



Paths Toward a Public Interest in Private Records and the Future of Business History

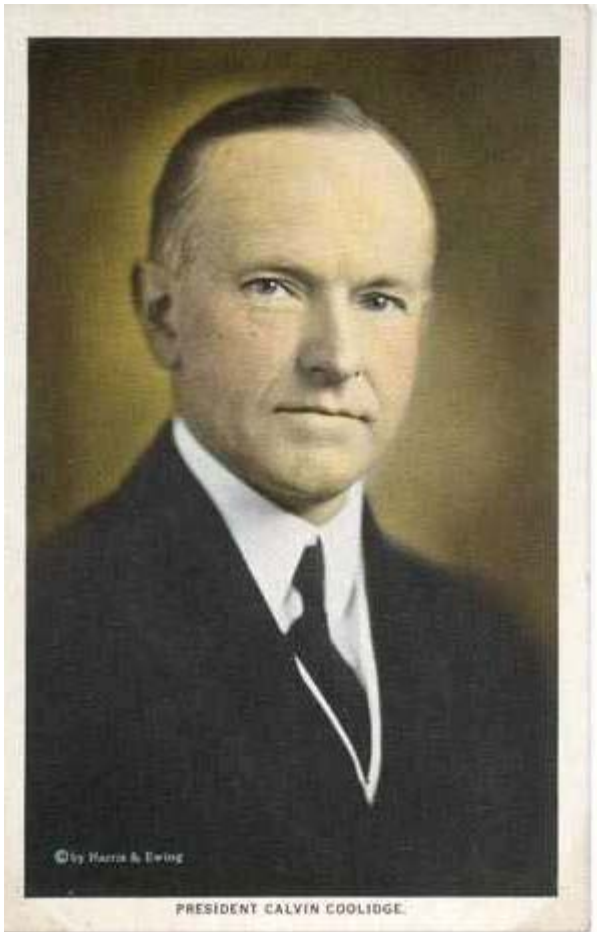
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Office of Strategic Initiatives
Washington, DC
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Com Era
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Agenda

- The Business of America
- Challenge: Record of Business of Risk
 - Dynamics of Entrepreneurial Capitalism
 - Fiduciary Obligations of Shareholder Revolution
 - Litigiousness and American Legal System
 - Technology and Landscape of Preservation
- Possible Solutions
 - Solution 1: Self-Interest
 - Solution 2: Public Interest
 - Solution 3: Abandoned Interest
 - Solution 4: Alternate Settings
- Pledge and Plea

The Business of America...



