Needs to Take Up the IP Challenge

The public has the right to expect that public broadcasting collections be preserved and that they be available in the future. The tangle of rights should not keep the system from taking positive steps toward supporting both long-term preservation policies and improved access to the materials.

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39 http://brtf.sdsc.edu/.

40 Blue Ribbon Task Force on Sustainable Digital Preservation And Access. "Sustainable Economics for a Digital Planet: Final Report of the Blue Ribbon Task Force on Sustainable Digital Preservation and Access." March 2010. pg. 21 http://brtf.sdsc.edu/. Accessed 19 April 2010

41 Ibid, Pg.77

42 For more on the implications of licensing, see the section "Control of Downstream Use" in Besser, Howard. "Commodification of Culture Harms Creators: The Information Commons, New Technology, and the Future of Libraries," Presented at Wye River Retreat on the Information Commons, sponsored by the American Library Association (2002). http://dlc.dlib.indiana.edu/dlc/handle/10535/901. Accessed 1 April 2010.

Copyright laws differ from country to country, and some countries have exceptions to copyright laws that make digital preservation of television material easier, while others have laws that create more impediments.[43] Audiovisual archives outside the US have begun exploring whether they can preserve and provide digital access to their material. For example, in Europe, with their localized national copyright policies, television archives and collections are actively creating and testing new rights agreements that cover broad classes of restricted materials. These are part of several pan-European collaborations under development that are beginning to l make archival television available for public viewing through a number of different outlets.[44]

As content distributors, U.S public broadcasters are only slowly beginning to adopt terms that expand the rights of stations to use materials beyond existing 'traditional' broadcast and educational permissions. However, such models are not being approached system-wide. Indeed, it is necessary to re-conceptualize the whole nature and terms of the distribution and use agreements that are currently part of every program production by taking into account and reflecting the radically altered distribution mechanisms and viewing patterns of today.

As content creators and owners, public broadcasters can better serve their audiences by promoting copyright policies that are more accommodating to preservation and future public access, and including them as part of the production package. Ultimately, adopting such policies will benefit the long-term viability and survival of (especially digital) content and reinforce the value and importance of preservation.

Legislative efforts to update current copyright laws are anticipated in the near future, and public television has a vested interest in helping shape many of these changes. Moreover, with its leadership in technology development, dedication to education and high credibility with the public for journalistic integrity, the system is well-positioned to have some influence on these concerns. When the opportunities arise. It should respond by representing not only its own interests, but also those of the public, in both formal and informal proceedings.

At the same time, as production environments and user demands continue to shift, pressure to reduce legal restrictions on access to older content will continue to grow. In a content-saturated world, archives and public media organizations must offer unique material to remain relevant and dynamic. Stations and producers should monitor the impact of other groups which are testing the limits of making content available, and be encouraged take some creative risks of their own to make older programs available when it appears that the rights issues can be managed or minimalized. By taking such steps, public broadcasters can help shape the future of legislation around preservation and access.

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43 Howard Besser and Mahnaz Ghaznavi. "Copyright Law regarding Preservation: National Legislation & Implementation Guidelines, an Annotated Bibliography," Draft version 3. http://besser.tsoa.nyu.edu/howard/Papers/interpares-copyright.pdf. Accessed 1 April 2010

44 See http://www.euscreen.eu/, http://europeana.eu/portal/, and http:// www.europeanfilmgateway.eu/

Public television is often recognized as producing, broadcasting, and disseminating some of the richest audiovisual sources of U.S. culture.[45] Federal, state and local grants provide critical public funding to support public television productions, and public money subsidizes the enormous and ongoing costs of the distribution networks that carry these programs to the public. With so much public support invested in the system, public broadcasters bear some responsibility to guarantee that these programs can be enjoyed by the public long after the broadcast windows expire.

Otherwise, encumbrances caused by intellectual property and related rights could so dissuade the system that programs will not be saved, rendering the rich history recorded by public broadcasting and its deep cultural insights effectively dark. Moreover, digital production and distribution workflows threaten to make program and production files unusable in the future if copy restrictions prohibit necessary practices for proper long-term maintenance and preservation. This would be a great loss to the public, which cherishes its public television experiences and expects them to be protected well into the future.

As the steward of this material, public television must advocate for the long-term and future interests of the public to have access to its history, regardless of technology, location or means of distribution. By changing policies, practices and laws to better provide the public with access to public television archives, the benefits of preservation become obvious.

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45 "Television and Video Preservation 1997: A Report on the Current State of American Television and Video Preservation" Volume 1 (Washington, DC: Library of Congress, October 1997), pg 69.

