Transcription
Section 108 Study Group, Public Roundtable #2
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Topic 1: Eligibility for Section 108 Exceptions

Participants

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Allan Adler, Association of American Publishers

Paul Aiken/Jan Constantine, The Authors Guild, Inc.

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William Arms, Cornell University

Thomas Lipinski, University of Wisconsin – Milwaukee

Keith Kupferschmid, Software & Information Industry Association

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Roy Kaufman, John Wiley & Sons, Inc.

Ken Frazier, Association of Research Libraries & American Library Association

MS. GASAWAY: Section 108 currently does not define libraries and archives. Instead, it lays out certain criteria that libraries and archives must meet in order to take advantage of the exceptions. For example, the libraries and archives must be open to the public or to researchers in a specialized field and the exempted activity must not have a direct or indirect commercial purposes.

Concerns have been raised that the terms "libraries and archives" are increasing used by some in a broader and more generic sense than was initially intended in the 1976 statute. It's not clear whether these non-traditional types of entities are covered. So the Study Group has discussed whether the statute should clarify what institutes are covered by 108 and whether the clarification would be achieved by adding some definitions or some more criteria to what helps you qualify for these exceptions.

For example, the group has considered adding definitions or additional criteria to reduce the risk of section 108 being abused for what is really a business activity as oppose to an archive as we traditionally thought of them. At the same time, there may be pressures to open section 108 up to institutions that are not clearly covered. For example, for museums or other types of institutions. So the group has discussed four issues and these are the questions that

we're going to be asking this morning, but we're going to take them in order. But I want to review all of them for you to start with. Whether Section 108 should be limited, but to non-profit entities? This would be either in addition to or in lieu of the other qualifying criteria. Whether virtual libraries or virtual collections within physical libraries that are part of an institution should be included. The third question -- whether museums or other cultural heritage institutions should be covered and why? Then, lastly, whether outsourcing should be expressly permitted and, if so, under what circumstances should we do that?

We're going to take those questions in order. The first one that we want to talk about is whether eligibility should be restricted to non- profit or government libraries and archives for some or all of the section 108 privileges. And then, as you address this, what are the benefits and drawbacks to limiting section 108 to non-profit government bodies. We encourage you not to read a prepared statement unless you can home in exactly on that.

(Laughter.)

MS. GASAWAY: If your prepared statement has a three-minute answer to that, go for it. Who would like to respond to that? We hope someone.

(Laughter.)

MS. GASAWAY: Ken, if you would say your name the first time.

MR. FRAZIER: Ken Frazier from the University of Wisconsin, Director of Libraries. I'm also representing ARL.

Increasingly research libraries are partnering with museums and historical societies, including small community historical societies. This is especially true in the areas where we're dealing with more digital content where we're seeing content that has very high paper pressure. It can disappear at any time. We are very much in favor of not narrowing the eligibility for the application of 108. We're particularly interested in the opportunity to partner with museums, cultural institutions in order to achieve preservation.

MS. GASAWAY: Roy.

MR. KAUFMAN: Roy Kaufman. I'm not sure I have a huge disagreement with Ken Frazier on this point, although I think the question of whether this should be limited to non-profit entities, most of what he's talking about are likely to be non-profit entities. I'm somewhat unique, I think, in that the company I'm responsible for, most of its business is with non-profit entities and governments. But I do think that is a meaningful limitation once we start talking about for-profit entities. It really opens this up and it's not so hard, quite frankly, to be not-for-profit entity. If you have a not-for-profit mission, you'll get not-for-profit status. This is an exemption that has a lot of power.

If you are a for-profit entity, you can still do what you want to do under a license or with permission. And there are certainly very robust engines and ways of getting about that. So I think the not-for-profit part is a meaningful limitations as, by the way, and I don't know if this is still a question, is the limitation currently in about not being for direct or indirect purpose. And I would add to that or in competition with existing business models. I can imagine some library acting in a manner which competes with for-profit companies who are licensed to do things and the fact that they may or may not claim that they're getting direct or indirect commercial damage because they're not-for- profit really shouldn't exempt the activity. Are they going to destroy business models.

MS. GASAWAY: Allan and Dwayne almost simultaneously. Do you all want to arm wrestle?

(Laughter.)

MS. GASAWAY: Dwayne first and then Allan.

MR. BUTTLER: My name is Dwayne Buttler. And, to go back to what Ken Frazier said, it's important that museums be added to 108 because I think we do that already. I also think that we need to keep in mind that a lot of people have to understand how to apply this. There are a lot of libraries that need to understand those qualifying conditions. I'm a little bit concerned about the notion. I'm comfortable with the direct commercial advantage. I've always been a little bit uncomfortable with indirect commercial advantage because sometimes, look at me, I talk about it a lot and they go what the hell are you talking about?

I'm okay with that, but the idea is we're not in competition with someone else. It's a little bit of concern to me as well. I work for a big archive and I'll talk a little bit about that later today, but I do think we need some clarity and some flexibility in how we define this. I've been pretty comfortable with the way it's defined.

MR. RUDICK: Allan.

MR. ADLER: Allan Adler of AP. When we're dealing with privileges, especially when we're talking about expanding privileges primarily because of new technological capabilities that are available in order to be able to enhance the way people view traditional mission responsibilities, it's probably a good idea that we don't sort of slavishly tie ourselves to the notion of having to make determinations based on an entity's status.

One of the things we've learned over time that has evolved as technology has evolved is whether or not something is actually a non-profit entity or a non-profit activity is going to be very, very dependent upon the actual circumstances involved. Non-profit status for an entity is either a matter of tax law of a matter of corporate

structure or a matter of other things that don't really say much about the activities involved. So I would hope this group is going to keep an eye on the fact that we all are aware of for-profit entities engaging in not-for- profit activities and not-for-profit entities that do engage in activities that can be characterized as for-profit.

So I think that in that sense there's a tradeoff to the extent you want to look at entity status as the key to who is the beneficiary under this provision. That tends to be something that is going to be very static once you actually have made that determination.

I would hope we may do some of that. But we spent most of the effort here trying to find which activities are actually the ones that should be subject to privileges that will be expanded or newly devised under this exemption.

MR. LIPINSKI: Tom Lipinski. This is the first point I would make. I start from the premise that both owners as well as users in virtual space of a digital content as well as with traditional space. If we're going to move or tweak a definition of qualification under 108 that's more functional, then I would be concerned that we clarify or at least maybe to follow-up on Dwayne's point about direct versus indirect. Other legislation is brought in on a somewhat similar concept that may even be more confusing to the non-legally trained direct or indirect financial benefit. That there should be a difference between the financial concepts that are at play in Section 512 and whether you're in direct commercial competition or commercial activity under 108.