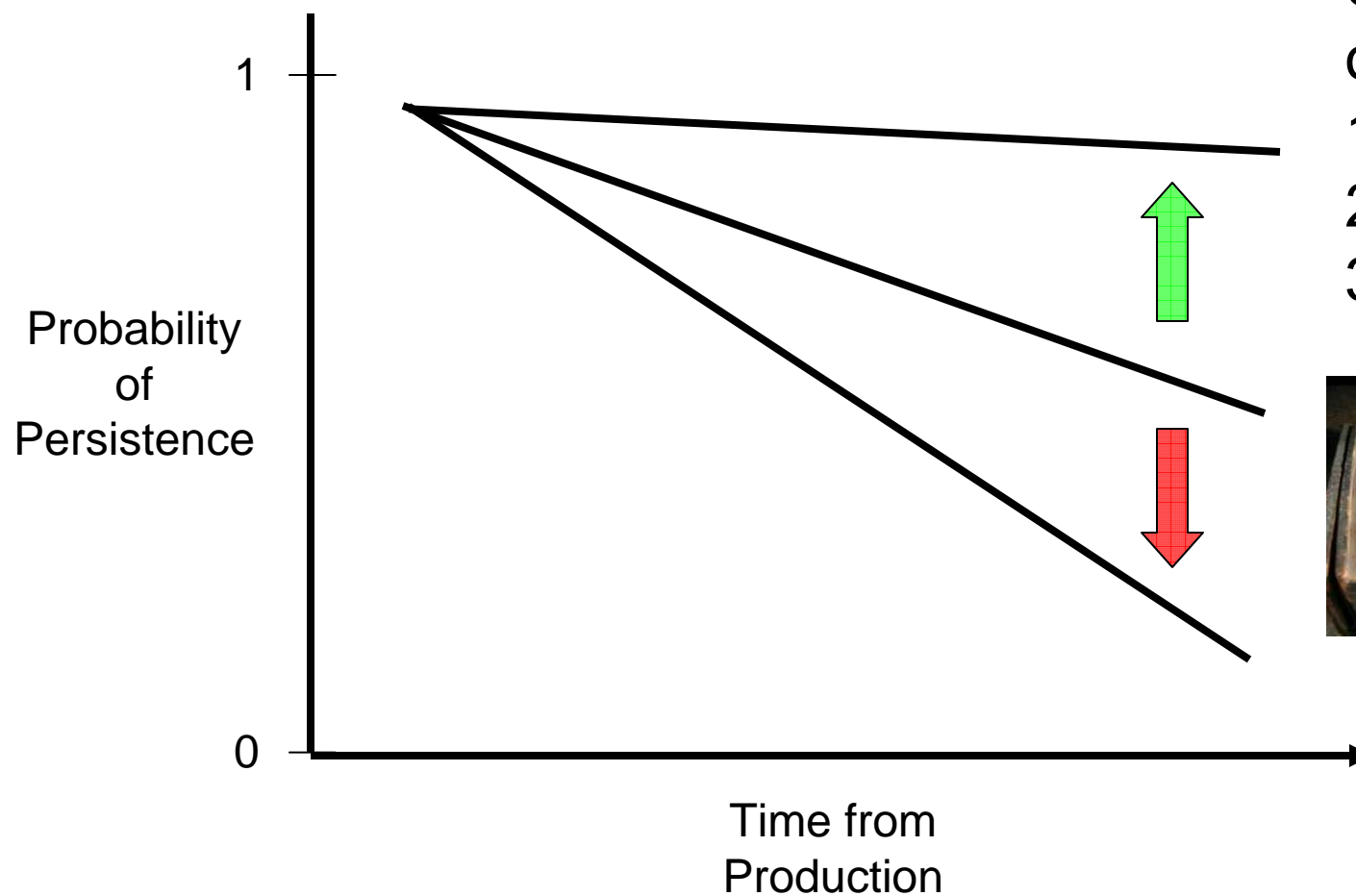
“The chief business
of the American
people is business...”

Calvin Coolidge

Challenge: The Digital Record of Business at Risk

- Dynamics of Entrepreneurial Capitalism
 - Startups come and go
 - Records not high on priority list
- Litigiousness and American Legal System
 - “Weapons of Mass Discovery”
 - Cost, Potential Liability, Uncertainty
- Technology and the Landscape of Preservation
 - Knowledge Management makes records valuable
- Fiduciary Obligations of Shareholder Revolution