Appendix A

Underlying Rights in Public Television Programming

While a public television entity might own the overall rights to broadcast a program, most productions contain a broad array of elements with underlying rights controlled by other parties. In order to make content accessible after the broadcast rights expire, these rights must be renewed. The process of identifying, negotiating, and paying for new permissions from these underlying rights holders can be both labor intensive and expensive. Moreover, these difficulties are compounded when a work or element becomes "orphaned" because its copyright owner can no longer be identified or found.

To illustrate why acquiring permissions can be so complex and expensive, the following sections describe many of the different types of underlying rights commonly found in the legal records of public television programs. Generally, some form of written consent or contract must be acquired to document each type of permission.

The great effort and cost required to obtain permissions to re-use or redistribute programs after initial rights expire, is a major factor that discourages the system from making an investment in long-term program preservation.

Licensed Materials

Public television relies extensively on footage and images from outside sources, such as archival film footage and old photographs. Use of these materials, even for a brief moment, requires negotiation with rights holders who may be another production company, an individual, or a stock footage house.

When footage is obtained from a stock house or production company, clearance of underlying rights within the piece will generally be the responsibility of the footage provider. However there are cases where licensed footage may require additional clearance of underlying rights (for example, music that is used in the piece). Additionally, the cost of stock materials varies greatly depending on the notoriety or uniqueness of the content and the material's owner.

Literary Rights

Literary rights relate to the script and any written source material used in a television program. Those holding these rights can be WGA (Writers Guild of America) writers, work-for-hire writers, or owners of written source material such as published authors.

If the writer is a member of the WGA or another union, the union's minimum basic agreement (MBA) defines the uses to which a producer has rights to the materials, and specifies the compensation that the broadcaster must pay to the writer, not just for the original use, but often for additional uses as well.

When a literary work is created as a "work-for-hire," the circumstances surrounding negotiation are quite different. The U.S. Copyright Act of 1976, section 101, identifies "works made for hire" as an exception to the general principle that the creator of an artistic work is the author, and instead, the work belongs to the contractor who paid for it. In public

broadcasting, works-for-hire generally are outright purchases made by the broadcaster or production company, which then own all rights to the works, unless a collective bargaining agreement is in place.

Beyond negotiations with writers, there are additional literary rights involved when a program is based on source material such as a book, story, or other material created in another medium. Ownership of source materials can include individuals, publishers, or any number of organizations who could all be owners. The costs for obtaining rights to use such source materials can also vary greatly, based on the nature of the source material, its popularity and the prominence of the owner.

Musical Rights

There are four types of musical rights relevant to television productions:

- Performance
- Synchronization
- Mechanical (recording)
- Publication rights

Performance Rights: Performance rights control the right to perform, or in the case of public television, broadcast, a musical work publicly. This can be extremely complex, as there are different sets of rules for using recorded music versus live musical performances.

Permission to broadcast live music performances is governed by talent, performance, union and other agreements. In addition, there are often specific restrictions relating to the right to record the live performance for subsequent broadcasts later.

To use recorded music, broadcasters must work with one of the three major music rights licensing organizations — ASCAP, BMI, and SESAC — which control rights and collect royalties on behalf of publishers and composers. These three organizations control the majority of copyrighted musical materials in the U.S. Licensing organizations are different from unions because they do not represent the artist directly, but have authority to charge fees whenever an artist's music is used and are responsible to compensate the artist accordingly.

Until the early 1990's, television stations generally maintained blanket licenses with each music licensing group. In a blanket license, the station would pay a set fee to cover all recorded performance rights for a designated period. This structure facilitated a simple relationship between the broadcaster and licensing group, but was not entirely cost-effective for the broadcaster who paid for more uses than they might actually need.

The licensing groups eventually conceded to let broadcasters pay for their music performance rights on a per use/per program basis. It can be assumed that programs aired prior to the early 1990's were protected under the blanket agreements, but later programs have individually defined contracts for each musical piece used in a program.[46]

46 "Per Program Licensing." Music Reports, Inc. http://www.musicreports.com/licensing_services_licensing_per_program.php. Accessed 13 January 2009 and "Music Licensing." The Museum of Broadcast Communications. http://www.museum.tv/archives/etv/M/htmlM/musiclicensi/musiclicensi.htm. Accessed 19 April 2010.

Synchronization Rights: Synchronization rights are rights that define how music can be used in relationship to the visual elements of a work. Put simply, it is the use of music as a specifically timed soundtrack. Synch rights belong to either the music publisher or the composer.