I don't know if I have an answer for that, but I'm concerned about becoming sort of one nebulous concept, which may be more limiting than we want. In terms of a structural approach, it has pluses and minuses. But I'm wondering if, perhaps, taking some definition or using a definition that's already in the United States Code. I'm thinking of, for example, the Institute of Museum and Library Services and their funding eligible entities are based upon statutory definitions of what is a museum, what is a library? Things of that sort. And, perhaps, either to tie a definition to that or to use that as a basis for a definition I think certainly goes to the more structural approach, which has its limitations, but it's a more bright line test rather than getting into, well, are they really not-for-profit? Are they doing a non-commercial activity in a commercial setting? You know, I'm not sure how the courts would deal with all of that. It's all based on existing caselaw.

MR. PERLMAN: Vic Perlman, American Society of Media Photographers. I represent the individual creators and copyright owners of visual arts. In the analog world there's a vast difference between a copy and an original that is commercially significant. In the digital world, once somebody has a digital duplicate, the genie is out of the bottle. We are very concerned about limiting access based on both criteria -- the non-profit identity of the organization and of the activity.

MS. GASAWAY: Paul.

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MR. AIKEN: Paul Aiken, Authors Guild. It's not in our nature to be in agreement with publishers.

(Laughter.)

MR. AIKEN: I could tell some hair-raising tales on that theme.

(Laughter.)

MR. AIKEN: But we need publishers. We need their money. And, to the extent that we're looking at expanding the 108 exceptions, we're talking really about making digital copies and, even more frightening, digital distribution. That's really supplanting the publisher function and could have a big effect on the market of our members -- the book authors, people who write books for a living and who write particularly for academic and library markets. The people who will be affected are not the best known authors. They'll do fine. Our concern is the mid-list authors who really depend on these markets in order to make a living to do their writing.

Fortunately, for everyone here I've got the solution. It's only like one page that is going to expand 108. What we're really talking about is something akin to a publishing function and it should be licensed. It should be certified. Institutions wanting to take advantage of it should be required to have a certificate and part of that certificate -- the certificate holder should be subject to security audits by rights holders so we know what's going on in the data sense. So we know if digital copies are being properly handled and not being lost out there in the world, which is the big fear. We have to make sure that these digital copies made pursuant to some expanded 108 are somehow water marked and water marked with a license number, the certificate number of the institution.

Certificate holders should be required to report security breaches and accidental losses. They should also be bonded and indemnified against any such losses, particularly if they're state institutions that might be able to take advantage of sovereign immunity and certificate holders would be established, non-profit institutions who's motives aren't compromised by an underlying and overriding profit motive would –

MR. RUDICK: Paul, if you keep going, it's going to carry into your time on the other answers.

MR. AIKEN: All we have to do is agree on it.

(Laughter.)

MR. AIKEN: That's it.

MS. GASAWAY: Keith.

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MR. KUPFERSCHMID: Keith Kupferschmid with SIIA. I should mention SIIA has not formal position on these. We stand to learn about. I know a lot of you around the table in the study group have known about this and worked on this for a while. We have not. So, if you will just be patient and keep that in mind as we go forward, it will be much appreciated.

It is very difficult to answer that question in a vacuum. Do we limit this to non- profits? Do we define libraries? Do we define archives without really knowing how we're expanding 108? As far as expanding 108 and whether we should define libraries and whether we should define archives and limit that to non-profits, without knowing more I'd say yes. I'll go into a brief example in a moment as to why I think that's the case, but I don't think it should be limited to that. I think there should be other eligibility requirements. I've got a pretty good list in that regard.

From my perspective, I think when we're talking about expanding section 108, a lot of this will be determined by how narrowly we define the subset of eligible entities, specifically libraries and archives and how we define them and certify them or not. We will certainly be more comfortable with deciding what that subset can do with the copies under Section 108 if that subset is defined narrowly.

If it's defined very broadly, then what that subset of eligible entities could do, we would hope would be defined narrowly in terms of the activities because the risks involved are multiplied.

MS. GASAWAY: A nice example of the squishy toy, by the way.

MR. KUPFERSCHMID: You said, give real live examples. I'll give you a real live example. We had a case -- the defendant in the case was someone named Nathan Peterson, running a site called I-Backups. What he did was, he sold software saying this is allowed under the copyright law because it was used for archival purposes. We can't go into it now because you can see these justifications, including 117 in section 108 in there. Okay. I give this example. Well, actually, let me mention how much damage it caused, okay, which is over $20 million in damage to our software companies. He pleaded guilty I think it was in January -- earlier this year -- he pleaded guilty and he's going to be sentenced April 14th in perhaps what might be the longest jail sentence.

I give this example to show that whenever we make an attempt to expand a section of the copyright law or even existing sections of the copyright law, for that matter, there are people that are going to try to abuse that. Okay. The result of that has come back and terrified, at least the copyright owners whom I represent. The threat is real and it's very significant and I think this is just one example of it, but I think it's a very good example.

MS. GASAWAY: Donna.

MS. FERULLO: Donna Ferullo. What I'd like see is that this part remain fairly flexible. There was a lot of collaboration would be something we would view to be a good thing. Some of this will be restricted to

governmental entities and that we worry about. I would not like to see that kind of restriction. I think that will harm a lot of the work that's being done.

MS. GASAWAY: I'm going to call on people who haven't spoken first.

MR. LAMOUREUX: Edward Lamoureux, Bradley University, Peoria, Illinois. Although I don't represent them, we are a member of the Media Consortium. The Media Consortium is 184 universities around the country, 10,000 members, lots of folks who deal with the media on most campus. They're on the cutting edge of the media center on campus. They estimate that only 30 percent of their members have anything to do with their libraries. That is to say they're not organized under the library. They are somewhere else on the organizational chart.

The folks at the American Academies of Higher Education who deal with new media materials, generally speaking, may or may not be a part of the library staff. Also, you know, depending on the exclusions, depending on the options, you might force folks to run a bunch of work through libraries that the librarians don't want to see because they've never done that kind of work. Collections of DVDs, CD-ROMs, the rest of the digital materials for distance learning, most of that stuff is run out of a different shop than the library. So the laws that we make and recommend, if they're exclusive to just defined libraries and archives they're going to put a pretty strong pinch on units on campus that do that kind of work.