The Pre-Digital Path from Business Record to Historical Archive

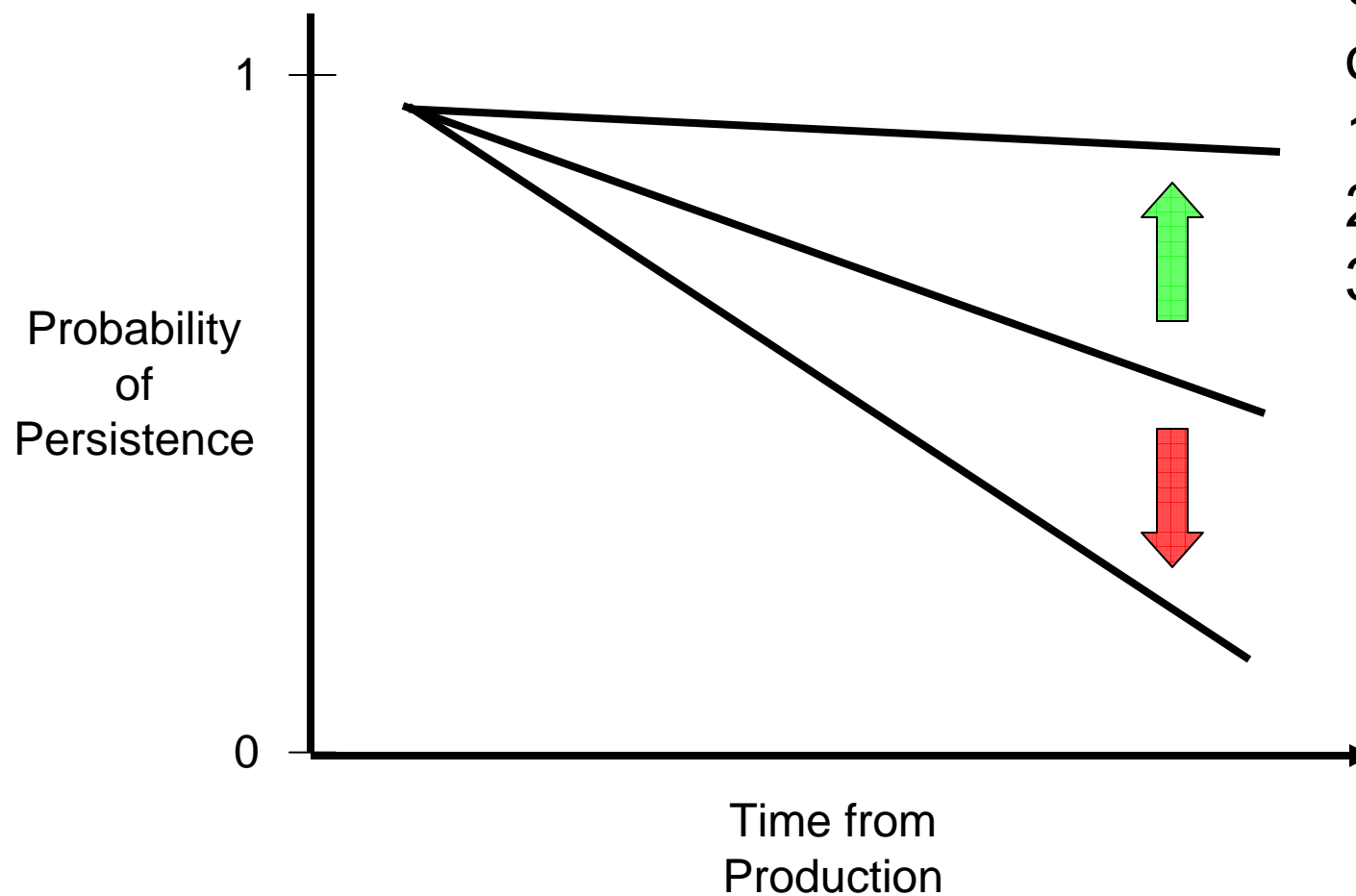


Slope is a function of prevailing

1. Technology
2. Organization
3. Institutions

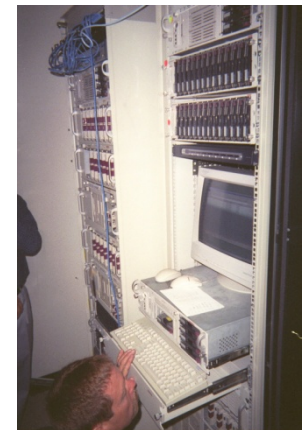


