Transcription
Section 108 Study Group, Public Roundtable #1
March 8, 2006, UCLA School of Law, Los Angeles, California

Topic 2: Amendments to Current Subsections 108(b) and (c): Access to Digital Copies

Participants
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Kenneth Crews, Copyright Management Center
Jeremy Williams, Warner Bros. Entertainment
Richard Pearce-Moses, Society of American Archivists
Brewster Kahle, Internet Archive
Jared Jussim, Sony Pictures Entertainment

Dick Rudick: We have a couple of members of the Study Group who have arrived who were not here at the beginning, and we also have a couple of people at the table who were not here for the first session. So, Study Group members who did not announce themselves earlier this morning, would you stand up.

Mary Rasenberger: It's Steve Weissman and Troy Dow that I see that we didn't introduce this morning.

Dick Rudick: And at the table, Cynthia and Mimi, would you introduce yourselves to everyone?

Cynthia Shelton: Hi, I'm Cynthia Shelton, I'm the Associate University Librarian for Collection Management and Scholarly Communication at UCLA. I'm here representing the UCLA Library, and I'm also here representing Gary E. Strong, who is the University Librarian. He called this morning at 7:30 and had some kind of stomach flu or something like that, and so I'm stepping in for him.

Lolly Gasaway: (jokingly) We appreciate his not coming.

Mimi Calter: Mimi Calter, I am the Executive Assistant to the University Librarian at Stanford University, and Mike Keller couldn't be here today, and so I'm here filling in for him.

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Mary Rasenberger: I have one change to our process, and that is that you do not have to say your name, you'll be glad to know, every time you talk. The transcription people are apparently doing a chart of where everyone's sitting, and that will be sufficient.

Lolly Gasaway: OK, Topic 2 is really looking at whether we should amend subsections (b) and (c), and whether off-site access to materials that are digital should be permitted. Right now, subsections 108(b) and (c) permit qualifying libraries and archives to make additional copies of works that they have legally acquired for preservation and replacement purposes, respectively. 108(b) applies only to unpublished works, and it allows the library to make up to three copies of a work, in digital or analog form, of that unpublished work in its collection for purposes of preservation and security or for deposit for research in another library or archives. Subsection 108(c) applies to published works. We loosely refer to these together as "the preservation section," but 108(c) is really a replacement section, and it says that a library or archives may make, again, up to three copies of a published work in its collection for preservation purposes if the work is either damaged, lost, stolen, deteriorating, or obsolete format, and the library or archives has made a reasonable effort to determine that an unused replacement cannot be obtained at a fair price.

The digital copies that are made under both of these sections, then, may not be made available outside the premises of the library or archives, and we understand that that has caused some difficulties for these institutions. That on-site restriction does not reflect, necessarily, how people use libraries and archives today. For example, academic libraries make materials available to students and faculty electronically, whether they are on campus or not at the time, so "premises" has just been a difficult concept. Now on the other hand, there are serious risks for the copyright holder when you permit off-site access.

So, the notice and accompanying paper talked about some of the ways that off-site access might be limited in order to reduce those risks while still not restricting to

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"the premises." So, Dick, you want to go with the first question?

Dick Rudick: All right, this is a biggie. The first question is actually four related questions, but they do it all at once because these questions are so interrelated. Fundamental question is: Are there circumstances under which off-site access should ever be permitted for 108(b) and (c) digital reproduction? Remember, we're talking about 108(b) and (c), which Lolly just described. You may have feelings about other types of 108 reproductions, but that is what we're really interested in here. And, are there ways to permit such off-site access without increasing the risk of infringing the rights of others?

Second, related to that: under what conditions should such off-site access be permitted? And finally, what types of restrictions would be useful/should be imposed to reduce the risks that we just talked about? I can tell you examples of what it describes, such as simultaneous use limits, user community restrictions, access controls, agreements. You shouldn't feel confined to that list, but those are some of the things we discussed. I expect many hands to be raised, many hands make light work.

Sherrie Schmidt: Our scholars and students have learned to use information, knowledge, in very different ways over the last years.

It seems to me that we must find ways to provide access to them when their expectation is that we will make things available. In the classroom, a faculty member may wish to use a piece of a work and want all students to be able to look at it at the same time. The faculty members work in research groups and may need to look at things in the lab where they're doing their work. So I do think that we should be providing off-site access. We already do authorization and authentication checking on our community: Our faculty, our staff and our students, and so I think this is a way that we should also move forward. I am very nervous about the use of simultaneous users. I think it's arbitrary, and I think it doesn't speak to the environment as we see it.

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Cynthia Shelton: I just want to follow up on what Sherrie said. It did come up a number of times in the first topic that the mandate and mission of the library is to preserve the scholarly record and the cultural record. But another mission and mandate of the university library is to serve the needs of researchers and students. And today's researchers and students and faculty, and even our staff, expect to get access, 24/7, from remote sites. I have some statistics just to show how hybrid we have become in the electronic world, in the print world, and how much more access is being gotten to electronic resources. In one week, 30 percent of all use of e-journals at UC was from off campus. Now, if you define on-premise as the physical library, the percentage of users that get our e-journals electronically from remote access is going to be much higher.

Just last year, access to the UCLA library website was up 8 percent over the previous year, more than 6.3 million users. I can give you a lot of other data that shows how much more users are coming to our libraries virtually, and expecting to get to our libraries virtually.

As Sherrie also said, we have long defined our users as faculty, staff, and students. Those are our primary clientele. Over the last several years, as we've entered license agreements to provide access to electronic resources, we have successfully negotiated for those same users to get access, and I don't see any problem in continuing along those lines for materials that we want to preserve and provide access to electronically.

Gordon Theil: I just want to follow up on what Cynthia and Sherrie said. More and more primary and secondary source material is available remotely through the Internet. Researchers and students now expect, as has been said, to be able to bring library content directly to the classroom or their home. Course software can incorporate a syllabus, online chat, blogs, links to websites, licensed databases, and content created by the library, so that relevant information is brought together in ways that are directly suited to the needs of the students. Humanistic research has also changed dramatically in the digital world, with scholars able to make use of digital surrogates of both

primary and secondary source materials, without having to travel to remote locations as a way to receive the original, physical copies, and of course we already discussed to some extent the preservation aspects of digitizing the original archival masters. Permitted off-site access should incorporate the network domain, allowing for efficient access to digital works by students, scholars, and instructors belonging to the institution that owns and provides access to the digital content. And the work of scholars, students, and instructors from other institutions should also be supported.

Jeremy Williams: With all due respect to the important purpose of the 108 discussion, the first problem that I and my company has with this off-site access is that it doesn't really seem to be a discussion within the purpose of modifying 108. And I would say that, listening to the points made just before me, I don't know that one could even tell, if you didn't know already, that 108 was being discussed, because, if you look at the starting point, and I'll address my statement to 108(c), which is of most concern to our company. 108(c) has a very, very narrow purpose, described narrowly: "solely for the purpose of making replacement copies." There is nothing in the Copyright Act that authorizes the type of off-site access that's being discussed for the original copy, and the notion that's being discussed here is really a modification of the distribution right, seems to us, not a modification of the reproduction right, and certainly not "solely for the purpose of preservation or replacement."