MS. GASAWAY: Anyone else who hasn't spoken want to speak to this question? William and then Carl.

MR. ARMS: Bill Arms. When you start doing research on digital information, what you find is that copyright is one of only several things that become very important. An example is when you are working with information that include people you get into very serious privacy considerations, making sure that you actually keep all the relevant information and don't filter it in various ways. I think what we all would like to see is responsible behavior by researchers and there are only a small number of people at universities that understand these issues.

On many of the policy issues, the great expertise lies in the committees on human subject research, which come out of medical research or bio- medical research. We need some way -- there's one place where all these policy issues are addressed and I think that expressing these things in functional ways and fairly tight functional ways is important.

As a researcher, I want to be confident that I'm doing the right thing, which means I need to know who in my organization knows the policies and knows how to enforce them and carry them out. I have a lot of confidence in the libraries, but it may be that there are other organizations and research organizations that are better qualified to look after these policies.

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MR. RUDICK: Just as a follow-up, I'm not sure I understand what you're saying, but where should that lead us in terms of the last two remarks?

MR. ARMS: My first instinct is to have a lot of respect for librarians. I think that the good, well-trained librarians are very sensitive about policy issues, but we heard this statement that we should be flexible and express these things in functional terms rather than in organizational terms and I think that's an attractive possibility from a researcher's point of view.

MR. RUDICK: I just want to make a comment. For better or worse, we are dealing with a section of the Copyright Act that writes library privileges and we would like to solve all the problems of the world. We're finding it very difficult just to solve this one, but your point is well taken.

MS. GASAWAY: Carl?

MR. JOHNSON: Carl Johnson. I like the discussion and where we seem to be headed, but the distinction of non-profit entities and not-for-profit activity, that's an important direction to pursue because, as a copyright advisor, many questions that I analyze or try to resolve have to do with how the law and other bodies of policy or legal references would treat the entity and treat the activity. So I found the question of non-profit entities -- I think we should continue with that characterization and do the best job that we an in defining what that is so it's clear when we think of an entity, whatever it is, whether it's an individual that's developing a website and proffering material to the world for sale or not for sale, it's clear in their minds that they qualify or don't qualify for non-profit entity behavior. This will be addressed in our other questions about activities, so I'll hold the remarks on that.

MS. GASAWAY: Jan, then Carol.

MS. CONSTANTINE: Jan Constantine of the Authors Guild. I'd like to follow up on something Keith had said. Not-for-profits are very easy to define. The functional piece of that is very difficult. There are some very profitable entities out there that are performing what they consider to be truly archival services -- services that will benefit the world that will bring forth an Alexandria-type library in the digital age.

There are concerns by our authors and there should be concerns by everybody else that while they may view themselves as performing a library function they are definitely a for-profit entity and using this very commendable marketing tool to get advertisers -- I'm not mentioning any names.

(Laughter.)

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MR. RUDICK: It's like a ship's pool. We bet on how many minutes before the company that dare not speak its name is mentioned?

MS. CONSTANTINE: Kind of like Harry Potter. In any case, it's very important. I'm all for non-profits. I'm a little concerned when we try to say, well, let's define the function because there are profitable and commercial entities out there that are performing functions like your defendant, who views himself, I'm sure as performing an archival 8 function to the world, and now he'll be doing it in the hoosegow for 14 years.

MS. RICHMAN: Carol Richman, SAGE Publications. SAGE does support retaining the not- for-profit status.

MS. GASAWAY: That is not in the statute right now.

MS. RICHMAN: We would like to add that. I'm sorry. We would like that added. It allows us some protection. I think that other archival endeavors can be handled by license agreements. We have, in fact, engaged in several of those that worked quite nicely. I'm going to also add something that might be out of context. But, for the book world, digital rights management is a technology that doesn't quite work yet. We are bit concerned about that.

MS. GASAWAY: Okay. Dwayne was next of the people who had already spoken once. Okay, Dwayne. And that will probably be the last comment because it's time.

MR. BUTTLER: I just wanted to make sure where we are with 108. I look at it as a relatively narrow provision that allows us to do certain things that when you need a lot of conditions. One of those, at least with respect to published work, is unused replacements. If they're available in the marketplace, we can't use it.

One of the things that's out there is the idea that that we're going to make use of things that are still available and that's not going to happen under 108 as it exists and I doubt that we can expand much beyond that. The other issue is that concept of licensing. I want to really touch on that.

Licensing is something that I think there's an underlying elegance and policy to U.S. copyright law. One of those things is that users ought to have some rights and privileges, depending on who you ask to make some uses of the materials and licenses are often used to thwart that opportunity. So, in the context of licensing as a condition, I do lots of licensing for the University of Louisville for electronic resources and they fairly and typically are very unbalanced. I have very little ability to negotiate those.

If you look at a federal policy question, I don't know that the licensing can be given that construction.

MS. GASAWAY: Rebecca, who hasn't spoken. Then Allan. Then we do have to move on.

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MS. PRESSMAN: I think museums are kind of an easy one to add.

MS. GASAWAY: We're not there yet. That's coming up as a question. Remember that will be one we address.

MS. PRESSMAN: What I'm thinking as I listen to this it would be -- functions make a lot of sense. Functions are flexible. But, if you've ever tried to explain fair use to a group of people, and if you've every tried to explain section 108 to a group of people, they find it kind of complex. So it would be nice for librarians of it somehow ended up being a little easier for them to know whether what they're doing is okay or not okay.

MS. GASAWAY: Allan, you get the last word.

MR. ADLER: I just wanted to add one of the reasons we function in communities where one doesn't draw a great deal of comfort in not-for-profit entity status as criterion for eligibility is, remember, the publishing world has among two of its most important market libraries and universities, both of which lay claim to being not-for-profit entities as a general course. Although, in the case of universities, I'm sure any parent who has a child in school today doesn't necessarily agree with that characterization.

The point also is that libraries and archives, in terms of their own functionality, play a particularly unique role in the service of universities and the university community that brings them both into tension with the role the publishers traditionally play. I recognize that the whole point of this exercise, in some respects, is not only to enhance traditional activities of these types of entities, but also to perhaps expand and allow them to do things that they couldn't previously do, but now have technological capabilities that would facilitate new activities.