The Digital Path from Business Record to Historical Archive

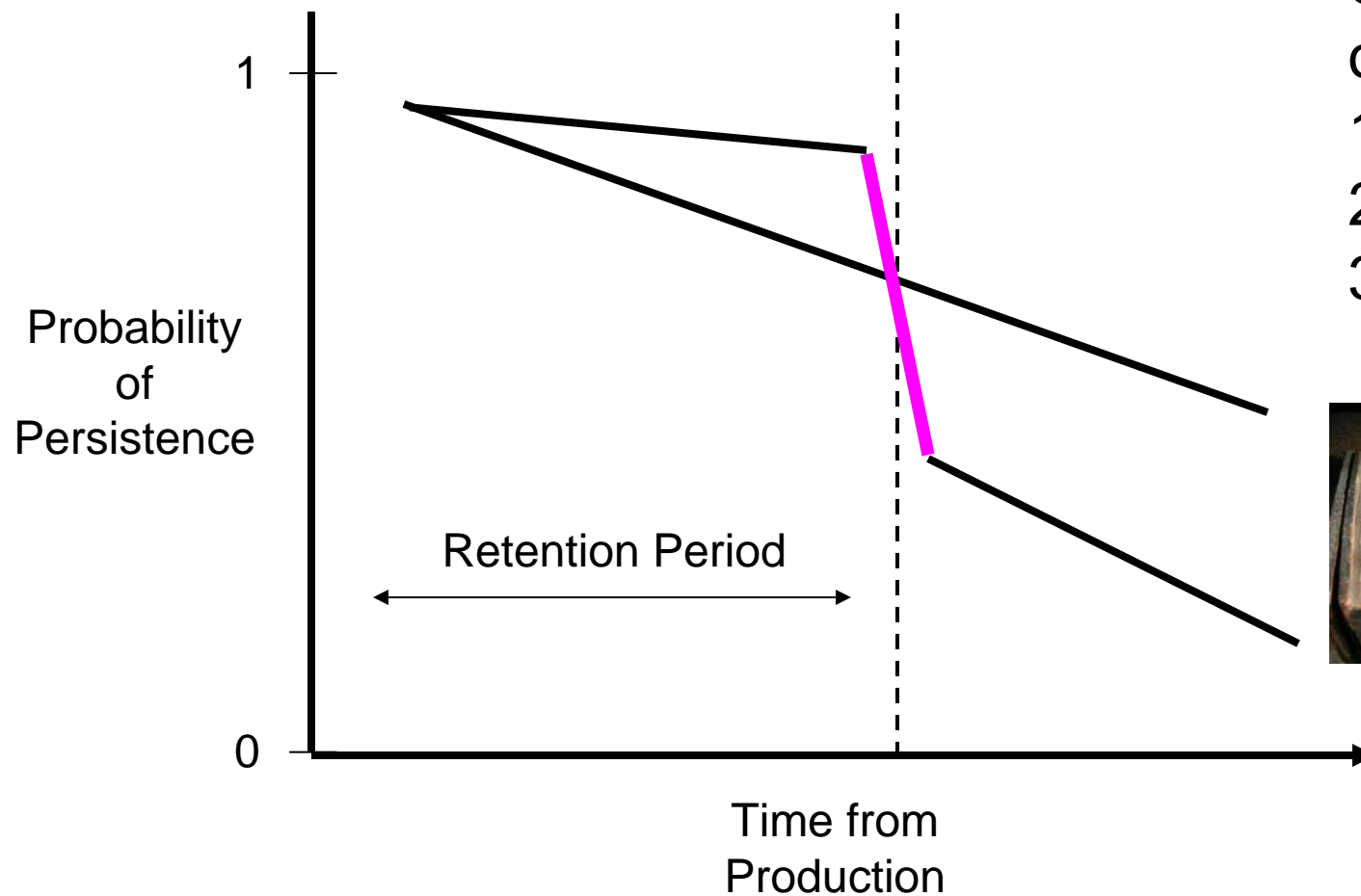


Slope is a function of prevailing

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The Pre-Digital Path from Business Record to Historical Archive (with Document Management/Retention)