The issue of how widely and when works under copyright should be made available to people is a very important issue, but it doesn't seem directly related to what we're talking about in 108 and, if anything, if it's going to be discussed at all it should be part of the larger discussion. And the dangers of it become clear when we consider the discussion we had earlier today, which is if all kinds of collections, virtual or otherwise, large or small, even for-profit was mentioned, become eligible for such off-site access, you've basically set up a distribution network which is supplying, by another name, what could be described as video-on-demand, and doing so

precisely at the time when copyright owners are going into that business. So, to open up the issue of remote access, opens up fundamental questions of distribution, and the hypothetical question of could someone conceive of some circumstances in which it was so narrowly circumscribed that it would be OK and not a threat, I suppose that, hypothetically, there's always something like that. But as a broad area of discussion it seems to me that it really is something that needs to be dealt with by licensing. In other words, with respect to copyrighted works, and certainly the majority of them that are of concern to our company, the type of uses that are being described could be made available through licensing arrangements – and indeed are in many cases.

Lolly Gasaway: Let me ask a follow up that could help put this in a little bit of perspective. 108(c) predominantly has been taking an analog work that the library tries to replace because it has lost its, or whatever, it's not available, so now, under the Digital Millennium Copyright Act, it got to do an electronic copy of that. Let's assume it's a book, rather than a movie, for example. The book could be used outside the premises. There was no restriction on premises for the original work. The same thing would be true if it were a purchased copy of a VHS copy of a movie, it could be checked out. So the question then becomes, when you make the digital copy of that, as permitted under the statute, that being restricted to the premises when the original analog copy was not.

Mary Rasenberger: Or even if the original was digital tangible, like a CD or a DVD that could be lent out, it gets destroyed, what about the replacement DVD or CD?

Lolly Gasaway: That's the next question, we want to hang on to that one: The replacement of a digital copy with a digital, tangible copy, we want to, sort of, hang on to that.

Dick Rudick: That may help focus the discussion.

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Lolly Gasaway: Does that help to focus it, just a little bit? That there really probably is no license agreement that occurred when the library got the original material. Just to focus it a little bit, that 108(c) was really "analog-to-digital" was the intent behind the DMCA. It doesn't say that, in the statute, but if you read the legislative history, that was really what Congress was thinking about at that time.

Dick Rudick: Brewster, then Jeremy, then Jared. (To Jeremy) If you're responding specifically to what Lolly said, why don't you go first, then Brewster, then Jared.

Jeremy Williams: Well, in a way, that illustrates what's being discussed. I mean, what you're describing is essentially a first-sale document activity, permitted by section 109 of the Copyright Act, a basic exception to the distribution right. And I'm thinking that, I'm certainly not advocating that that should be any different for an analog copy or a digital copy, but when one gets into the digital world, and when one imagines all of the copies of a work that could be made available by all of the libraries, archives, museums large, small, thirteen-year-olds with their collections, remotely, then one is talking about a kind of distribution network, which is very, very different than lending out the single, physical copy, which requires purchasing an additional one every time you want to do it.

Brewster Kahle: I'd like to speak on two aspects. One is the identifiable user base, and idea that we're sort of evolving with in our library world, and Jeremy you mentioned it, and the other is sort of "loaning", first-sale, right?

First, on the identifiable user base, I would suggest, well, a lot of our materials were licensed already, so it's already digital stuff, it's already constrained. So whether it's Elsevier journals or the like, we're talking about things that are re-formatted. I would not limit your exception, please, to just "Identifiable User Base," because that's going and defining a library fairly tightly, so I would say it's not leaving open the door to innovation, of the library system itself.

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Ben Franklin started the subscription library system in the United States, and it's not that dissimilar from JSTOR. And universities have always had libraries that had fairly defined user bases, right? So, in those worlds it worked fairly well. But then, a hundred years ago, an outsider, Andrew Carnegie, pushed hard for a massive expansion of the public library system – he was a die-hard capitalist. So he pushed on this from the outside, not being an accredited librarian. Actually, if you go to his Pittsburgh library, it's really cool, above the door is carved "Free to the People." Andrew Carnegie, right? "Free to the People." But he made it open access. Not a subscription model, not a defined user base, anyone could walk in to one of those libraries and borrow a book. So: radical concept, maybe? Well, no, there was precedent, but it was a radical expansion of that idea that was an innovation that we really wanted. I'd say that this "open access" model is somewhat like "open source," which is causing a re-arrangement of the software industry. Some are adapting well, some are not adapting so well, but these sorts of changes come through. I think open access libraries, we're starting to experiment with them. Can we make them sustainable, as open access, in the sense of not having a defined user population? And the Internet Archive is one of those that is experimenting with how to make a model work in that. And if you were to define an "identifiable user base" as the only realm that we could do for re-purposed works, or re-digitized works, then I think we're limiting not just ourselves, but other things that might come up. So I would say that sticking strictly to the "identifiable user base" would be a mistake. It may be a useful one. I think it's something that is baked into most of our Elsevier contracts at this point, you know, ". . . identifiable . . . somebody has to have a card," and it's evolving through the market system, great.

Let's go back to another alternative. Maybe you could do an "identifiable user base" or – the tradition of loaning has worked very well for our whole field. Every so often publishers gripe that we can loan things too often or the like, but in general it seems to be a balance that has worked. Exactly what does "loaning" mean in the digital world? And I can't tell you, and I think it's going to be

different for different types of materials. We went and fought through the whole CONTU process, in which I was not personally involved, but from all involved, it was horrible. But anyway, it was a process that, painful as it was, we got some general parameters of what was kind of OK, what was kind of not OK. On the Web, going and having web pages loaned out in that sort of same way would probably be a little ridiculous. And I think that going and loaning out DVDs would even be handled differently than we would put under CONTU. So I think it's a more nuanced thing, but within a legislative approach, if we're –- by philosophy -- loaning, and I think we even got the Vanderbilt Clause, right? It's the loaning of a limited number of copies of television news. We interpreted that as streaming over the Internet when we put the television news up, the Television Archives, put the television news up for a period of time, so that only a few people could actually see this thing. It limited its use a great deal, unfortunately, but it was an attempt to try to approximate "loaning" in a new situation. I think that if we allow ourselves to evolve with the "or" of identifiable user base or loaning, we can allow interlibrary loans, that would make some sense; we'd be able to have CONTU survive, that would be my suggestion.

Jared Jussim: Let me just reiterate to a certain extent. To the extent that you make the copy available, and the person brings it back, and it's a physical copy, that's a section 108(c), and remember, if it's commercially available, you do not have the right to make a copy under the statute, you go out and buy another copy. Now, I love the reference to Andrew Carnegie, because, I'll tell you why, and I hate to put a balloon in it, but one of the things Andre Carnegie did, it's sort of bad to go around building statues of yourself all over the place, so what you do is you put up a library, you put up a big building, and you give it to the public and you say: Andrew Carnegie Library, but you forget two things, one to give the books, and two to give the maintenance. So, what Andrew Carnegie did, this great capitalist, was he built statues to himself, but of course, they're not statues, they're buildings. By the way, he started out as a socialist, which is why he had to leave Scotland. So, understand that

there was a capitalist motivation underlying, if you will, everything.