Mechanical Rights: Also referred to as recording rights, mechanical rights allow the licensee to use, record and release a composition written by someone else.[47]

Publication/ Master Use Rights: Publication/ Master Use Rights allow for the use of the final, mastered musical work in broadcasts.[48]

Performers Rights

Musicians, performers and creators such as actors, directors, cinematographers, and others who participate in creative works, can claim specific rights to the work and garner fees for any use or airing of a program in which they participate.

As with writers, there are union groups for performers including Directors Guild of America (DGA,) Screen Actors Guild (SAG), American Federation of Television and Radio Artists (AFTRA) and American Federation of Musicians (AFM) that negotiate contracts on behalf of the entire membership. Each union has its own list of minimum terms that entities must agree to in order to employ the talents of the members.

Depending on the scope of the content, a single performance program such as an orchestra, ballet corps or Broadway musical can require a large number of individual performer contracts. Keeping track of all these individuals, the compensation they are due, and the terms of their contracts can require major administrative record-keeping.

Privacy and Publicity Rights

Distinct from intellectual property, privacy and publicity rights, "protect the interests of the person(s) who may be the subject(s) of the work or intellectual creation."[49] In a statement related to its American Memory project, the Library of Congress notes that, "because of the ease with which various media in digital formats can be reused, photographs, audio files, and motion pictures represent materials in which issues of privacy and publicity emerge with some frequency."[50]

Privacy rights allow an individual to maintain control of his/her own image and protect people from having private or embarrassing information publicized.[51] In an article titled, "Rights of Privacy and Publicity for Film and Television," Robert Hassett and Casey Gilson

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47 "Music Licenses and Copyrights". IAMUSIC.COM. http://www.iamusic.com/articles/copyright.html#Synchronization%20Rights. Accessed 19 April 2010.

48 Ibid.

49 "Privacy and Publicity Rights." Library of Congress American Memory Project. 2 Jan 2003. http://memory.loc.gov/ammem/copothr.html. Accessed 19 April 2010.

50 Ibid.

51 "The Rights of Publicity and Privacy: When Should You be Concerned." Public Domain Sherpa. http://www.publicdomainsherpa.com/rights-of-publicity-and-privacy.html. Accessed 19 April 2010.

outline a limited number of instances when using photos and footage of people without their permission is acceptable. These instances are:

1. When the image is taken in a public or non-restricted area, "in which individuals are not recognizable."
2. When the individual used is not recognizable; i.e. a face is used in a piece of artwork and is morphed beyond recognition.
3. Media captured during a newsworthy event used to cover that event.
4. Use in biographies.[52]

Otherwise, the individual must give permission or sign a waiver that allows use of his or her image. Privacy rights are not federally established, but there are state laws that apply and vary by state.

Publicity rights refer to an individual's right to "control and profit from the commercial use of his/her name, likeness and persona."[53] Publicity rights are also granted by state law and generally apply only to public figures or celebrities. Unlike other rights, publicity rights do not require any negotiation or paperwork between the broadcaster and individuals; they only prevent the broadcaster from profiting off of an individual's image, whether through promotion or other means.

Labor and Craft Union Contracts

In addition to rights associated with ownership of intellectual property, there are also various types of labor contracts that must be honored when a program is produced or reused. For some groups of professionals, broadcasters have signed collective bargaining agreements with various talent unions, and the program producer must work with the union group to which that artist or professional belongs. These unions include:

- Directors Guild of America (DGA)
- Writer's Guild of America (WGA)
- Screen Actors Guild (SAG)
- American Federation of Television and Radio Artists (AFTRA)
- American Federation of Musicians (AFM)

The unions serve to protect artists during negotiation. The producer will negotiate a contract with the union that covers all of its members who participate in the production. All subsequent uses of the production must adhere to this initial contract. Union contracts support fewer variations in rights terms and allow a producer to make multiple agreements at once through a single point of negotiation.

Union contracts run for a specific period of time, and making adjustments, additions, or renegotiations during a contract period is not allowed without mutual agreement. They generally specify the exact terms and compensation that must be paid to union members in regards to both initial broadcasts and subsequent uses of any content produced under contract rules.

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52 Hassett, Rob and Casey Gilson. "Rights of Privacy for Film and Television." Presented at the Fourth Annual Entertainment and Sports Law: A Basics Boot Camp. 26 Sept 2003. Internet Legal. http://www.internetlegal.com/articles/Rights%20of%20Privacy-Film-TV.htm. Accessed 19 April 2010.

53 "Privacy and Publicity Rights."

Other Rights and Licensing Considerations

Aside from those underlying rights described above, there are other rights categories that broadcasters and archivists must also keep in mind. These include:

Pictorial, Graphic and Sculptural Works

Section 101 of the 1976 Copyright Act defines pictorial, graphic, and sculptural works as "including two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans."