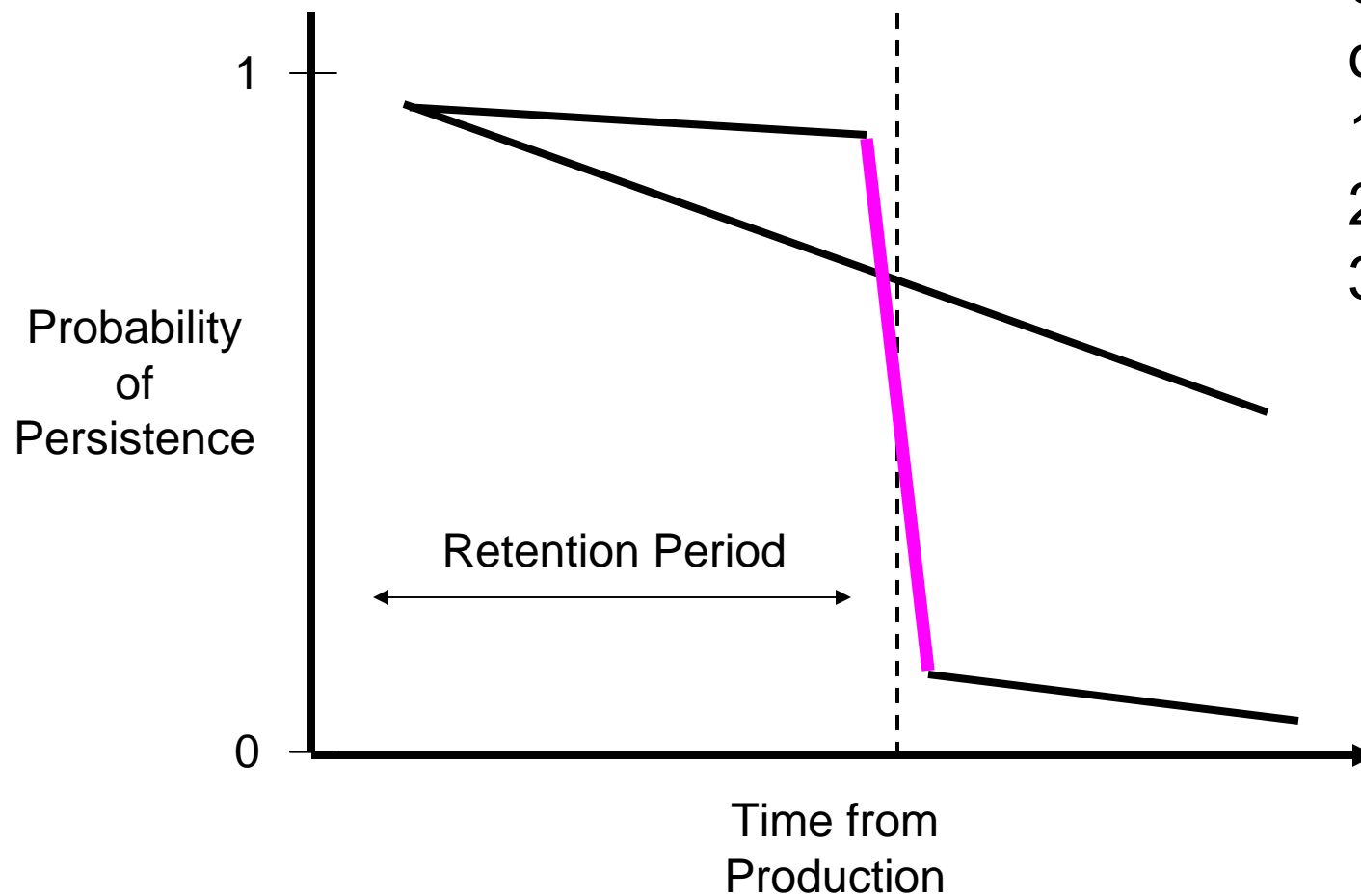


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The Digital Path from Business Record to Historical Archive (with Document Management/Retention)