My question to Stanford, I think it was the Stanford professor –librarian —- who said how many people are relying on this, how many of these are copyrighted works? How many of the works are not copyrighted? Because if Stanford wants to make the Stanford Book Collection, not the book, the Stanford Press available, I don't care. They can massacre their work as much as possible, and make it freely available, that's their business. But my business is the production and distribution of motion pictures and television programs, and when you're saying you have a system where it goes out one after another after another one to multiple sources, you're undercutting the distribution right, and you're undercutting our ability to produce new works. And, to that extent, you undercut the ability to add to your archives by new works. When Kathleen and I were in UCC 2(b), and she reminded me of it . . .

Kathleen Bursley: That was even less fun than CONFU.

Jared Jussim: One of the things that people pointed out was that you can take the educational books and reproduce them, but the next one won't be printed, and the next research won't be done. This is something that you have to bear in mind, that you cannot undercut the ability of the copyright owner, the ability of the person who puts up the money and makes the money, to get a return on his investment, otherwise, the new works will not come. That is a fact of economic life, and nothing you can say, nothing will change that fact.

Kenneth Crews: Thank you. There are lots of realities here that are shaping the current 108 and are probably going to shape any future versions of 108. There are a lot of issues, issues that we can talk about in glowing terms – about information access, etcetera – but there are also those hard issues of market forces and market realities, and let's face it, anybody who wants to argue information access has got to do it here, in an environment where, every bit as important in that, is the pressure about

shaping, defining, and protecting markets. And what I see in this definition of 108, the current definition and probably a future definition, is the information-access push coming this direction, the publishing, structures, and market definition coming in this direction, and where is that line where they meet, and where this side can co-exist simultaneously with that side. And one of those definitions, Mr. Jussim, is exactly what you alluded to, and that is the availability in the market. If you're putting out on the market, you have undercut a piece of this preservation provision under 108(c).

Jared Jussim: I haven't undercut the preservation provision, because I'm the one preserving it, so preservation is there.

Kenneth Crews: Yeah, but you've undercut the other party's ability to use 108, in effect. But anyway, be that as it may, we come back down to this question that, if we're going to have a section 108, and Dick, your original questions, where you gave a set of three interrelated questions, kind of summed up said: Under what circumstances can a 108(c) type of preservation/replacement right exist in this environment with competing pressures. I see two general things: a) keep in mind, we don't want to go there in detail, but please keep in mind that some of the things we're talking about – education access and so on – we still have 110, we still have Fair Use that we can turn to, so this is apart from all of that.

Second, in general terms, I'm seeing from this discussion, and I'm seeing from the current 108 three categories of circumstances under which a 108 can exist. I'm seeing Category 1: Will there be some type of control on user access? And this is raising the question of technological controls, limiting access to certain types of uses. Category 2: Are there certain types of works that are suited for this 108, and other types of works that are not? And a simple one is, is it on the market? Is it in print, out of print, is it currently marketed? That can affect that question. And, Category 3 of the circumstances is "The Uses". What is this work being used for? Is it used for research, is it used for education, is it used for

something else? Not all three of these categories have to be part of the law, not everything we can think of under any one category has to be part of the law, but is there some balance, some healthy mix of some pieces from those categories: Types of controls, types of works, and types of uses, that can be brought into the equation to identify a permitted sphere of activity under section 108.

David Nimmer: I'd like to propose something that perhaps goes with the context of what Kenny was talking about. Right now we have heard two goals articulated. One goal is archivists say "we have a great collection, everything in that collection should be available – 24/7 ideally – to everyone on Earth". On the other hand we have copyright owners who say, reasonably, that if the New York Public Library subscribes to every book, every movie, every record, and everything else that's currently published, and makes them available to everyone on 24/7 streaming basis, then our markets will completely collapse. It seems to me that we can accommodate both goals if we build the distinction between 108(b) and 108(c) not on the current basis of unpublished vs. published, but instead on a different basis. The unpublished-published basis is both over and under-inclusive. On the one hand, there might be things that were published a long time ago that nobody cares about, and on the other hand, there might be something that is unpublished, namely the next 100-million dollar feature that Warner Bros. is going to put out next month, and so it's currently unpublished, but Warner Bros. would not be happy if somebody exploited it because it's unpublished. So the distinction that I would like to draw is between currently commercialized and not currently commercialized.

Visiting the Getty some months ago, I go there because they have a large collection of architectural works, there was one particular book, published in France, about Le Corbusier, limited edition. So this is a published work, but it's not currently available, and it's not currently being commercialized. It would be wonderful if everyone in the world interested in architecture could access, from the Getty site, this book about Le Corbusier, and given that it is not currently being commercialized, the successor to the

publisher in France would not be sensibly diminished by that activity.

Another example of something that is not currently being commercialized, ironically, are television commercials, let's say, from the 1960s. I knew somebody who wanted to put together an interesting product about cultural changes and use television commercials as the basis for doing so. He was not able to do that because he could no get copyright clearance because he could not locate many of the owners of those commercials. That's an orphan works problem, but other owners were locatable but didn't want --let's say Procter & Gamble, to use a random example-- did not want it to be publicized what it's advertising campaign happened to consist of back in the 1960s.

So, if we were to draw a distinction in the statute between works that are currently commercialized -- and those would be put off-limits from the archives exemption -- and works that are not currently being commercialized – and those would be available 24/7 – then I think we could accommodate many of the conflicting concerns.

Kathleen Bursley: I feel as though I'm probably piling on to a dead horse here, but I just want to, again, say so that I can hear it, that we are talking here about preservation and replacement copies. Replacement copies for works that have been lost, stolen, or otherwise rendered unusable, and preservation copies for works that are, I guess, in imminent danger of being unusable for other reasons. Replacement copies, to me, as a publisher, it seems relatively straightforward that the commercial availability element of it is really key here. I think about, certainly with digitized journals, that kind of thing, there are innumerable projects underway to create archives of those materials that would be available as formats change, as the methods for viewing them change, that they would be kept in dark archives, which sounds very exciting, really, but which I gather are only to be used in the event of nuclear holocaust or some other situation. But thinking just about a normal book that gets stolen, or disappears somehow, what then should the library be able to do about it? If it cannot find a copy anywhere to buy, then

how is it going to digitize it, I mean, if it doesn't have the copy? Or am I just being really dense about this?

Lolly Gasaway: You can get it from an inter-library loan.

Kathleen Bursley: OK, but what if the publisher is bringing out a new edition next week? You know, it's not going to be the same as the old edition, so maybe there should still be a way for the library to have the old edition, because in some way it's different, or for just the sake of completeness, or whatever. But I guess what I really want to say is that it's not the case of a public library that anyone can come in and check out a book. Anyone can come in and read a book, or take notes on a book, or nowadays, make photocopies of a book. But in order to check out a book, you have to have a library card, or a digital equivalent of a library card. And I don't see why you should have more availability of preservation copies than you would of the original copy. For someone to check out the original copy he has to have a library card, I mean, this is in a public library. Why should it be easier to get a preservation copy or a replacement copy? I don't see that, I guess.