Pictorial, graphic or sculptural works may appear in a program as an important part of the content, in which case the producer would likely be aware of the need to clear the rights. However, these works could also be captured incidentally and appear in the background of a scene. The producer may not realize the need to negotiate permission in such cases, when in fact an owner can claim copyright infringement if the captured work is visible for an extended period, regardless of how incidental it might have been.

Trademarks

According to the U.S. law, a trademark is, "a word, phrase, symbol or design, or a combination of words, phrases, symbols or designs, that identifies and distinguishes the source of the goods of one party from those of others."[54] In public television content, a trademark could appear as a sign, a product, or a well-known building, and prominent usage of a trademark within a film or television series can be considered to be trademark infringement.[55] In order to successfully claim trademark infringement, the trademark holder must prove that their trademark was used "in connection with a sale of goods or services," and that, "there was a likelihood of consumer confusion."[56]

In general, the incidental appearance of trademarks in public television programming is not a major concern and would most likely fall under fair use. However, if the trademark is a prominent piece of the content or the trademark or trademarked product is used to promote the program, the broadcaster must have an agreement with the trademark holder.

Buildings can also be trademarked. However, this pertains only to a small number of highly recognizable buildings that have been trademarked as a way for the owners to profit from their use in new works. Examples of this type of building include the Empire State Building and the Solomon R. Guggenheim Museum. Although these buildings are few, this is a concern for public television and the PDPTV partners in particular because many of these buildings are in major cities where WNET and WGBH shoot their local programming.

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54 "Trademark, Copyright or Patent?" U.S. Patent and Trademark Office. 8 Nov 2004. http://www.uspto.gov/web/offices/tac/doc/basic/trade_defin.htm. Accessed 19 April 2010.

55 "Crash Course on Trademarks." Ius Mentis: Law and Technology Explained. 1 Oct 2005. http://www.iusmentis.com/trademarks/crashcourse/rights/. Accessed 19 April 2010.

56 Levi, Stuart D. and Rita A. Rodin. "Ninth Circuit Curtails Ability to Challenge "Gripe Sites." Skadden, Arps, Slate, Meagher & Flom LLP. 21 April 2005. http://www.skadden.com/Index.cfm?contentID=51&itemID=1024. Accessed 19 April 2010.

Appendix B

Clearing Archival Programming for Reuse: Two Case Studies

Case Study I: *The Adams Chronicles*

To coincide with the release of the major HBO miniseries *John Adams* (2008), Acorn Media, a small independent distributor, approached WNET about acquiring its classic miniseries *The Adams Chronicles* for home video distribution. The critically acclaimed thirteen-part series originally aired to the national market during the 1975-1976 season. It had been rebroadcast twice, first in September of 1976, and again in 1987 to the local New York City market in celebration of WNET's 25th anniversary season, but had been out of distribution since. The series had enjoyed a brief life outside of broadcast, being used as the framework for a distance-learning university course offered by nearly 700 institutions.

WNET had been aware of the market potential of the miniseries and expected it would eventually be cleared for non-broadcast distribution. In 1991, as a step towards acquiring grant monies for clearing archival programming for broadcast and distribution, the network developed a large matrix of rights clearance needs for a number of its old programs including *The Adams Chronicles*. The series was also the focus of a rights analysis by New York University's Moving Image Archiving and Preservation graduate program in 2006. WNET suggested the program as a good case study because the content encompassed many important rights issues, and the files related to the program were reasonably complete and in good order.

Partnering with an Outside Distributor

When WNET is approached by an outside distributor, the first step of the negotiation process is for the station to assess how committed the distributor is to the project. The station does not want to put time into initial research if it is highly unlikely the distributor will be willing to provide a realistic amount of funding.

However, if the distributor's interest is deemed to be serious, WNET's Program Rights and Clearance Department will initiate a rights analysis to identify the complexity of the rights that will need to be cleared in order for the program to go back into distribution. Based on the rights analysis findings, the Department will attempt to provide the distributor with an estimated figure of the cost of the clearance process. It is difficult and time-consuming for the Department to determine this figure because the process includes a number of unknown and variable factors, such as rights holders' response time, the number of dead or otherwise un-locatable rights holders, and how cooperative the rights holders are.

In the past, WNET has been approached by many independent distributors who, although interested in the content, ultimately could not make the financial commitment to follow through on the time-consuming rights clearance process. Although WNET anticipated that the series would eventually be funded for clearance, the station initially expected that negotiations with Acorn would prove unsuccessful. Clearing the program would be

expensive, and WNET thought it was unlikely that Acorn would provide the level of necessary funding.