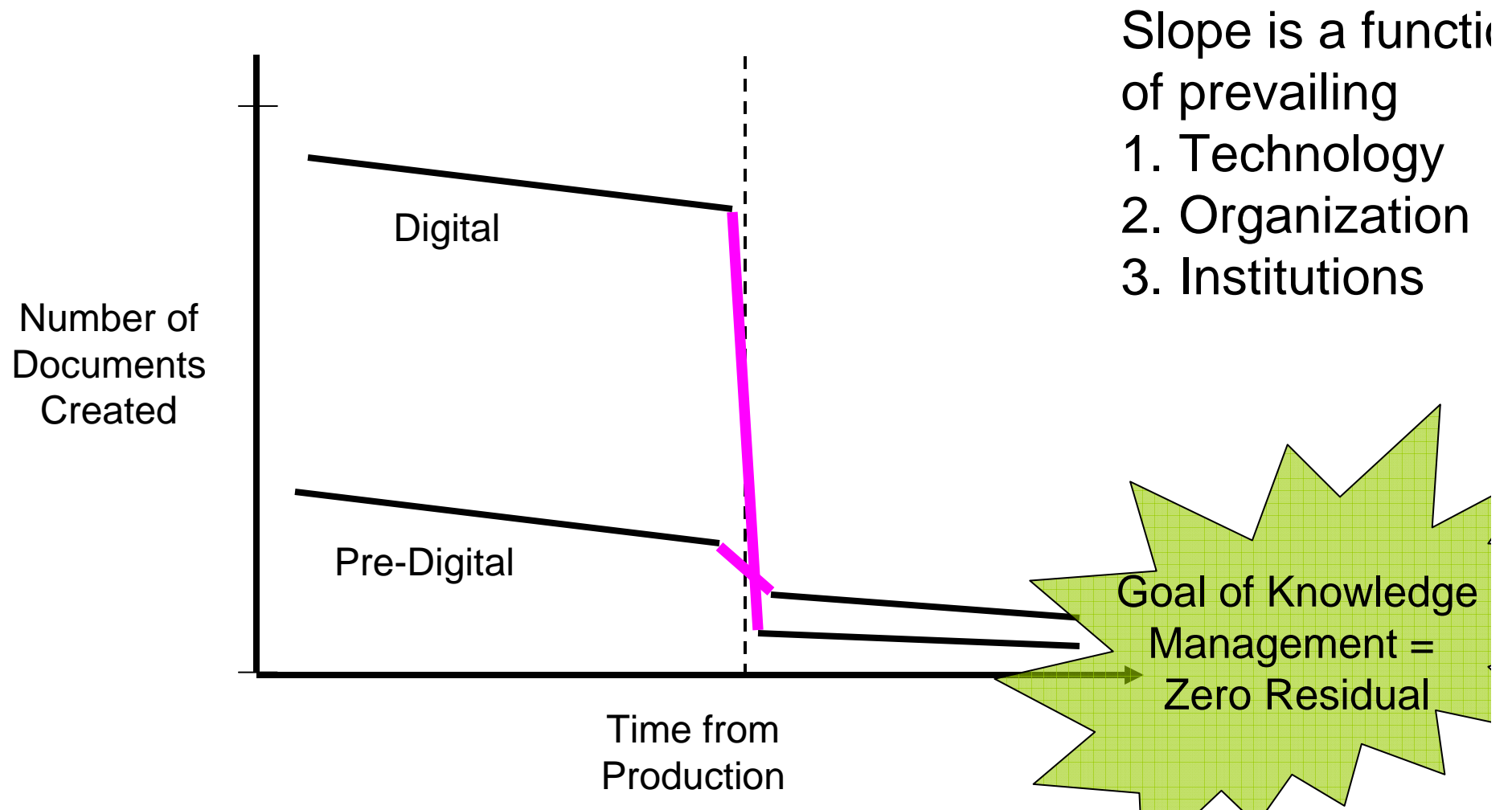
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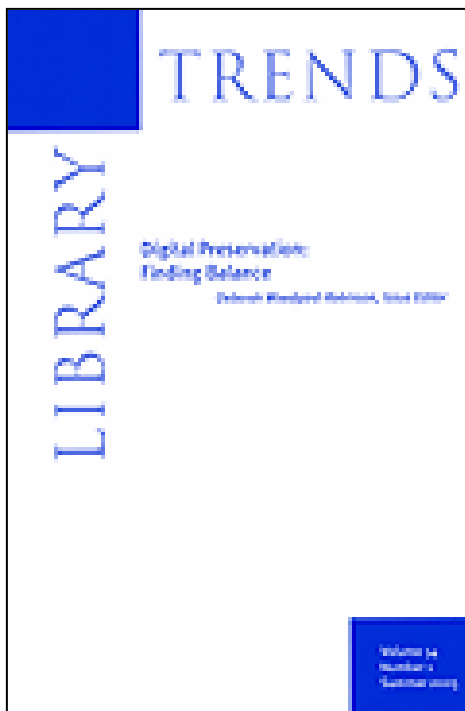


Path from Business Record to Historical Archive:

Taking Account of Scale



Summary:
The Record of
Business is at
Risk



■ Finding:

“In the past business records survived inadvertently. The digital revolution, consistent with changes in the structure of the economy and the clearest dictates of shareholder capitalism, will destroy the Record of Business not *by accident*, but on purpose by making it manageable and valuable for a discrete, but limited period of time beyond which its value to the corporation falls below the cost to maintain it. On that day the Record of Business will be erased.”

Response



Do Something...



“It would be an unsound fancy and self-contradictory to expect that things which have never yet been *done* can be done except by means which have never yet been *tried*.”

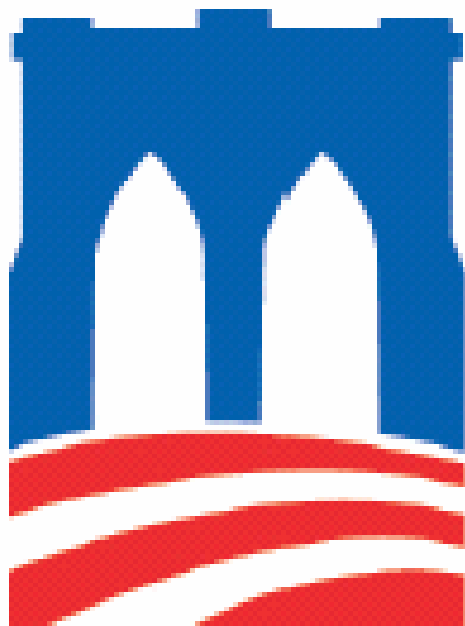
Francis Bacon
Novum Organum

Solution 1: Self-Interest



- *Future Value* of History to Single Firm Justifies Investment in and Risk of Preservation
 - Rindova *et al.*, “Becoming a Cultural Producer: A Study of the Strategy Transformation of an Italian Manufacturer,” Working Paper
- “Collective Action”
 - Chemical Industry Institute for Toxicology (CIIT)
 - National Venture Archive
 - History LLP?