Again, one of the questions that we're going to have to look at is the traditional roles of what libraries and archives are as entities, vis a vis, what a publisher is to the extent that we are deliberately trying to look at 108 in a new way that not only enhances those traditional activities, but expands upon them. Then, of course, it's going to be incumbent to look upon how that affects the tension that already exists. Again, I think that's just an indication that not-for-profit entity status, while having some role in this, is not going to be sufficient in and of itself to be able to guide eligibility.

MR. RUDICK: Okay. We're going to move to the second question, which as to do with what a library looks and feels like. people my age think of the main reading room of the New York Public Library or dashing to the campus library before it closes to get a reserve book. We think of a library as physical place, often a single building. We've learned that that's not necessarily how libraries think of themselves. Understandably, when you think of how technology has moved on and how many functions that used to be centralized are now distributed.

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So that's the background for this question which has two aspects to it. We're not talking necessarily about off-premises access under 108, which comes up in a later question. We're talking about two concepts. The virtual library -- the library that may not be a place you go to in the old- fashioned physical sense, but it's a place you go to a server on the net. It's defined in some way. You can educate us about that, I hope.

The other is the idea of the traditional concept of a library, but maybe not all the collections are physical. Some of them are virtual. I hope you understand this better than we do and that you will educate us on it. So the question is, should the statute cover these virtual libraries and what about virtual collections? How does that play into it? What conditions or limitations should there be? There may be a link back to other questions like eligibility and this is a case where specific examples are particularly helpful. We do want to be educated so it's open season. Raise your hand.

Allan.

MR. ADLER: I think that the fourth topic of this discussion is one that, in itself, demonstrates the notion that creatures online, particularly websites, have an inherent permanence about them. That's the whole point of discussion the preservation exception. Given the current nature of impermanence and the ability of the websites to appear and disappear, the idea of virtual libraries as being beneficiaries of this type of privilege, I think, is something that probably should not be accomplished in the absence of some kind of institutional affiliation with an entity that has a sufficient physical presence to be able to allow for the necessary measures of accountability regarding the activities of the virtual library. How you define the nature of the specific affiliation, how you define the sufficiency of the physical presence of the affiliated institution all are going to be a matter of trying to figure out what do you need in order to have a comfort sense that a virtual library is acting in a way that it can be held accountable in a meaningful way.

I think that distinguishes the notion of virtual libraries from virtual collections. Because, presumably, virtual collections -- we're not talking about a virtual library. We're talking about a virtual collection that exist in some form of entity that has the requisite characteristics to allow for the necessary accountability with respect to its use of that collection. I certainly wouldn't say we would exclude virtual collections, but I think virtual libraries, in the absence of that kind of affiliation that allows them to be held accountable for their activities, should not be beneficiaries of this exemption.

MR. RUDICK: Carol is next.

MS. RICHMAN: To follow up on what Allan said, I'll provide an example, which is the University of Phoenix, which has institutions and learning centers throughout the United States and in other locations. So, if we

want to define a virtual library, and I think it would have to be tightly defined as a learning institution that houses a virtual library, that it's open to researchers and students within that domain. So I really think that a virtual library needs to be better define. We can't just say it's a website or something like that. It has to be something that is protected by an institution.

MR. RUDICK: Bill is next.

MR. ARMS: Bill Arms. I think Allen has got exactly the right distinction here between virtual libraries and virtual collections. I do a lot of work with small educational virtual libraries. Many of them very fine, but these are organizations often spontaneous in a grassroots organizations that build virtual libraries and call themselves virtual libraries. Many of them are excellent, but, by and large, I would not say they are very mature about policy matters.

(Laughter.)

MR. ARMS: You know, this is a fact of life. On the other hand, when you get a mature organization, and I'll call on the university library as an example that has virtual collections that it looks after, manages and so forth. Then I think the question should be, is this an organization that we trust with Section 108 and the virtual collection is just part of what it does?

MR. RUDICK: Those comments are very helpful.

Paul.

MR. AIKEN: I'm really going to echo what William just said. What we're trying to define here is what a trusted institution is for section 108 purposes. There are institutions that author and I believe publishers would trust in most circumstances -- the great state universities, the great well- established university libraries and other libraries that have been around for a long time. We know them and we know how professional they are. We know they're far more likely to take some care with their data centers and more ephemeral, not long-established institutions that may or may not be here in two years may care very little about how they treat any works they copy under an expanded section 108.

MR. RUDICK: Ken Frazier next, then Keith Kupferschmid.

MR. FRAZIER: We worry that the emphasis on physical institutions in general is a drive to make the digital world resemble the analog, paper world. Generally speaking, we would see that as a mistake. If the idea is reliability, trustworthiness, accountability -- those values -- then the focus should be on those values rather than the corporal nature of the institution because I think we're going to see in the future some virtual libraries. The internet archive does have a door with its name

on it somewhere. But we're going to see virtual libraries that have less of a physical presence than that, but will be fully accountable.

MR. RUDICK: We have Keith Kupferschmid next, Tom Lipinski and Edward Lamoureux in that order.

MR. KUPFERSCHMID: Bill and Paul said it best. They focused on trusted institutions, trusted third parties when you're talking about virtual libraries. That's really what this issue comes down to.

From my perspective, in section 108, the biggest safeguard against abuse is the premises requirement. It's possible I don't understand the question here, though I think I do. But, if all of a sudden that requirement, the premises, disappears I think it will definitely open up to abuse unless there is some sort of trusted institution requirement to make up for that -- certification or something like that. We talked in this question and the previous question about making sure that copies are not made for commercial demand.

MR. RUDICK: Just a minute. It sounds like you're talking about 108(b) and (c). We're talking about here something that isn't in the current law which doesn't define a library. It does say much about it because everyone know, which everyone did in 1976. So it's a little different question.

MS. GASAWAY: The premise part is only in 108(b) and (c) for digital copy. It's not in the definition of what entity gets to qualify.

MR. KUPFERSCHMID: I understand we're talking about crafting new exceptions, which would not include a premise requirement that is found in (b) and (c).

MS. GASAWAY: There we go. We're with what you're saying.

MR. RUDICK: We're talking about the broad question. Here's something that may help you in your answer. Libraries aren't defined in 108. It just assumed you all know what you are and we all know what you are. That's the overarching question.

Maybe we asked the question slightly the wrong way. You don't necessarily have to define it the same for all parts of 108. Maybe we didn't say something about that earlier. You could say that 108, as a whole, quite broadly, some sections apply less broadly. In your written comments you may want to focus on that. It's something that's not in the present law.