This skepticism from WNET was based on the fact that *The Adams Chronicles* is a historical drama, consisting of thirteen episodes, each one-hour long, and the series involved hundreds of actors, several writers, and multiple directors. The sheer number of people associated with a production of this size meant that there were large numbers of rights holders who must agree to any new uses of the program, and generally, this implies a high cost to clear all these rights.

Determining the Scope of Payment Obligations

The rights analysis for *The Adams Chronicles* identified the following rights categories that had to be considered for home market distribution:

- *Literary Rights*: Literary materials from the Massachusetts Historical Society were used as the basis for the miniseries. A number of writers worked on the series but there was no consistent single writer throughout. Some episodes were written by individual authors, while others had multiple authors. In addition, some writers contributed to more than one episode.

- *Musical Rights*: There was a single composer who wrote the scores for all episodes, and 38 musicians and 4 copyists contributed to the performance of these scores. Additionally, four unpublished songs not written by the composer appeared throughout the miniseries. However, these were determined to be performances of traditional folk songs that were in the public domain.

- *Performance Rights*: In total, the miniseries featured more than 300 actors. Of these, between 160-180 were determined to be principle performers who had speaking roles and thus were eligible for "step-up" payments and residuals. The remaining performers were extras who do not share in exploitation rights.

  Each episode of the series also had at least one director, but usually two, who were rights holders. The two directors could be co-directors or a director and an associate director. Stage managers also share in back-end ancillary rights for programs.

There were numerous others who contributed to the production, such as consultants, wardrobe people, and assistants. The specific contracts for these individuals generally proved to be work-for-hire, and thus these individuals were ineligible for payment.

Following this rights analysis and sharing the rough estimate of how much it would cost to clear the program with the distributor, WNET was surprised to find that Acorn was willing to meet the financial obligation required to make these payments. Due to having complete and accurate records, the station was able to begin contacting and negotiating with rights holders almost immediately. The main focus of the clearance effort varies depending on the program and its associated rights; in the case of *The Adams Chronicles*, WNET spent the majority of its time contacting the many performers.

Contacting Performers

When the home video market emerged in the early 1980s, WNET amended its basic contracts with AFTRA to include a clause that built-in an automatic consent to distribute the

content to the home market. However, for programs produced prior to 1984, WNET is required to contact all AFTRA performers to obtain their formal consent to distribute the program. *The Adams Chronicles,* produced in 1975-76, fell into this latter category.

The Rights and Clearances Department drafted a formal letter to send to each of the performers explaining the new plan for home distribution of *The Adams Chronicles*, noting that the performer would receive whatever payment they were rightfully owed based on their contract, and requesting a signature that would provide the station permission to move forward. The letter was sent to all 160-180 performers at their last known address or updated contact information from the union. Although this process is reasonably straightforward and does not require negotiation, it is extremely detailed, labor-intensive and time-consuming.

Indeed, one of the factors that made the process so complicated was that WNET did not have information for all the performers on file and had to research current contacts, and information in the records for many performers was incorrect, since many had moved or died in the 32 years since the series was produced. Because WNET needed to guarantee the permissions letter reached the correct recipient, the station had to be sure that contact information obtained during the research phase was accurate.

The station received responses from approximately half of the performers. Following the first round of letters, WNET had to conduct further research to locate those performers who did not respond or whose letter was returned. This involved either resending the letter to the known forwarding address, or researching further if there was no forwarding address. When performers were found to be deceased, it was necessary to research if there was a next of kin. The station even took out an ad in the AFTRA members' bulletin encouraging performers who participated in the series to contact WNET. A small number of performers did so.

Until signatures are received form all performers, the station technically should not proceed with distribution agreements. Despite this, AFTRA is aware that the process is difficult and it is virtually impossible to get a signature from all rights holding parties. Thus, it is most important for the station to show due diligence, or *best efforts*, in the contacting process. Best efforts is a concept noted in the law and protects organizations like WNET if a rights holder were to come forward following the release of the program. To protect itself, the station carefully documented its attempts to contact each person, tracking and saving each piece of failed correspondence. WNET's best efforts process took several months.

Contract Review

Another time-consuming aspect of the rights clearance process is reviewing the enormous number of contracts and documents generated by a complex production. In the case of *The Adams Chronicles*, although the literary rights from the Massachusetts Historical Society were cleared in perpetuity and the wardrobist, consultants, and many other participants were contracted as works-for-hire, these contracts still had to be reviewed and the four unpublished songs had to be researched by WNET's Music Service Department to confirm that there were no rights-holding parties.