Solution 2: Public Interest



- Possible “Stroke(s) of a Pen” to create public interest in private records
 - National Register of Historical *Documents*
 - Escrow Institution(s) that place(s) records “beyond discovery”
 - Technical redaction or selective invalidation (anti-Bates stamp)

Solution 3: Abandoned Interest



- Failed companies lose power to dispose of records
 - Bankruptcy
 - Revise social contract?
 - Brobeck, Lehman Brothers, etc.
 - Public workouts
 - General Motors, AIG, etc.
 - Private workouts
 - Sherwood Partners

Venture Workouts

- Question: What happens to venture backed firms that do not have successful exits?
 - Answer: Assignment for the Benefit of Creditors or “Workout”—may be thought of as a private bankruptcy.
- Board of Directors replaces management with senior executive from specialized consulting firm that oversees liquidation.
 - Outsource non-core VC activity
 - Specialized team increases value recovered
 - Allows investors to maintain control (v. bankruptcy)

Sample: Sherwood Partners

- One of two Silicon Valley firms that specialize in serving venture capital market.
 - Market share not known at present
- Handled several hundred workouts since late-1999
 - Mostly IT though some biotech and medical device companies.
- Seven year statute of limitations for records retention expiring and new failures arriving...
 - Sherwood needs to get rid of some of 7,000+ boxes
- Unfortunately, business is picking up again...

Marty Pichinson, Founder, Sherwood Partners

BusinessWeek

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Venture Capital's Liquidators

As startups go bust, it's boom times for firms that restructure and sell off tech companies' remains—everything from furniture to patents



"Really, we're a sophisticated mortuary that monetizes assets," says Pichinson. Gabriela Hasbun

By Robert D. Hof

Silicon Valley is famous for its awesome startup machine, but the place is just as brutally efficient at winding down those companies when things turn south. So as the

BW MAGAZINE

[How Risky Is India?](#)

The ~~Archive~~ Warehouse



Records We Don't Want...



Records We Might Want...



Records We Can't Read...



Records We Surely Want...

See handout.

IP DEMO
DO NOT DISTURB

CURLY

PWR OK
FAULT
TEMP
I LIM

PWR OK
FAULT
TEMP
I LIM

MOE

IP
Equipment

LARRY

September
2008



Solution 4: Alternate Setting



- Try somewhere else first
 - Less litigious
 - More open to public interest arguments
 - Joe Martin, Canadian Business Hall of Fame



- Central Archives for Finnish Business Records (ELKA)
 - Matti Lakio, Manager
- Strong government records archival landscape
- ELKA created by Public Law, in existence since 1981
 - 70% of Budget comes from central government
 - 15% from host city (Mikkeli)
 - 15% from depositors (€160/shelf meter)
- No formal deposit requirement; companies participate voluntarily
 - Signal Problem: Companies that have something to hide don't participate
 - Records are sealed for periods of 10-20-25 years
 - Longer for documents with privacy concerns (60 yrs)
- Are there problems with digital records?

Pledge and
Plea



Do Something...

...but Do No

Harm.



Questions and Comments

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Additional Slides

Brobeck, Phleger & Harrison: 1926-2003



- Prestigious San Francisco Law Firm
 - Represented ~2,000 tech clients in 1990s
- Filed for Bankruptcy, 2003
 - Paper records span 77 years, extend to 200,000 boxes
 - Digital records span 9 years, extend to 2.5-4.0 Tb (~20-40M pages of text)
- Preservation via Closed Archive
 - Established by Court Order, August 2006
 - www.brobeckclosedarchive.org

Court Transcript, July 18, 2006

9 MR. JONES: Yes, Your Honor.
10 THE COURT: Do we have other appearances on that?
11 MR. MURPHY: Yes, Your Honor, it's Ben Murphy of
12 Hennigan, Bennett & Dorman, LLP for the trustee. Mr. Jones

“First of all, let me complement the Trustee and you, Ms. Borrey, and all the people you’ve been working for, for a very, very comprehensive and, you know, well thought out and well conceived approach to this problem, a unique problem, and I’m not going to pause and then say “but...” I was quite impressed by the degree of effort that went into something so novel and unique as what you and the Trustee have asked ... to do.”

