TimeWarner

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Via E-mail and Overnight Delivery

April 28, 2006

Mary Rasenberger
Policy Advisor for Special Programs
U.S. Copyright Office
James Madison Memorial Building, Room LM-401
101 Independence Avenue, SE
Washington, DC 20559-6000

Dear Ms. Rasenberger:

Pursuant to the Notice of Public Roundtables with Request for Comments issued by the Copyright Office and the Office of Strategic Initiatives of the Library of Congress in the *Federal Register* on February 15, 2006 (the "Notice"), I submit the following comments on behalf of Time Warner Inc. and its divisions to underscore issues raised by representatives of Warner Bros. and Turner Broadcasting Systems, Inc. during the Roundtables.

Time Warner commends the important work of libraries and archives in preserving copyrighted works for research, education and other socially laudable purposes as permitted under Section 108. We are also cognizant of the fact that the Study Group and the Copyright Office must balance sometimes competing interests of content owners and libraries and archives. Mindful of our legitimate interests as a content owner, we would like to be supportive of the interest of libraries and archives in updating Section 108 to reflect the preservation and archival activities in the digital world. However, our overall ability to support those interests will be determined by the details of the Study Group's final proposal. We are particularly concerned that the limitations on the reproduction right embodied in Section 108 not extend into other exclusive rights of copyright owners set forth in Section 106, in particular the distribution right. Moreover, if libraries and archives are defined explicitly and with the reference to more narrow criteria than the present statute, we would be more likely to agree (as discussed below) with some of the suggestions raised in the Study Group's discussions.

Based on our participation at the Roundtables, we believe that certain areas of agreement are emerging between content owners and libraries and archives. Those areas could form

the basis of a consensus proposal that would improve Section 108 without threatening content owners' legitimate legal interests. For instance, it appeared to us that there was general agreement that libraries and archives should be defined in a concrete manner. Although the criteria that were most valued by the participants varied, both sides seemed to put conceptual value on clarifying the required non-profit and non-commercial nature of the activities undertaken by libraries and archives. We support revising Section 108 to make it clear that only non-profit institutions, with bona fide, publicly accessible library premises, are included in the definition.

In this vein, provided that the definition of libraries and archives is narrow and the nature of entities included in the group are thus reasonably identifiable, agreement seemed possible also with regard to the application of Section 108 exceptions to non-profit, non-commercial archival and preservation activities by museums. In our opinion, no particular distinction exists between the archival/preservation activities of entities like the New York Public Library and the Metropolitan Museum of Art.

With the same appropriate definition in mind, we likewise see potential consensus with regard to permitting outsourcing of certain activities under Section 108, provided that adequate controls and conditions are placed on the entities performing the outsourcing. Such conditions to using outside vendors should include at least the following: (i) the vendor shall not retain copies for any longer than necessary of the content provided, i.e., copies and originals must be returned to the library/archive premises and no copies may remain at the vendor's premises (e.g., servers, etc.); (ii) the vendor must make appropriate commitments and warranties relating to confidentiality and security; (iii) the vendor must be in the business of providing the services involved and financial consideration must be paid to the vendor for the services; (iv) content owners whose works are to be digitized shall be named as third-party beneficiaries to the agreement; and (v) the library and archive must be held accountable for any vendor misconduct, whether negligent or intentional.

Although there are certain areas where consensus seems to be emerging, there are other areas where we have not yet seen an acceptable solution. Although we urge the Study Group to narrowly define libraries and archives in order to make the above-identified compromises possible, we also urge the Study Group to recognize that with respect to other issues, such as the remote access problem discussed immediately below, premature expansion of the Section 108 exemption will effectively narrow the scope of our core Section 106 distribution and performance rights. We do not believe it is desirable or appropriate to use the Section 108 revision process for that purpose.

Time Warner is concerned that granting remote access to works reproduced under Section 108 will unduly endanger the content owners' exclusive right of distribution. While we have sympathy for certain requests to update Section 108 for the digital age, the basic premise of the request to grant remote access to copyrighted works involves the right of distribution and serves no particular preservation and archiving purpose. The unintended consequence of granting remote access to the collections of libraries and archives will be to undercut a rapidly developing and vital commercial business model,

namely, the provision of commercial on-demand information and entertainment services. With respect to audiovisual works, remote access upon request is the very essence of the market widely referred to as "Video On Demand".