A Labor-Intensive Process

Personnel in WNET's Program Rights and Clearance Department often say that, when clearing a program, 90% of the rights clearances will take 10% of your time, and the

remaining 10% will take 90% of your time. It is often impossible to identify from where the hiccups in the process will emerge, because while there are types of rights and particular rights holders that are known to be problematic, often problems emerge from the most unexpected places.

One of the major aspects of the production of *The Adams Chronicles* that eased WNET's clearance process is that the miniseries used no stock photos or archival footage. WNET notes that, although problem spots are unpredictable, stock houses and footage acquired from major studios are a common source of trouble. These agreements often result in the most intensive and frustrating negotiations, and can be financially burdensome.

Although WNET personnel are hesitant to quantify the work hours that went into the process, they estimate that over the course of one year with two staff members working on the project, a total of 1.5 to 2 months of solid, full-time work went into completing all the clearances required by *The Adams Chronicles*. WNET stresses that this estimated number of work hours is relevant to this program only, which was a fairly straightforward process with good records and few complications. If the series had had more rights associated with it, or if the program files had not been as complete and well maintained as they were, the amount of time spent clearing the programs would have drastically increased.

WNET staff members note that the rights clearance process takes time, money, and "sweat equity." Unfortunately, regardless of how culturally valuable an archival program may be, if the station does not have upfront funding and a guarantee of return on investment, their budgetary structure does not allow for researching new distribution agreements that will not be useful by leading directly to a distribution deal for the station.

* * *

It is rare that outside distributors are willing or able to provide upfront funding, as Acorn Media did for *The Adams Chronicles*, leaving most older public television programs without a viable means of reaching the public after they were first aired. Furthermore, as stated earlier, *The Adams Chronicles* was not an especially problematic program to clear because the records were good, and rights holders were primarily individuals who belonged to unions, where compensation rates would be fixed by contract.

Had the production included other rights holders with whom WNET would have had to renegotiate, such as owners of archival footage, the process would have been much more complicated and costly. A more problematic example of rights clearance is outlined below through the example of the landmark civil rights documentary *Eyes on the Prize*.

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Case Study II: *Eyes on the Prize*

Eyes on the Prize is a highly acclaimed fourteen part series that tracks the major events of the civil rights movement from 1954–1985. Public broadcasting acquired the program from the independent production company Blackside Inc., and it originally aired nationally in 1987. Blackside's founder, Henry Hampton, served as executive producer of the series. Despite the huge impact it had when first broadcast, the task of re-releasing the series involved tremendous obstacles.

Eyes on the Prize received accolades for its in-depth insight into the civil rights movement and its moving story. This detail was achieved through the extensive use of archival materials from a wide variety of sources, including television news footage, historical films, personal photographs and original manuscripts. While the success of the series as an educational and historical document depended on the archival material, this is also what rendered the program unavailable for nearly two decades. In 2005, prior to the re-clearance of the program, the *Washington Post* found that bootleg videotape could fetch over $1000 on eBay.[57]

A Vast Quantity of Underlying Rights Holders

Jon Else, a producer on the series, estimates that half of each episode is derived from archival materials. Throughout the 14 parts, "video footage from 82 archives, approximately 275 still photographs from about 93 archives," as well as "120 song titles" are used.[58] The number of rights holders falls in the hundreds. Initial negotiations for use of these materials were entirely focused on the immediate needs to acquire rights for use in the production with the inadequate budget.

Else says, "What happened was the series was done cheaply and had a terrible fundraising problem. There was barely enough to purchase a minimum five year rights on the archive heavy footage." The licensing agreements for most of the archival materials used in *Eyes on the Prize* expired in the mid-1990's. At the time he made this statement (2004), Else estimated that clearing the program for rebroadcast and distribution would cost $500,000.[59]

In addition to the anticipated problems and costs associated with the huge volume of archival content, additional issues regarding the use of the image of important civil rights leaders emerged. Following the initial airing of the documentary, Blackside was contacted by Martin Luther King Jr.'s estate, which accused Hampton of using King's image without permission. Blackside first attempted to settle with the estate for $100,000, but King's estate wanted a larger payment. This resulted in Blackside suing the estate. The case

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57 Dames, Matthew K. "Copyright Conundrum: Documentaries and Rights Clearance." Information Today. June 2006. Vol. 23, Issue 6. http://www.allbusiness.com/professional-scientific/management-consulting-services/4097590-1.html. Accessed 19 April 2010.