Richard Pearce-Moses: A couple of points. First off, to respectfully disagree with Professor Nimmer, I don't think archives really want to make all of their collections available 24/7. We recognize and respect and support the commercial property owner's right to profit from their works, and we also recognize that there are a variety of other restrictions on works, so we are very careful about what we want to make available, and we very much want to respect the rights of intellectual property owners to do that. That being said, we take care about what we release, for a variety of reasons beyond intellectual property.

I also would like to respectfully comment to Mr. Jussim that, congratulations to Sony for doing your job well by preserving your holdings, but not all copyright owners do as well as Sony is doing. And I think that is part of the libraries' jobs, and archives' jobs, to be another agent that see that some materials that are not being preserved get preserved.

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I really am seeing a bit of a distinction here I've heard echoed, that there are – I'm not quite sure I like the terms, because they're ambiguous – but the commercialized versus not commercialized distinction, very mushy, but there's much I like about that, because we don't want to compete with peoples' rights to make money off of their intellectual property.

The other thing I'd like to comment on, though, is the issue of defining user groups, and I'll give two specific examples, one from my own personal employer, which is the State of Arizona's libraries and archives. I always say that carefully to distinguish it from Arizona State University. As soon as you say Arizona State and they immediately add "University", and that's somebody else's job. All of our users are not required to register in any fashion. If they live in the state of Arizona, they are our patrons, they are our users, by definition. And I will say that one of the real advantages of the Internet here is that we can finally meet our market and our targeted user group. We don't require someone to come 8 hours from Navajo to Phoenix to see the materials in some contexts. I'd also point to a lot of my member organizations: Archives, historical societies that have collections of copyrighted, typically unpublished, materials, and they make those collections freely available. They may have a membership group to support the organization, but they readily make those materials available to anyone in the world. At the Heard Museum where I worked I got requests for letters from Germany, and those letters -- and this is the commercialized aspect that I'd like t try and illustrate -- the letter was technically protected by copyright, but there was never any intent to commercialize it. It was routine correspondence. There is always the possibility it could be commercialized, but it was clearly intended in the course of business correspondence. Can I provide a copy of that by scanning it and e-mailing it, rather than mailing it through international postage, adding significant cost to it? So those are some of my concerns of user groups, very hard to define in some contexts.

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Mimi Calter: I just want to echo a lot of what has already been said about commercial versus non-commercial. I do respectfully also disagree with David that the role of the library is not to make everything available 24/7, but the goal is to make as much information available as possible, within the restrictions of copyright law. And to the extent that we do want to make these materials available electronically, we're generally looking to do this to better serve our patrons, and avoiding the cost of mailing is an obvious one. The goal here, if this is something that is a legitimate electronic copy under section 108, to make someone come to a physical location to look at an electronic copy seems a little ridiculous, especially when you are dealing with a defined user base where you can clearly identify your patrons, that seems to become a really difficult proposition.

Gordon Theil: I just wanted to confirm also that in my earlier comments I'm speaking within the framework of (b) and (c) of 108 in terms of access. I also wanted to point out that one other way that a copy can be made of a book, for example, is a book that is in the process of being destroyed and the cover is off and you can actually copy the text.

Kathleen Bursley: And do you think that is preservation or replacement, do you think?

Gordon Theil: It's probably a combination of both, to be perfectly honest. And I also was going to make the same point that Mimi just made, where you can make the argument that perhaps we don't want to provide greater access to a digital copy than we would have of the original, physical item, you also don't want to provide less access. What you want to do is to provide that person who would have been able to check out that book and use it at home or be able to receive it through inter-library loan to also be able to use that material without having to go to the library, especially if it's a library that charges eight dollars a day to park, etc., not a library, but a university or an institution, for example. So I think that what I would say is that for any situation where the original physical item

would've been loaned for use, you would want to be able to make it available digitally as well off-site.

Brewster Kahle: Again, I would also like to congratulate you on preserving everything Sony is ever done. That tradition is not widely held within the audiovisual world. Just a couple of stats: The PrestoSpace Annual Report on Preservation Issues for European Audiovisual Collections in Europe: "At current rates of preservation work, the audio and video materials beginning to deteriorate after 20 years at 5% per year…"

Jared Jussim: I'm sorry, I apologize, I just didn't hear that first part of what you said. Who are we talking about when you mean "the report"?

Brewster Kahle: The PrestoSpace Annual Report on Preservation Issues for European Audiovisual Collections.

Jared Jussim: It said Europe, didn't it?

Brewster Kahle: Oh, no, no, no, Sony is not involved in this. ". . . 40% of existing material will simply disappear by 2045." Anyway, it's a problem. I think that we leverage our publicly funded institutions to take on roles that actually aren't profitable at particular times. As I understand, there's quite a bit of work being put on UCLA and USC to do some of the preservation work, which I think is just fantastic. And I think that the area here that gets back to the 108(c) preservation section is that bulk preservation is becoming more the norm in these sorts of untraditional areas, such as television, movies, web pages, so bulk preservation where it's not, "that book was lost, we're going to get it back by interlibrary loan to make a copy and re-bind it" sort of thing. So more bulk preservation I think not only should be encouraged, but should be better funded so we actually keep our cultural materials around. Then it gets around to the access part, and Professor Nimmer brought up for things that are kind of off the market, not commercially viable, whether they're out of print or orphan works, and things like that. That's a certain class, and I concur. Then there's the materials

that are still commercially viable, and the question is do we keep those away completely or do we have some limited set of uses of these? And when I go around and look at how people use books and libraries, they're not just doing it as if they were going to Barnes & Noble and getting around it, not in research libraries. So in research libraries, often the people will have a couple of books out, and they're using the books out in a non-traditional way. They're cross-correlating things, and it wouldn't have been something that you would have imagined replacing a Barnes & Noble by people reading it through, because some of these things were meant for a particular time, and they're being used in a different way. My point is, in-print works, commercially viable works can still be made available within a library-type environment in such a way that protects the publishers' interests, but serves our research interests. It may be a more qualified, more diminished way of getting out those in-print works, but I suggest that we don't rule those out.

Dick Rudick: Brewster's question is a segue to a clarification question/follow-up question I wanted to ask, and Mary may want to ask one now so that these questions can be addressed in the 15 minutes we have left, and your last comment is a segue to something I wanted to say, and that is that we would love input from you as to what types of restrictions -- that's our third question – should we impose to reduce risks, that are most useful, most effective, in terms of the purpose of the statute. Brewster, I think you started that by saying you didn't like user group definitions, exclusively. So what is best, and what is best in what circumstances, I think that's one of the questions we would love input from you on. And then, Mary, would you like to ask a follow-up question as well?