This undercutting of the Section 106 distribution right of copyright owners has basic economic repercussions that will inhibit the ability of the rights holders to produce new works and to provide them in formats and markets that permit on-demand access. If, as discussed in the Roundtables, libraries and archives were able to send unlicensed content digitally to a subscriber's home, their activity would directly compete with commercial VOD programming. And even a narrow definition of libraries and archives would create thousands of potential distributors and/or exhibitors of works. An open-ended definition could produce millions. In either case, and even with a "one-at-a-time" limitation, the negative effect on emerging VOD markets would be significant. Thus the right of libraries and archives to engage in that form of program delivery should be the subject of licensing arrangements determined in the marketplace, not the result of an exemption primarily intended to facilitate archiving and preservation

We note that during the Roundtables in Los Angeles, concerns were also raised about the effect remote access would have on content owners' decisions as to when best to commercialize content, given Section 108's conditioning of the ability to make a copy on inquiry as to whether the content is subject to commercial exploitation and whether a copy can be obtained at a reasonable price. Content owners frequently "rest" previously released content for a period of time in order to develop viable market for re-release. The suggestion that Section 108 might potentially enable libraries and archives not only to make a copy of a work currently being rested, but to additionally enable consumers around the world to access it remotely from the library's or archive's collections, is extremely troubling, and would materially undermine current business practices.

The Study Group has hypothetically presented the idea of a narrow definition of libraries and archives. Nevertheless, we believe it is unlikely that any definition of libraries and archives could be constructed narrowly enough to eliminate the threat to the distribution right about which content owners are concerned. Absent an adequate solution proposed by libraries and archives, Section 108 should continue to require on premises access.

We also note that others have apparently suggested enabling even entities deemed "virtual" libraries or archives to exercise these potentially expanded rights. We find such suggestions particularly disconcerting, as they apparently seek to expand the exceptions to entities with no physical premises and no true affiliation with members. We doubt that such entities can readily be distinguished from unlicensed peer-to-peer services.

Time Warner is also concerned with the potentially broad scope of the proposed new exception for website preservation. We are concerned that purported "archiving" and "library" activities conducted pursuant to the exception could serve to replace subscription and advertising supported services. Undermining business models that support subscription services like GameTap, a broadband entertainment network that offers video games plus original programming, will result in less content being available

online. We are likewise concerned that if archival or library copies of "preserved" websites were to be made available to users, public confusion as between the "live" and the "preserved" site may result. This would be of particular concern with respect to news sites such as CNN.com.

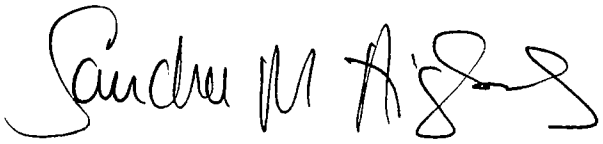
As mentioned at the hearing in Washington, D.C., based on our practical experience with content archiving for our commercial services, an exception permitting the capture of websites would have to be so broad that it would be futile. In many instances, running today's websites requires more than just a capture of a webpage. It requires a web publishing system, which operates differently depending on what a given company seeks to enable at any specific time. A webcrawler would not be able to capture and operate the webpage without the publishing source system. Without such playback and presentation components, the content experience could not be preserved in the manner apparently desired by archivists.

It is unclear from the Notice how deeply into a website the library and archival privileges would extend. The notice suggests that users might be permitted to capture not only an image of the home page of a given website, but also the content and the underlying software used to deliver the services to subscribers. Many of these elements are licensed from third parties, who may not be inclined to offer licenses, or to offer licenses on the same terms, if by virtue of being used to facilitate an online service, their intellectual property would become subject to uncompensated and unauthorized copying and distribution through libraries and archives pursuant to the exemption.

Regarding various questions posed concerning the use of technologies to "opt out" of being captured pursuant to the exception, Time Warner would object to any exception that would require an "opt out" for the exception not to apply to a certain website or online offering. As a practical matter websites and online offerings become increasingly dynamic (i.e., produced in real-time for individual visitors from various software programs operating on data), signaling what is copyrighted and what is not becomes highly problematic. Moreover, in order to effectively archive a site, greater cooperation is needed from the site owner in terms of how content is marked to enable capture and display. It is our belief that any website should be notified ahead of a crawl and capture, in order to allow the Website to "opt in" to the captures. "Opt in" is the appropriate mechanism to indicate a desire to be archived pursuant to the exception, and such an approach is consistent with the Copyright Act.

We welcome the opportunity to review any proposal or questions the Study Group may present and to provide further information to the Study Group throughout the commenting process.

Respectfully submitted,



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