58 Dean, Katie. "Cash Rescues Eyes on the Prize." Wired. 30 Aug 2005. http://www.wired.com/entertainment/music/news/2005/08/68664. Accessed 19 April 2010.

59 Aufderheide, Patricia, and Peter Jaszi. "Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers." Center for Social Media. November 2004. http://www.centerforsocialmedia.org/rock/backgrounddocs/printable_rightsreport.pdf. Accessed 19 April 2010.

eventually was settled out of court.[60] Clearly, this cost of clearing this program for any type of distribution was going to be exorbitant.

Finding Funding

In 2006, Blackside received a $600,000 grant from the Ford Foundation. With this grant and an additional $250,000 from private donors, the original producers moved forward on the formidable task of clearing the beloved program for rebroadcast and educational distribution. The funding was designated for clearing rights and making any necessary edits to the program should they be unable to clear specific rights (for example, if the producers could not secure rights to a specific image, they could use the funding to cut that image out of the program).

Multiple teams were dedicated to the clearance process and conducting renegotiations with archives and stock houses. Despite this volume of personnel power and unprecedented level of funding, the renegotiated rights only applied to rebroadcast on public television and educational distribution only – home video was not included. The series is currently available on DVD, however it is priced for classroom use at roughly $350 and is not intended for home viewing.

Layered Rights

One of the most problematic aspects of clearing *Eyes on the Prize* for broadcast and education distribution is the condition of layered rights. Layered rights refer to instances where the content that is used may included additional creative content embedded in it. This embedded content is generally not relevant to the purpose of the scene, but nonetheless, it is present and must be cleared. The oft-cited example of this in *Eyes on the Prize* is a scene in which Martin Luther King Jr.'s staff sings "Happy Birthday" to him.

An editor on the program, Rena Kosersky, notes this brief chorus of "Happy Birthday" resulted in nearly four months of negotiations before a reasonable fee was agreed upon. Although one might assume the song is in the public domain, "Happy Birthday" is in fact owned by Time Warner, which charges a very high fee for it use when performed in public. The "Happy Birthday" problem is one many producers have faced, and one producer found that, "It costs $15,000 to $20,000 for just one verse of 'Happy Birthday.'"[61]

During the clearance and re-negotiation process, producers also found that the cost of rights clearance had drastically increased in the twenty years since the program was first produced. It is argued that a major factor contributing to the inflated costs is the consolidation of media companies resulting in an increased stranglehold over archival footage. One producer has stated, "Conglomerates have collected archival footage and songs in "mega-shops," which are sometimes less willing to negotiate prices with filmmakers who are creating content for a good cause."[62]

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60 DeNeed L. Brown and Hamil R. Harris, "A Struggle for Rights." The Washington Post, January 17, 2005. http://www.washingtonpost.com/ac2/wp-dyn/A14801-2005Jan16?language=printer. Accessed 19 April 2010.

61 Aufderheide.

62 Brown and Harris.

The case of *Eyes on the Prize* exhibits how deep the rights clearance problem can go. Public broadcasters, academics, critics, and educators unanimously agreed that the program series is one of the most significant cultural and historical resources on the civil rights movement ever produced. Furthermore, there is an undeniable market value to the program that has remained unexploited due to the prohibitive cost of exploring a home market. However, considering the cost of obtaining the rights for an education market alone, distributors are likely to remain daunted by the idea of clearing the program for home video or online viewing by the public.

* * *

Conclusion: The Rights Thicket

The examples of *The Adam's Chronicles* and *Eyes on the Prize* illustrate the complexity of the rights clearance process for re-distributing archival programming. Representing only two types of programs in the expansive list of productions aired by public broadcasters, the time and funding that went into these examples illuminate why much of public broadcastings' past remains unavailable.

The system itself has scant resources to invest in re-clearing programs, and in order to attract outside funders, a program must show a clear market value. With decades of valuable educational programming in need of care, the costs can be astronomical. This results in a difficult situation that, unless the conditions can be changed, renders much of our public broadcasting past inaccessible to all but the smallest research audience. By extension, the implied question is why should the system invest in preservation if there can be little access to the content. Therefore, it is in the interest of the system to be aggressive and creative in trying to alter the conditions to break up this significant logjam.

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Appendix 3

Archival Collections of Moving Image Materials
Sample Terms of Use

In the course of doing research for this report, the PDPTV Project reviewed a range of archival moving image collections for their policies regarding access and use of copyrighted works.

This section summarizes some of the diverse policies and practices followed by a sample of such institutions. Complete policy statements can be found on each respective website.