Mary Rasenberger: That would be great, actually. To follow up on what Dick was saying, the other types of restrictions, I think some of you already mentioned simultaneous user restrictions as well as user community restrictions. With simultaneous users we sort of had in mind the e-lending type model where a user of a library can

check something out for, let's say, a period of a couple of weeks, and after that time it expires, their ability to access it expires, and then somebody else could check it out. It would be like one person checks it out at a time, very similar to the analog lending model.

We also, though, would like comment on access controls, I think in the paper we mention should we be looking at TEACH Act-type access controls, or are there issues with the TEACH Act provisions? We'd be very interested in hearing from you on that. And then also the notion of having users have to somehow sign or go through user agreements preventing them from further transmitting or downloading copies. So that's all on Dick's point regarding on this off-site access.

The other follow-up question I wanted to ask goes to the distinction David raised about commercial, about currently being commercialized versus what's not being currently commercialized. What about what is referred to as "the Long Tail," what about works that are not currently being commercialized but where a rights-holder wants to retain the right to bring it back out, and you've got libraries who are making it publicly available online, is that an issue or isn't it?

Dick Rudick: OK, that's a lot of stuff to cover, and we'd like for this part of the discussion to end at 11:30. So we have 15 minutes. We have Cynthia and Jeremy in queue, then Sherry, David, Kathleen, Richard, and Kenny.

Cynthia Shelton: I'm coming in on the tail end of the conversation, before your questions, but I have to make a point that preservation, in a university setting, is not an end in itself, it's a means to access. So preservation can be an end in itself in certain circumstances, but we spend a lot of resources in having the analog world and making sure we respect the right of the copyright holder and to get out to the user materials that have been damaged or lost and so on. So, if you advance into the series of questions, it would be very restrictive to even try and place a simultaneous user model over the distribution of copies for preservation purposes. It just doesn't fit the

way that our identified and definable users get access to research and teaching materials.

Jeremy Williams: A couple of things. First, David's discussion of commercial viability and Mary's question about Long Tail are very related, because the fact of the matter is that as part of the distribution process copyright owners, and this is particularly true, I know, in the film and television business, do make commercial decisions about the rolling out of product. I think as we get into the future it's probably going to be likely that more product will be available more of the time, and there will be less of that, but it is nevertheless, I would submit, a part of the commercial distribution decision that copyright owners make, and the fact that something may not be commercially available now does not mean that it is not commercially viable. And one could imagine, particularly -- just as members of the Library Committee were saying complimenting movie studios for preservation, we could compliment the people at this table for their respect for intellectual property owners, but as we said at the very beginning, we don't know who is going to be able to take advantage of this. I mean, I can start the Jeremy Williams Star Trek Fan Club Archive Library Museum. I can say I am making replacement copies of my vast Star Trek collection, and I can say that it's really too bad that Paramount has not put them all out at this time. So I'm going to make them available to researchers and I require that you come to my website and attest "I am doing this for scholarly and research purposes." I don't have a great deal of faith that that necessarily would be followed strictly. The result would be that I, rather than Paramount, would become – under all the restrictions we talked about – the distributor of Star Trek episodes when I wanted to. That's very different than somebody saying I want to make a replacement copy to be sure that even if Paramount forgets to do it, our archives will make sure that it's done. So the issue of replacement, preservation, which is what 108 is primarily about is very different from access and distribution.

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Sherry Schmidt: I want to speak to the TEACH Act. The experience of the education community with implementing the TEACH Act has been one of enormous frustration. It's presented institutions with huge, almost insurmountable problems, and to my best knowledge there are only two institutions in the country, one in Lolly's state – North Carolina State – and one at the University of Minnesota, I'm less sure that they totally implemented it. But if we really want to effectively modernize section 108, we need to keep the TEACH Act out of it, because that has not helped anybody or anything.

Dick Rudick: OK, four people, ten minutes. David, Kathleen, Richard, Kenny, have I missed anyone?

David Nimmer: I agree that the TEACH Act is not a template for anything but messing up. To answer Mary's question about the "Long Tail," it's a very legitimate point that -- Jeremy makes the point that in years past, let's say Disney used to decide to release Fantasia theatrically and then keep it in wraps for five years and then bring it back. So that was a model that copyright owners did use to create that effect in the past. My current proposal would largely eliminate that option, which I believe follows the marketplace, which is not currently following that model. So, the way I envision the description of currently commercialized works and not currently commercialized works would be as follows: If the Getty determined after a reasonable investigation, to quote the current language of 108(c)(1), that that was not being commercialized, then it would have the right to digitize it and make it available, and it would have safe harbor for the future until such time as: 1) the work was made commercially available by its copyright owner, and 2) the Getty became aware of that perhaps through some mechanism analogous to the reliance parties provision of section 104(a).

Kathleen Bursley: I just had a few sort of unrelated points. The way we're talking about this, I just want to be sure I have this right, we are really talking primarily about analog-to-digital replacement and preservation, is that correct? I mean, I'm just thinking. For example, you

have a digital product under license, you, the library, have a digital product under license, something seems to be going awry with it, it's not commercially available, you make a replacement/preservation copy, whatever it is. I'm presuming that that would still be subject to the license terms, that you would not have more rights for that than you do under the license. One thing that was suggested to me by all of the comments put together was that simultaneous user may not make sense in a number of areas, but maybe in those areas user registration or user identification or something maybe would make sense, and maybe would obviate the need to impose a simultaneous user restriction, and perhaps making in a way that is not further transmittable might obviate the need for user identification and registration. I just suggest that because I think that's the squishy toy thing, a little bit, only a smaller squishy toy.

Dick Rudick: What do you mean by "user identification"?

Kathleen Bursley: Well, we were talking about an "Identifiable User Group," is that the term? And saying, for example, the state of Arizona, everybody in the state of Arizona at a given moment is perhaps not an identifiable user group in the sense that that's used. But if there is a smaller group, which in many instances I suspect libraries would have a smaller group than "everyone," then maybe that requires less restriction on how many people can see it at once, how long they can keep it, how it's transmitted; and on the contrary, if you don't have a smaller user group then maybe it should be more restricted as to what you can do. The only other thing I would say about the "Long Tail," I guess, is the concept of unpublished documents, whether letters, manuscripts, whatever, that for example are donated to a library or archive, and that are frequently subject – at least in my experience this is true – to restrictions as to what can be done with them, whether people can make photocopies, can only take notes, can quote or not quote (if you're J.D. Salinger). The restrictions are there, and I guess that I would just want to be sure that any preservation element, because I think that since these would not normally be lent, it would either be a

preservation project or one to make them available online, would take heed and there would have to be a way of imposing those restrictions, really imposing them, on the users. I think it's not up to the place that's housing these documents to effectively override the decision of the donor by effectively making them universally available when that was not what he or she intended.

Richard Pearce-Moses: I'll keep this as brief as possible. First off, a couple of comments in terms of what the SAA council has pointed to officially is that SAA is completely willing to support something like a click-through notice that is very similar to a copyright notice that has to appear above a copy machine. This is not profound, but at least it's something. We actually think that's a very good idea, to always remind people that this material may be subject to copyright, just to make sure that the end users remember that. We also do discourage registration, because it's something of an invasion of privacy. We do register users in many ways when they come to use analog materials, that's for security purposes and those circumstances are different in the digital environment. There is no need to track users for preservation/protection of our materials in the digital environment.