MR. KUPFERSCHMID: I understand. I guess want I need to make a little more clear is there is a premises in sections (b) and (c), unless I'm missing something. And, if we craft some virtual libraries exception to be added to 108, that wouldn't include a premise requirement and that's a significant concern. So there needs to be someone ready to address

those concerns and certainly a trusted institution type requirement is certainly a step in the right direction.

Let me just finish up by saying there was some mention about these libraries not making copies for commercial advantage, either direct or indirect. Certainly, that is an important criterion, but not the only criterion. For those who are familiar with the LaMacchia case where you had a student that was making these copyrighted works available for free and causing a lot of harm, there was no commercial advantage there, but it was causing a lot of harm in that case. That type of situation needs to also be accounted for, especially when you're talking, perhaps, about crafting new exemptions for virtual libraries.

MR. RUDICK: Tom was next.

MR. LIPINSKI: Just two quick points. The example of Phoenix University is well taken. But, as an example in our own program, 60 percent of our students now are distance education. In higher education there are many programs that are going completely to virtual. So, for those students, the library they use is a virtual libraries and those institutions may eventually one day, though they may still be trusted, have no physical space or premise. People may sit there but at least the library really exist only virtually and I think we don't want to have a definition. I certainly see the point and have no disagreement between someone in their basement throwing up a website. I don't think that's what folks are asking for here.

The second point I would like to make is that let's not forget we're sitting around this room and many of us coming from the user side, from institutions of higher education. For many in this country, they don't even get to those collections. They don't even get to use those virtual collections. Many 108 libraries today are public libraries and I think we want a new definition that would be broad enough to serve their evolution in virtual collections as well.

Think of some states like Alaska where they're developing a library system for some communities. They really are a virtual library. There is no physical aspects to going into business. So I hope that definition is flexible enough that it would include public libraries. We don't forget about those other institutions as well.

MR. RUDICK: Edward Lamoureux.

MR. LAMOUREUX: Ed Lamoureux again. In the broad view, one of the primary concerns that we have is that old media isn't able to choke off new media because it's already at the table. If one had adequate procedural mechanics and benchmarks that protected the rights of rights holders without stifling innovation, we'd be better off, I think, than immediately jumping to trusted institutions, which, by its very nature says we're only interested in doing business with those people that we already know.

Topic 1: Eligibility for Section 108 Exceptions

It strikes me that part of the reason you all want to tweak and that the Library of Congress thinks we should tweak this section is that it doesn't enough consider the interest and concerns of new digital media. Those entities may not look like the trusted institutions that we already know.

MR. RUDICK: Rebecca Pressman.

MS. PRESSMAN: I did some research into what the digital libraries are and how they're defined within the field of librarianship. What I would say is that it's a recognized concept. It's a concept that's taught in a number of courses and it's based on the idea of intellectual access and organization -- a group of users, a certain amount of services, and not on the idea of a trusted institution. We've been there before. I could see where you wouldn't want my website to be a library. You wouldn't want the exception to be so broad that it swallows everything, but in our field the idea of a virtual library is accepted, digital libraries, by our users and by librarians.

MR. RUDICK: We have next Roy and Paul.

MR. KAUFMAN: I actually think we're all so close to the same position here, which I think is a surprise and a miracle.

(Laughter.)

MR. KAUFMAN: I think we're all trying to get at the same thing. Recognizing from the publisher's side and the user's side that we don't exactly know what a library is, but it does have a physical presence. So, if we're going to have an extension, and I don't think that the copyright owners -- I'll certainly speak for Wiley -- has a problem saying that it has to have a physical presence, but there needs to be some form of accountability. What do you call that accountability? You can call it a trusted institution. I take your point very well that you don't want trusted institution to me only people you know. There should be some form -- instead of "trusted institution" say physical presence or certification process. Unlike a lot of the piracy things I have to deal with in the digital world, people who put up 200 books from Russia and say that they're a library. Here it is for free. That's not someone who should get it. But there's a slippery slope in the middle. But, if there's some form of certification, someone who I know within the jurisdiction of the United States who basically says I am responsible for this. So, if there is a problem, hey, it's me.

I hate to say Sarbanes-Oxley because I hate Sarbanes-Oxley.

(Laughter.)

MR. KAUFMAN: But that sort of notion that someone's accountable. That there's a certification process or let's face it a big physical presence where you may or may not even require the certification

process. Because I know at Wisconsin library they're not going to actually move physically move between now and when we discover they're doing something wrong. I think we're all actually pretty close here and what we're talking about is something that is extended beyond physical presence and can also give meaningful accountability.

MR. RUDICK: Jan, you had your hand up.

MS. GASAWAY: We're trying to let everybody go once.

MS. CONSTANTINE: I was really going to say what Roy said. But I think we really have to take into account the fact that, if in a virtual library context, a book then either by the user or by some oversight in the library gets out to the ether and there's no market anymore for the author or the publisher, the ramifications are more than just wanting transparency, for somebody to take responsibility. You've just killed the market for somebody's royalties or somebody's book. So I'm a little troubled by the concept of virtual libraries. I'm not quite sure I know what it is. I'm not quite sure I know it has the wherewithal to pay an author for all of the lost royalties that is incurred because this book is now basically worthless because it's out on ether.

I like the distinction that Allan made -- virtual collection versus virtual libraries. I can understand it. My kid goes to Wisconsin. I can go to you when I have a problem and I also know what users in that context do and how little they value copyright at some point, in the music industry as well as the book industry. So I'm concerned about virtual libraries being included in the definition.

MR. RUDICK: Paul, we're going to have to move on. If you can keep it within a minute.

MR. AIKEN: Jan made my point.

MS. RASENBERGER: I want to make one clarification for purposes of written comments, which I hope many of you will submit. While in 108, only b) and (c) actually refer to physical premises, there is legislative history. So, to the extent that you think legislative history informs the law, it's important to note that in the DMCA the Senate report does very clearly say that the committee's intent is that section 108 does not cover virtual collections. It actually says "Although online interactive digital networks have since given birth to online digital libraries and archives that exist only in virtual rather than physical space on websites, bulletin boards, et cetera, it's not the committee's intent that section 108 as revised applies to such collections."

MS. GASAWAY: But that was revising only (b) and (c).

MS. RASENBERGER: That's right. But it refers to 108 generally.