LIBRARY OF CONGRESS
http://www.loc.gov/homepage/legal.html

> "Whenever possible, the Library of Congress provides factual information about copyright owners and related matters in the catalog records, finding aids and other texts that accompany collections. As a publicly supported institution, the Library generally does not own rights in its collections. Therefore, it does not charge permission fees for use of such material and generally does not grant or deny permission to publish or otherwise distribute material in its collections.
>
> "It is the researcher's obligation to determine and satisfy copyright or other use restrictions when publishing or otherwise distributing materials found in the Library's collections. Researchers must make their own assessments of rights in light of their intended use."

LIBRARY OF CONGRESS: AMERICAN MEMORY PROJECT
http://www.loc.gov/homepage/legal.html

> Same policies apply as those for the general collection.

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
http://www.archives.gov/global-pages/privacy.html#copyright

> "Generally, materials produced by Federal agencies are in the public domain and may be reproduced without permission. However, not all materials appearing on this web site are in the public domain. Some materials have been donated or obtained from individuals or organizations and may be subject to copyright or other intellectual property right restrictions. Please note that because we cannot guaranty the status of specific items, you use materials found in our holdings at your own risk."

NATIONAL LIBRARY OF MEDICINE
http://www.nlm.nih.gov/hmd/help/reference/copyright.html

" Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement. Users of material found in NLM historical collections are under obligation to determine and satisfy copyright restrictions when publishing or otherwise distributing this material.

"Films and videos in the NLM Historical Audiovisuals Collection may be duplicated if there are no donor restrictions, and if they are determined to be in the public domain or if written permission from the copyright holder has been received by collection Curator. The NLM does not own the copyright to the films and videos in the collection, nor do we charge access or permission fees for their use."

VANDERBILT TELEVISION NEWS ARCHIVE
http://tvnews.vanderbilt.edu/web/tvnews/about/?SID=20080604629882812

"The Vanderbilt Television News Archive makes all the items in its collection available to the pubic through a loan service. We can create copies of material in our collection on DVD or VHS tape which are shipped to your address. To comply with the terms of the copyright law, these materials are considered a loan, and must be returned to us. The length of the loan period is flexible. We charge service fees to cover the cost of creating these custom-made DVDs or tapes."

ONLINE COLLECTIONS

BBC CREATIVE ARCHIVE LICENCE GROUP
http://creativearchive.bbc.co.uk/licence/nc_sa_by_ne/uk/prov/

"This Creative Archive Licence enables You to use and distribute Works within the UK in the ways and on the terms set out in this Licence. The Licensor hereby grants to You a Non-Commercial, No-Endorsement, payment-free, non-exclusive licence within the United Kingdom for the duration of copyright in the Work to copy and/or Share the Work and/or create, copy and/or Share Derivative Works on any platform in any media.

"HOWEVER the licence granted in Clause 2.1 is provided to You only if You --

- make reference to this Licence (by URL/URI, spoken word or as appropriate to the media used) on all copies of the Work and/or Derivative Works Shared by You and keep intact all notices that refer to this Licence;
- share the Work and/or any Derivative Work only under the terms of this Licence

(i.e.Share-Alike);

- do not impose any terms and/or any digital rights management technology on the Work and/or Derivative Work that alter or restrict the terms of this Licence or any rights granted under it;
- credit (attribute) the Original Author and/or Licensor(s) in a manner appropriate to the media used;
- do not use the Work (which includes any underlying contributions to the work) and/or any Derivative Work for any illegal, derogatory or otherwise offensive purpose or through the use of the Work or any Derivative Work bring the Licensor's (or underlying rights owners') reputation into disrepute;
- keep this Licence intact and unaltered and including all notices, including FAQs that refer to this Licence;
- attach the Logo to any Work or Derivative Work you Share under the terms of this Licence to identify the source of the Work and/or Derivative Work and in order to demonstrate your agreement with the Licence terms. The Logo may not be altered or distorted in any way or used for any other purpose."

BRITISH FILM INSTITUTE SCREENONLINE
http://www.screenonline.org.uk/help/terms.html

"All materials available on the Site (the "Materials") - including but not limited to text, video clips, audio clips, designs, logos, illustrations and still images - are protected by copyright, trademark and other intellectual property and proprietary rights and must not be used for any purpose other than educational, non-commercial viewing purposes, unless otherwise stated in pop-up notices throughout the Site.

"The Materials contained in the Site are either owned by the BFI or have been licensed by the owners to the BFI for inclusion within the Site. Under no circumstances may the Materials contained in the Site be copied, downloaded, reproduced, transmitted, broadcast, distributed or modified in any way, unless otherwise stated in pop-up notices throughout the Site. Any unauthorised use of material on this site may result in civil and criminal liability."

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