I'd like to also say, in regards to the "Long Tail," that the Society of American Archivists believes very much that there be procedures established in some way to protect both owners of copyright and institutions providing access. Copyright owners should be provided with information as to how to challenge distribution of their materials as part of an archival collection, while section 108 should protect institutions providing access to those materials for possible damages. They're trying to find a good balance here. That is the statement the Council made, and I will now go on to thin ice, in regards to the "Long Tail." Going back to that distinction between currently commercialized and non-commercialized, might we be able to look at something that might be protected by copyright that is not being commercialized? And should the IP owner want to commercialize it, there are clear procedures to go to that organization distributing it and say "we are now commercializing this, you may need to remove it from your

website"? That is my personal opinion, and not that of the Society, and that was a question, not an opinion.

Kenneth Crews: I'll keep my comments very brief because we've already had the alarms go off about the TEACH Act. And one of the lessons of the TEACH Act that I would contribute to this discussion is that the TEACH Act, I contend, is largely not used because no one person can use it, it takes a team of people to do it. You have to have the policy-making authority of your organization make policy, you have to have the instructor who determines which pieces to use, you have to have technology experts implement technology. I would urge the Study Group that, whatever your recommendations, ask yourselves this, in whatever you're recommending: Can one responsible citizen, who is not a lawyer, actually make the decisions that are necessary to implement whatever you're recommending, and if one person acting alone can't do it, it probably won't get used.

Dick Rudick: It's a comment on academia, I guess. Brewster?

Brewster Kahle: I'll keep it short. Mary, you asked a pile of questions. We've had some experience in different types of restrictions, for different types of works that we found to be important. For instance, the web collection the Internet Archive holds is not subject to a Digital Rights Management or a "click-through" license and it seems to be working just fine, we'll have more of that this afternoon. But I think it's an interesting example of where DRM probably would not have helped us very much – it's a great service that has been working just fine, but it does have a Terms of Service, and that has also helped a lot. So the web collection, for instance, people will go and say, "Hey, can I go ahead and reuse this web page that I . . ." and they call us on this, and we say look, we're a library, just remember we're a library. We don't own this stuff, it's just on the shelf, and that analogy of a library, at least for all we old folks who remember libraries, it works! And it's an area where DRM probably would not have worked.

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"Simultaneous Users" is a mechanism of trying to approximate loaning, right? So I think that if you kept a little vague in your definitions and try to hit sort of what's the point, it might work better for future media types that go through.

"Registered Users" has some issues around privacy that I think in these current days we should be more and more conscious of. There is some bad history in the 20th Century European tradition around tracking peoples' library use for things that I hope don't happen in this country.

On the "Long Tail," there's the "commercially available" versus "commercially viable." Let me just say a couple of things about how that's come about. The Internet Archive is a participant in the Open Content Alliance, it's working with publishers, libraries, and technical institutions to digitize large numbers of books. Mostly out-of-copyright works or works that we have permission for at this time. We have been working on orphan works, then out-of-print, and then in-print. But right now it's basically out-of-print -- out-of-copyright -- works. We give copies back to those that can legitimately have them, for instance, publishers. Gosh, might as well not have to make them also digitize these materials. And the idea of having these be short-run, print-on-demand is now kind of the rage. I mean, there is a bunch of these little companies out there that will go and print, on demand, a book for you. So then does it become commercially viable? Is it because we did a preservation copy and gave it back, and bam! We can't use it? It doesn't quite make sense, and I don't think that it would stand -- was I clear? So, there's this concept of what is "commercially viable" which I don't think really exists in law yet. I'm sure I could be corrected, but Raj Reddy of the Million Books Project has tried, by working with the government of India, to try to set some threshold. To say: What does it mean? How many books of that copy have to be sold to sort of trigger it into "it is commercial"? So there might be something in there. I would again keep it vague, otherwise we're going to end up with a CONFU problem, but I think it might represent what it is we're trying to achieve here, and trying to keep away from commercial distribution.

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Dick Rudick: I will resist making a comment on legislation which is potentially vague, it happens though. I think we've run through the cue, and we're right on time. I'm sorry, Jared?

Jared Jussim: I will try to keep it brief too, and I'm responding to Professor Nimmer, and I'm responding because he is so erudite and so highly respected in the law, that I feel it incumbent upon me not to let his comment go unanswered. And he's dealing with the term "commercialization," and as I gather, his example is if the Getty decides, in their unique ability, that something is not being commercially exploited, say, something that Disney is resting for six years or for whatever period they decided. They unilaterally, even if it's only resting for one year, can suddenly come out with it and they have a safe harbor from that time forward until Disney brings it back forth again, which sounds nice, except that I'm always suspicious of one person unilaterally making the decision about anything. Number two, it takes away from the person who's put a hundred, a hundred and fifty million dollars into a picture, the ability to determine how/when to release it. One of the nice things about the motion picture business in this country, that is the way we produce and distribute films on a worldwide basis, is we make it available in different markets at different price points. And I know I sound like I'm worshipping Mammon, but I got to tell you that a lot of these non-profits and universities – I paid a few tuitions – also have seemed to worship Mammon. And so, we make it available theatrically, pay television, DVD, free television, and each period the price really goes down, so eventually -- except for the problem of watching commercials, commercial interruptions, which, by the way, you can avoid -- you get it for free. This is a wonderful system, and we produce a lot of product, we make a lot of things available, and before we take this -- and one of the problems with the questions is the world is a seamless web, and the law is a seamless web, is that you can't take one without seeing what its impact is on everything else.

Now, you referred to the digitalization under the European plan. Let me explain to you one of the reasons

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Europeans have problems: Their copyright is different from ours. Their copyright law is based on authors' rights, and "author" to them, as a matter of religion, must be an individual, and you have to spell out every one of your rights, and you can't have new technologies. So if you get all distribution rights to a motion picture – which by the way, many of us thought was "all distribution rights to a motion picture" – you don't have television rights. So they have a lot of product in Europe sitting there that no one can exploit because the agreements do not allow the exploitation of it because they don't have the work-made-for-hire concept. That is one of the reasons why their property might be disintegrating: They cannot exploit it because they don't have the rights. Also, one person, one author – and you never know who the author is, because the author will be at a minimum, and I'm sorry to digress like this, but this is copyright, is the director, the writer of the underlying literary material, the writer of the screenplay, and the composer of the musical score, and, if I was in any Nordic country, anybody else who makes a contribution to the film, which is a lot of people, that is a copyrightable contribution, which is the cinematographer, and if I was in Germany it's that, but he has to be one which can't be separated from the film. So they have a lot of people who have to get together, and that's why. We in this country have a different system, and by the way, that's why we control – well we don't control, because we don't force anybody to watch our product – we sell, license 85, 90, 95% of people who voluntarily go in, and go to see our products in other countries.