Topic 1: Eligibility for Section 108 Exceptions

MS. GASAWAY: Shall we move on? The next question I would like to take up in a slightly different way. This is the museum question and other cultural institutions that we would ask. Several people have already spoken to this. What I would like to do is ask does anyone object to including museums and cultural institutions in that group of whatever could qualify if we stuck with an institutional definition? And tell us why if you object to that.

(No response.)

MS. GASAWAY: Do you object to it, Carl?

MR. JOHNSON: I don't object. But I think the point of what several have said characterizing the commercial or non-commercial activity, museums, by tradition and by practice, have stores. They have cash registers. And, of course, cash registers are creeping into a lot of non-profit activities. I use the "cash register" metaphor to apply to the activity. So, while I'm in favor of including them, but at the same time we need to look carefully at the activity at a museum website side-by-side or on the same display as access privileges and ordering privileges for sale. Again, a virtual cash register is on the same display. Does that cause concern? Maybe it should.

MR. ADLER: Yes, it does. You asked the question in a very, very lawyerly way by you saying are you opposed to museums being included. It's a yes or no answer. I think that, again, I don't know if the publishing community has an inherent objection to museums having some privileges under this section. But, again, as you just pointed out, you have to look at the nature of their activities. I'm old enough to remember class trips to a museum that were a highly passive activity. You had display cases. You looked at displays. If you were lucky, you had a docent who actually added a little bit more activity. But, otherwise, you were pretty much lead around to look at things and it was fairly passive. I would suspect, of course, the museum community would say today that they do a lot more than that and a lot more proactive activities.

The final thing I would say about this -- also to the general question we just discussed is -- remember, in 1976, when this provision was enacted, for the particular reasons, Congress made very careful choices about whether or not it was the reproduction right or the distribution right that was going to be affected by the particular provision. And, of course, since that time we have learned in the digital environment, distribution rights, for example, in the United States, includes something call "the making available" right. That's about to be litigated at the moment because there are some people who aren't happy that that's position that the U.S. government took when it was asked to ratify the WIPO treaties. But the position it took was unquestionably that the new making available right was assumed within the existing distribution right in the United States.

I think that I would also point out that while section 108 in 1976 didn't see any reason to deal, for example, with the right of public display, we all know now that in the digital environment "public display" means something quite different and is essentially part of the business models of all kinds in a way that simply displaying a copyrighted work would never have been in the pre-digital era. Again, you have to look at how the rights have evolved and how they're, in fact, implicated by various activities. Once again, don't simply rely on status determination with regard to what a particular entity is or what you think it does.

MR. AIKEN: I think, again, we have a definitional problem with museums. My children go to a children's museum -- The Children's Museum of Art. It's not a museum. They go there and they make art. I think it's called a museum probably for tax purposes.

(Laughter.)

MR. AIKEN: There are wax museums. There are now virtual museums. There are all sorts of museums. They have various levels of sophistication, various institutional histories. I think the only way to deal with this is through some sort of certification process. Again, some sort of verification process so we know that they're treating the materials as they should be treated. Without that, we won't know what's going on out there and the materials are being lost.

MS. GASAWAY: Does anyone else want to speak to this question?

(No response.)

MS. GASAWAY: Then I suggest we move on.

MR. LAMOUREUX: Do you want to talk about the second part of the question -- about the types of institutions?

MS. GASAWAY: I thought I asked it all in one. I'm sorry.

MR. LAMOUREUX: I would reiterate that, if you're asking are there other types of institutions that should be considered, university media centers should be considered. They again do this work nationwide in great profusion and they're hamstrung if they have to do their work through the library.

MR. SIGALL: Can I follow up on that and ask what you mean by a university media center?

MR. LAMOUREUX: If you're teaching an education class and you have a blackboard center, you don't go to the library for the materials you want to manage. You go to the university media center. They have different names, but, generally speaking, you don't do that work through the library. If I'm teaching in a class and I want DVDs shown,

a VHS shown or whatever, or something brought to my class, I go to the media center and they have collections and they deal with having to backup those collections, having to distribute them around campus and they're not the library.

Now 30 percent of them probably are, maybe 35 or 40 percent are close enough on the organizational chart that, if the librarian had that responsibility, he or she would probably be willing to participate, but many of them are virtually separate entities. You've asked if there is another group that meets, I think, in every way the sort of requirements that the section speaks to, but probably didn't exist in '76 -- whether they were guys running slide projectors in the classroom. That was it. They're much, much more than that now.

MS. GASAWAY: Very quickly.

MR. KAUFMAN: Just a question. Are these entities withholdings?

MR. LAMOUREUX: Yes, collecting, holdings and digital because the library has all the books. For instance, and my place isn't like every place, but in my place the library has never purchased CDs or DVDs or software. We specifically saved our budget for books. The media center gets that as a separate budget. So, yes, in many cases they have a much larger digital archives than the library. Many libraries have a much larger collections, but there's 180 of them and only 30 percent were organized under the library.

MS. GASAWAY: Okay.

MR. RUDICK: It's a miracle. We're almost on time. A question that comes up. We're aware that many libraries and archives, maybe all, outsource or are more and more considering outsourcing some of the activities covered by section 108, including photocopying, document delivery, digitizing, digital storage or possibly stewardship for preservation. So the question before us is, should section 108, which is now silent on this point, apply?

Actually, it's not silent. There's restriction. She knows all this stuff. Should section 108 apply to contractors of the library or an archive, provided they are acting solely on behalf of the library and the archive. And subsidiary questions, if so, does it make a difference whether the outsourcing is off premises or on site? And, again, examples of what you think should or shouldn't be permitted would be helpful.

MS. RASENBERGER: The law right now says "libraries, archives and their employees." As you all know, other parts of the Copyright Act refer to employees and contractors. So they're there by omission and it would seem that there's a presumption that contractors are not included.

MR. FRAZIER: Just a question to you. Am I right in thinking that this part of the law isn't applied in the current environment? Because it seems that there is a lot of outsourcing already.

MS. RASENBERGER: Yes. And we'd like to hear about that.

(Laughter.)

MS. GASAWAY: You get immunity.

MR. RUDICK: Roy, Keith, Allan -- in that order.

MR. KAUFMAN: I'll get the ball rolling on this. This is very, very, very important to us. I think that's enough "verys." I'll give some examples and some analogies and also say your question about outsource acting solely on behalf of the library right there is an inherent contradiction. The outsource entity is working on its own behalf. So let me give you an example going back into ancient history that some of us will know.