20 THE COURT: Well, first of all, let me compliment
21 the Trustee and you, Ms. Borrey, and all the people you’ve
22 been working for, for a very, very comprehensive and, you
23 know, well thought out and well conceived approach to this
24 problem, a un
25 then say “but

**Basic Principles Endorsed
And Closed Archive Approved**

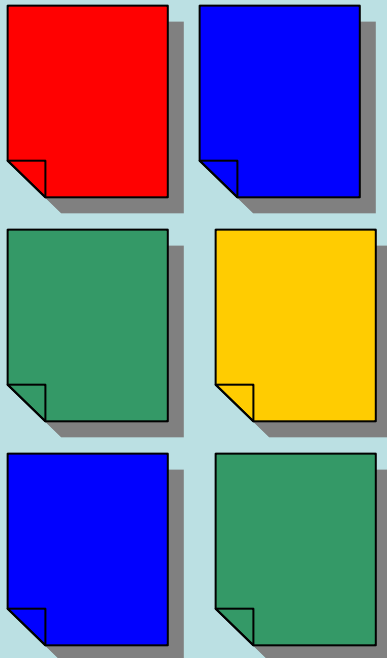
Brobeck Closed Archive: Records Overview

Managed Documents (~3.48 million; 800 GB)

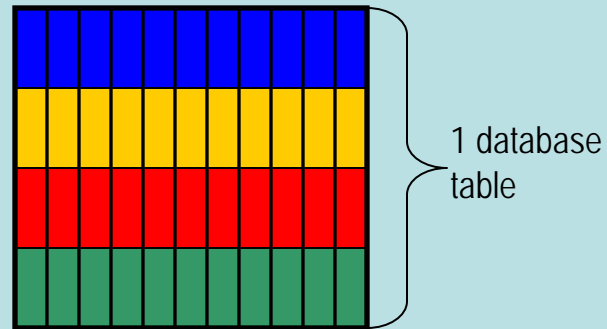
Word & Word Perfect (~3.34 million)

Excel (~54,000)

TIFF, PDF, PowerPoint, etc. (~90,000)



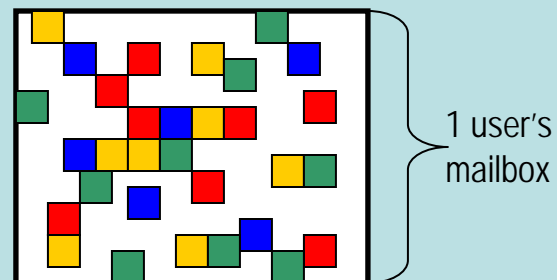
Relational Databases (~7; 229 GB)



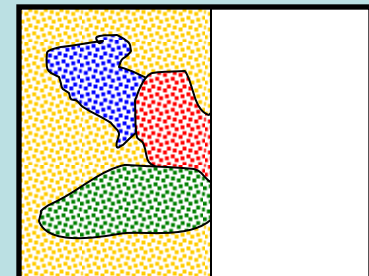
Brobeck Clients

- Client A (Blue square)
- Client B (Green square)
- Client C (Yellow square)
- Client D (Red square)

Microsoft Outlook Data (~1,700 users; 363GB)



Network Share Drives



Analysis of Opt-Out Files

- Total number of objects in database
 - 3,378,959
- Total number of files returned
 - 3,369,635
- Missing files (difference)
 - 9,324 (<.03%)
- Number of opt-out clients
 - 367
- Number of files belonging to opt-out clients
 - 404,050 (11.96% of total)
- Share of files from Top 10 opt-out clients

Analysis of Opt-Out Files: Top 10



- Cisco
- Wells Fargo
- Bank of America
- MacArthur Co.
- Chevron Corporation
- Broadcom
- Robertson Stephens Inc.
- Ligand Pharmaceuticals
- Union Pacific Railroad
- United Airlines

Next Steps



- Processing records to establish Brobeck Closed Archive
 - www.brobeckclosedarchive.org
- Working with legal and technical communities to interpret court ruling
 - i.e., like writing regulations from law
- Access will be governed by system modeled on U.S. Census Research Data Centers
 - Merit-based access
 - Data enclave
 - Pre-publication review for disclosure
- Other potential collections
 - Buy non-law firm records from bankruptcy court