Dick Rudick: I want to ask a follow up question, and then we're going to have to go. What you just said about the way that films are made in this country, how does it apply to, say, a documentary film, because we're with the Preservation Partners, and the Library of Congress partnerships are doing this preservation, and documentary films are not necessarily made by major producers.

Jared Jussim: You mean the work-made-for-hire?

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Dick Rudick: No, imagine all the stuff that's not produced by a large corporation, the preservation problems, what would you do with that?

Jared Jussim: There are independent producers who do the same thing we do. There's literally I don't know how many thousands of films produced each year by independent producers. There's nothing magical about our work. In other words, we distribute for example *Fog of War* and *Why We Fight*, those were actually independent productions which were distributed by our Classics Division. They were produced in the same manner, and distributed in the same manner. I'm sorry, I don't understand what the question was.

Lolly Gasaway: The question was the preservation, not the production.

Jared Jussim: Oh we treat them… if we touch them…

Dick Rudick: You forget, this isn't about you.

Jared Jussim: You have to understand, we're talking about my wallet, it's very important to me.

Dick Rudick: Does anybody want to comment on this in less than three minutes. I'm asking about the little guy, whose stuff is often hardest to preserve, does anyone want to comment for three minutes?

Jeremy Williams: I'll comment for one minute. I just want to bring this back to the difference between preservation and distribution. I don't think that in anything that we talk about from the content owners' side, the concern is fundamentally about preservation. Whether the works are big or small, I think that preservation/replacement is a goal that we can all support. As to the distribution right, it is possible that a smaller producer could be even more damaged by an undermining of his or her market, if the person of course is choosing to make it available for free or in a non-profit basis, that is their choice, but I

wouldn't assume that the small copyright owner is necessarily any less harmed, could be more.

Richard Pearce-Moses: I will try to this in one minute. There's a wonderful film I would recommend you watch, it's coming to me from Netflix on Friday, called *Lyrical Nitrate*, on all of the wonderful nitrate movies that are being lost because no one's preserved them, and this does get at Mr. William's comment because if the films are not preserved, there is no access at all. So, it's a very complicated problem.

Kathleen Bursley: I'd just, in terms of the little guy, or the little movie maker, the one who makes a four-minute movie or something, and it's not preserved, I would also suggest that lack of commercial exploitation or availability, or whatever, is something that changes over time. Not many people bought John Grisham's novel *A Time to Kill*, which came out before *The Firm*. After *The Firm*, a lot of people bought it, I think you could extend that to short stories, to work that was done as a student filmmaker, that kind of thing. The commercial exploitation aspect of it, I think, is quite complicated, and not an either or proposition.

Lolly Gasaway: We'll move to another question, then. The off-site restriction that we've been talking about for preservation of unpublished work and replacement of works where we use digital to replace or to preserve, those two types – only unpublished is preservation and for published it is replacement after you've tried to buy it – that premises restriction says "to a digital copy". Well, there are some digital works which are tangible digital copies, like DVDs and CDs. We've all been puzzled in the library community as to why when a library could loan that original CD, and we replace that by a digital copy that we make because it's not on the market, is that now restricted to on-premises because it is digital-to-digital? And the question for you is: Should the rule be the same if the digital copy is going from a tangible copy to another tangible copy about premises restriction. Does that make

sense? It's kind of a hard concept. D oes anyone want to talk about that?

Kathleen Bursley: It sounds to me as though it's sort of like my question about a replacement for a digital bit of information or work that is licensed to the institution.

Lolly Gasaway: Except there's no license.

Kathleen Bursley: Right, exactly. I would say that while you shouldn't have more rights than you would have had under the original license or the original material, I'm not sure you should have less, either.

Lolly Gasaway: Anyone else?

Gordon Theil: I would agree with that assessment. There should be no loss of an access which resulted after you had to replace something.

Lolly Gasaway: There is sort of a side question that comes in here. If it is a DVD that is, of course, encrypted, then we run up against the anti-circumvention provision. The CD is an easy one because we don't have that. What do we do about that? It is not available.

Brewster Kahle: Preservation should be allowed. Not only should it be allowed, it should be encouraged as a society. The idea of preserving these materials. Access, we are restricted, but by libraries and archives -- we ran into this real problem when we were dealing with software collection, so we received a donation of 10,000 CD-ROMs and floppies, this is classic software: The original VisiCalc, the original Lotus 1-2-3, Tetris, in Russian. I mean, this stuff is great, and a lot of it is copy-protected. We had to go and spend $30,000 of lawyer fees to try to get a three-year exemption for the DMCA allowing us to -- allowing us to break copy protection for preservation purposes. This makes no sense, we don't have $30,000 dollars for next time, you know, three years from now. Actually, it's just coming up, we're doing it with pro bono work, so we'll see how we do. So, preservation, God bless

it, let's do as much as we can, please don't stand in the way.

Gordon Theil: I second that. The 1201 rule-making process is very cumbersome and it's not inclusive. There are CDs that are also restricted, the SA-CDs, and there is material being issued on those, so we need to preserve those recordings.

Jeremy Williams: I think the reason there is a 1201 process, cumbersome as it may be, is that the issue is a complicated one, and permitting circumvention raises a lot of serious issues, and that's why that process is there. I would be concerned about using the backdoor of 108 to get around that. Part of the reason is, it's nice to say "let me circumvent because I'm just a very responsible person who only wants to use it to preserve," but there could be a long line of people standing up and saying "I have a good reason." And I know that there are a lot of people who do not believe that there should be a 1201, but that is an important part of the modern Copyright Act and you all know, having been involved in that kind of process, it's not as simple as saying "I have a good reason therefore I want to circumvent it."

Lolly Gasaway: There is that little library exemption in 1201 about circumventing too . . .

Jeremy Williams: But even that has complexities.

Lolly Gasaway: I know, I know, but my question was, following up on that, whether that could then be tweaked to deal with replacement copies, when there's none available.

Kenneth Crews: On this issue, I don't think there's a happy medium kind of answer even out there to find. Because no matter what, no matter how any opportunity to bypass 1201 for preservation purposes may be drafted, no matter how easy the conditions may be, you're still coming down to the question then of, OK, I've checked off my list of pre-conditions, can I hack my way through this code, and if I'm wrong I'm going to jail! So, it just really creates

a highly unseemly set of circumstances that real librarians – and I'm using that as just a catchphrase here – that real librarians are really going to have to face, and I don't think it's a healthy set of circumstances. Whatever we propose here, and whatever you propose here, I hope that some criticism of that state of affairs makes it into the report.

Kathleen Bursley: I think this is sort of a segue to something I wanted to mention but doesn't fit in exactly with any of the questions. The ability to circumvent for purposes of making a preservation copy certainly has the possibility of abuse, shall we say. And one of the difficulties with a lot of these questions about access, and making replacement copies, and how are they made available online, and whatever, is what is the remedy if, in fact, you have a bad seed librarian, an institution, let's say, which is really abusing the requirements. It's very awkward in the case of books and journals to sue your customer, for a publisher whose materials are being misused, and I wonder if – going partly to what Kenny was talking about, I think – if there's a way to have, I'd hate to suggest another bureaucracy, it's really just appalling to even think about it, but if there's some mechanism for resolving some of these things that falls short of suing your customer or going to jail. I mean, some middle ground in there, that there might be something that could be fines or things like that, something that would be less Draconian than suing your customer or just taking it.