There was a company called Kino's that used to exist. They made course packs, which infringed the copyright of publishers and sold these things to students. Publishers said, hey, you can't do that. You need to pay us a copyright fee. They said, no, no, no. There's a fair use here of the students and we're just the outsourcing entity. Admittedly, that's fair use, not 108, but I think the analogy applies.

The court said, look, you guys are a for- profit entity. Whether or not the students have the right to make this copy, you do not. You do not have the right to make a business model on the backs of the publishers by copying. There are three or four circuits -- I did some quick research before I came here -- all of which have more or less agreed with this. I have not found anyone who has disagreed. Outsourcing, if it's through a for-profit entity, is outsourcing to someone who wants to make money on the copying and on the infringement. We're happy. And, in fact, in the Kinko's case, we had an answer to that. We will and have to, as companies and authors, have answers. We have a collective licensing solution there through the copyright clearance center. We still have that in place. There are business solutions. If a third party wants to get into this, if a for-profit entity wants to get into it, if someone wants to outsource, you go to the copyright owner.

I won't mention the case that Jan didn't mention, although we are also involved in that case, and I'm going to give another example of outsourcing to a not-for-profit entity, although one that's not here. Some people -- the British library, which might be a library that might be the government, but it's certainly one or two or both. It is the largest commercial document supplier in the world. I'd hate to see a non-profit -- if you outsource something to them -- we're not talking about document delivery here or ILL. But, if you start outsourcing to other non-profit entities, those non-profit entities are only taking the outsourcing because they're essentially doing a profit-making function.

So I think outsourcing is a hugely slippery slope. I think if someone wants to outsource they should not just do it under an exemption, but do it under a license. I don't think there is much more

I can add to that other than, again, history has shown that when these issues have come up in fair use we've come up with a solution and we've made it very clear that, if you want to make a business out of copying someone's material, you go to that person. History has shown that publishers and authors are actually good at letting that activity exist and operate.

MR. RUDICK: Ken and then Bill. I'm sorry. Keith. I knew it began with a K.

MR. KUPFERSCHMID: I agree about controlling this via licenses, but licenses will be able to address all the concerns. It's not like the copyright owner doing the licensing. It's the library that's doing that.

Thinking about this question, I came up with in my mind what are several requirements, but not an exhaustive list of things. If outsourcing is going to be allowed, what is absolutely essential to take place? The first one has to do with retention of the copy. And that is that the outsourcing agent doesn't retain the copies. If they're making the copy, they don't retain the copy any longer that it's actually necessary to complete the outsource activity.

Secondly, with regard to security, this contractor or outsourcing agent must make certain guarantees with regard to security -- access to copies is restricted. And perhaps, more importantly, that in the event that someone circumvented these restrictions, that the contractor has to notify the library, to notify the publisher or copyright owner and in the attempt to re-acquire the copies and to stop their redistribution of the copies. This is especially important where you've got the outsourcing activity is storage of library copies.

Third, the copies should be made accessible by the library or archive, not by this contractor. This exemption is for library archives. It's not for their outsourcing agents -- and I think Roy sort of touched on this. Also, I think there should be some requirement that a library archive deal with a good actor. There shouldn't be any past history here of copyright infringements or problems with the contractor they're dealing with.

And, lastly, one we touched upon here many, many times -- accountability and trust. Ultimately, the library or archive at issue here must be accountable for the contractor's bad behavior. So I think that's got to be part of any solution or attempt to address this issue.

MR. RUDICK: Allan.

MR. ADLER: Not surprisingly, I agree with the things that Roy said. But I think that what Keith said following up was important. The terminology here is going to be very important. When you talk about, in the 108 articulation, it doesn't mention agents and agencies, which is an area of law that is very important because it essentially attributes responsibility for the actions of the third party to the person who engaged the third party and with those actions. I think Keith mentioned that as an important aspect of accountability.

You're going to want to be sure that the actions of the vendors to whom certain services are outsourced, ultimately, in terms of accountability and responsibility will go back to the agent entity, whether it's the library or the archive. On the other hand, you want to do that in a way that doesn't allow those outsourced vendors to essentially say, you know, we have no legal liability for what we do. Go back to the people who engaged us, which means that you have to figure out a balance in the kinds of activities involved.

For example, Keith mentioned one thing, which I agree with, has discomfort about the idea that an activity outsourced to a vendor would allow that vendor to retain copies or actually be the person who distributes or provides access to those materials. That's not to say that it should be prohibited. Clearly, there would be some circumstances where that makes a lot of economic sense. It also makes sense in terms of achieving the most efficient dissemination. But recognize that that will be a different situation than the situation where all the vendor has done is to reproduce or create the material and ultimately the activity of providing access or distribution will be done by the library or the archive.

However these issues are dealt with, we need to be able to account for both circumstances because there will be situations where you're going to want to allow libraries and archives the choice. But you have to make sure that in those circumstances there is responsibility and accountability for the party who is deemed to be most responsible for the particular actions taken.

MR. RUDICK: Bill Arms, I think, is next.

MR. ARMS: With due respect, I think this example is irrelevant to our discussions. I think we all agree that we're talking about -- the underlying thing is how can digital information be preserved in the long term so that the intellectual history of the country and the world is not lost, and doing it in a way that protects the interest of the copyright owners. And yet, at the same time, allows responsible scholarship. I don't think anybody would argue that Kinko's deserved probably what they got in that case.

Let me give you an example that I'm very conscious of, and that is the web. The libraries, and I include the Library of Congress in this, failed very badly in preserving the history of the web. It was done by an independent organization which happens to be a not-for-profit. One of the reasons that happened is, when you get into a field like this, when you start dealing with very large amounts of digital information, you find yourself in a world which is difficult.

One of the reasons they succeeded was because expertise -- the founder of that was one of the pioneers of super-computing. He had expertise you don't have in libraries. He did not have expertise in making these available to research. And anybody who's trying to do research and then collection knows. We, in fact, at Cornell are currently organizing parts of those collections for researchers.

The point I want to make is that long-term management of digital information for historic purposes is going to be very difficult for the foreseeable future. And, if the country wants to do it in a cost-effective way, we're going to have to have the people who have that expertise doing it. I hate the term "outsourcing" and I hate the term "contracting" because I think it's actually got to be a partnership. One part of that partnership has got to be the people who take the responsibility for looking after the interest of the copyright owners and other things. So I think we've got to find a way of permitting responsible partnerships in which there is very clear understanding that the interest of the copyright owners have got to be protected and that the researchers who make use of that make it use of it in a responsible way. We've got to face up to this and do it properly.