Jared Jussim: I'm going to speak very limitedly on this, if there is such a word, because there's a man in the back, Grover Crisp, who is far more of an expert in this than I am, but merely hacking, ripping the DVD and making a copy is not going to give you a preservation copy. That type of copy which is made from a DVD, even if you get through the hacking, is going to be one that is very prone to erasure, very prone to disintegration, very prone to not making a good copy. So, when you talk about preservation, that won't be it. There may be other methods of preserving digital copies, but DVD to DVD is not going to do it. I just mention that by the by. So when you tell me that you're

preserving a copy I sort of say, well, I'm not too sure you are. But I'll let Grover speak to that, because Grover can give you more on that.

Now, when you talk about circumventing, and I've dealt with Russian works, so my question is: Did you try to find the copyright owner? Because they can be found. Anything pre the change in government – there was a society, and it still exists, and you can write to them and they write you back, and you make a deal, or they sell you another one. They're very nice that way, you know, Russians have always been in business and they like money. You know, my question really is, what is really necessary? And then there's the hacking, and like Jeremy said, if you give somebody the key, there's no guarantee that the person is going to use the key for the right purpose. Now, if works are disappearing, they're vulnerable, we're obviously keen to that, nobody wants to see works disappear, we want them preserved. What we're worried about is taking works that are available, and somebody saying "well, I'll skip a few bucks, I'll build up my happy little DVD collection, I'll build up my virtual library, I'll make copies, and I don't have to worry about it." That's what I'm worried about. Now, I know everybody in this room is honest, and everyone is virtuous, but there are people out there in the world who aren't necessarily the most honest, and I'm told that at some universities – I don't know why they don't just give the students more homework – they send up our movies all over the place. My solution to that is increase the homework load. Stanford is looking at me with dirty looks, but it's OK.

Cynthia Shelton: That is Stanford, I'm from UCLA.

Richard Pearce-Moses: I wanted to echo Kathleen Bursley's point here, because I think that is what I was trying to get at with this concept of process and some sort of protection for both rights, and I'm not sure how we'd craft this, but if we can come up with some really good procedures where the copyright owner can say "wait, wait, wait, you're not doing that right," we can be protected from – if we did a due diligence, good faith effort, what does that mean? – But if we do a due diligence, good faith

effort to find a copyright owner and we make a mistake, an honest mistake, that we don't lose enormous sums. I think there's duelling responsibilities here, or joint responsibilities here, because one of the biggest challenges is finding the copyright owner. Can we encourage those intellectual property owners to use the University of Texas -- and I'm sure there may be others -- UT has writers and they're copyright holders, especially for those cases where the author has died, who do we go to ask? Our biggest challenge at the Heard Museum in trying to get any of our holdings of paintings that were copyrighted up on the Web, was trying to contact Native American artists, and we chose not to publish most of our collections on the Web in any fashion – we're going into access, I'm sorry – but because we couldn't even find the owners. If we can find mechanisms where it's pretty easy to find the owners, the owners can find us – and we're going to have bad apples that we need to look out for – but I am cautious about writing the law for the bad apples in a way that prevents the good apples from doing useful work, where's the balance?

Mary Rasenberger: I just want to put the thought in your head, related to the circumventions again. It's something that has come up in the Study Group, and if you have a reaction to it I'd love to hear either now or in comments. Section 112, which deals with ephemeral recordings does have a provision that says that if the transmitting organization, they want to make an ephemeral recording that is protected by TPMs, they have to go to the copyright owner – well it says that the copyright owner shall make available the means to make the photocopy. So it could be that they provide a non-TPM-protected copy or they find the means to circumvent, and if the copyright owner fails to do so in a timely manner, then the transmitting organization can circumvent and won't be liable under 1201, which isn't an out and out exception to 1201. The thought would be if you could something somewhat similar for preservation, where you have to go to the copyright owner first, and if you need a preservation copy you need to wait a particular amount of time if the copyright owner fails to provide one.

Topic 2: Amendments to Current Subsections 108(b) and (c): Access to Digital Copies

Brewster Kahle: There are different types of works that we're talking about. There are DVDs that have been on the market for a long time, and there are things like web pages or software titles. Preemptive preservation is about the only way that we know how to deal with, say, the issue around web. To answer your question, yes, we did try contacting some of these old publishers of these antique disks, and generally, you just can't find them. If you want to look at good studies about how hard it is to try to clear things that are not commercially viable, look at the submission for the orphan works. There's a fantastic set of documentation from the library communities that just tried.

Jared Jussim: I'll make it easier for you, it may help you out, too. One of the things that I put together, because I deal with that problem all the time, I mean, because I clear, under my jurisdiction, every motion picture that's released by Columbia Pictures, Tri Star Pictures, Screen Gems, Sony Pictures Classics. I will tell you, we put a list together to check all the different ways to find out where that copyright owner is. Because our directors – and I know Jeremy's are the same way – do not care, so we run around clearing everything, with people watching the film and spotting everything that goes into it. And we have a list on how to check and find out who they are.

Brewster Kahle: So, I would strongly suggest in most categories of digital works that preemptive preservation be encouraged.

Lolly Gasaway: We'll talk about that a little bit this afternoon too.

Mary Rasenberger: Jeremy, and then Kenny, and then we have to stop.

Jeremy Williams: Mary, the concern I have with the ephemeral recording is that in that section you have a very specific and narrowly defined things that are eligible, and then very specific uses. If we are contemplating this for the very broad notion of libraries and archives, the copyright owners would not be in a position of encouraging

anyone to come and say "I'm from the Archives, and I'm doing this for preservation purposes, give me the key," when the consequence of saying "I don't believe you" is that they can circumvent, it's not a very good point for the system. If libraries and archives were defined as narrowly as broadcasters are in 112, and the purposes were defined as narrowly as in 112, I think that some would be willing to consider it, but I don't that would be a useful direction in this arena.

Kenneth Crews: In response to Mary's question, and if I'm following it correctly, I think you're getting at a concept of should there be some mechanism if the work is behind some technological measures to actually even require the copyright owner to make it available for limited purposes. And there is this model in 112, or we can look around the world and think about other models that pick up on that. The German copyright code, within the last year, year-and-a-half, in response to the EU directive, adopted such a provision, that there are exceptions to the technological provisions, and one of the areas, especially in the area of teaching and research – if it's behind technological restrictions – you, the copyright owner, must make it available so that people really can have the benefit of these exceptions.

Jared Jussim: But not circumvent the technological protection it mentions.

Kenneth Crews: That's right. We save the librarian from saying am I right, or am I going to jail? We avoid that problem, but it does put the burden back on the copyright owner to make the work available, whatever that means, whatever pre-conditions go with that.

Lolly Gasaway: Thank you all very much. This was a great session; we'll see you back at 1:00.