MR. RUDICK: Thank you. Ken.

MR. FRAZIER: Ken Frazier. If the compelling public interest is to preserve the world's knowledge, then I think we have to face up to the reality that the preservation task won't get done if we don't have responsible third parties involved. They have the expertise to do it. In fact, in the analog print world, not only are libraries dependent upon third parties to assist with preservation activities, but the publishers are also dependent upon third party outsourcing in order to get the task done. There is a part of the world of copyrighted information where there's very active interest in protecting and preserving the content over time, but there's a huge alternative universe of content where there is no one in a position to engage in preservation activity, either from the author, publisher. It really becomes up to institutions like research libraries to preserve the contents. So we need these partners and the task of preservation won't happen.

MR. RUDICK: Michael Capobianco is next.

MR. CAPOBIANCO: I ran into traffic on the way here and I didn't get here in time. I'm from the Science Fiction and Fantasy Writers of America.

MS. GASAWAY: You should have beamed yourself here.

(Laughter.)

MR. CAPOBIANCO: Unfortunately, I had to use the light rail. I was merely going to raise the "G" word and I have a feeling that it was already dealt with. So, perhaps, I should just not.

MR. RUDICK: Paul.

MR. AIKEN: The proper way to do what Bill and Ken suggests is going to be outsourcing to some entity to handle these tasks. It's licensing by

the rights holders. The fact is that for-profit entities always have a profit motive. It's like a law of business. It's in their DNA. They can't help it. They have a responsibility to their shareholders, to their owners to make money and they will find a way to make money if that's what they're doing. If they're doing it for profit, if they're doing for money, that value should be captured by the rights holder or by the author who creates it or by the publisher who helps distribute the work. It's not something that's to be done by statute.

MR. RUDICK: If you're a congressman, you've got a vote on something. I think Victor you're next.

MR. PERLMAN: Vic Perlman. I think that trying to limit the thing to staff ignores the business models. It ignores the availability of resources. However, protection for the rights-holders, whether it's by licensing or whether it's by using the respond at superior theory or the joint venture theory, what is important is that the liability should not be allowed to be contracted away.

MR. RUDICK: Okay. I think Tom you're next.

MR. LIPINSKI: Thank you. I'm just running over possible solutions. I don't necessarily disagree with the abrogation of responsibility, but I take a cue from data privacy law. When that information goes to a third party, they're held to some of the same standards. Without getting into some of the terms and conditions that are in the subsections of 108, if we do it all through outsourcing with that content, that intellectual property be subject to some of the same terms and conditions. I'm somewhat fearful about moving everything to a licensing model. There might be some cleaner way statutorily to say -- that would allow for outsourcing, but under that same conditions that appear in (c) and (d) or whatever we end up with in terms of subsections and conditions.

MR. RUDICK: I have Jan, Dwayne, and Roy - - in that order. Jan.

MS. CONSTANTINE: One thing that we haven't really raised is the possibility or probability that if you outsource the best people it might be abroad. It might be in India, for instance, or in another country that has no exemption of the copyright laws.

I think the balance tips really against the copyright holder. Because it could be as responsible a company you could wish for who has a renegade employee that's going to take whatever you're copying or working on and take it out into the world, then you're left with again the world wide web -- something there that could be accessible anywhere. I think that's something that you raised in your work for us to consider. Whether we should consider not allowing outsourcing outside the context of the brick and mortar institution.

If you outsource to a country that is known for its piracy, that there should be additional security requirements for that. Again, it's one thing to be held responsible, but it's another if you have an

inability to recoup any of the losses that have come as a result of this behavior.

MR. RUDICK: Dwayne, I think you were next.

MR. BUTTLER: I am in agreement with Tom Lipinski. I'm not sure licensing is the appropriate way because they're a lot of materials that we're interested in. We just don't know who the rights-holder is. But I do think that we do seem to be talking about that partnering kind of arrangement that would typically have some sort of legal framework. So it's part of the contracting practice in my mind. Those contracting practices do roughly parallel those suggestions that were made and I don't know how you would improve that in section 108 and say that your contract needs to say this in order to do that.

MR. RUDICK: Roy.

MR. KAUFMAN: I know how important outsourcing and specific knowledge is to the task. Wiley is engaged in preservation tasks as well. We know it's extremely difficult. One of the problems I have about not having a bright line, no outsourcing without permission is an elephant in a room that's well beyond section 108. This is libraries and governments. A lot of those libraries are state libraries and have sovereign immunity.

You can say, oh, well, the library is responsible, respond at superior or whatever the other person does. We can't sue the library because the library is going to defend on sovereign immunity -- get an injunction against the regents. It's not a very satisfying answer, which is, again, why although a bright line in some ways seems a little antediluvian, perhaps, for us where you're dealing with sovereign immunity issues, I think it's very important.

MR. RUDICK: Ken Frazier, a queue of one.

MR. FRAZIER: A couple of quick points. One is sovereign immunity is such a hugely important issue to universities in the state that it's unimaginable to me that we would invoke sovereign immunity in a preservation case. It's very, very unlikely. The two are so disproportional there in their significance.

I want to put in a quick point about the licensing issue. The University of Wisconsin has 50,000 current subscriptions. Five thousand of those come from mainstream publishers. Another 5000 of those publications come from enterprises that depend on the revenues stream. But a huge percentage of what we get it would be even hard to pin down where the publisher would be. When the government went looking for the lunatic fringe literature that Timothy McVeigh was reading, we had it.

(Laughter.)

MR. FRAZIER: It cannot conceivably happen that way. You have to appreciate that we want to preserve things where the ownership, and

especially the electronic world, is impossible to determine in a possible way.

MR. RUDICK: I have Keith Kupferschmid and then Paul Aiken. Then I want to save a little time for Mary and Jule in case they have some questions or observations.

Keith.

MR. KUPFERSCHMID: I'll be very brief. I cannot express enough how important the sovereign immunity issue is to SSIA in the context of this discussion. It has presented a very large and significant problem to our members. One example -- I'll give you one example of a university. I won't name the university in Washington State who is pirating three quarters of a million dollars of software. Okay.

We were in negotiations with them to settle the case without having to go to court when the Florida Prepaid case came down. They said sorry. We'll see you later. Sovereign immunity. It happened and it happened a lot. I think in the context of software we have a long list of cases that shows that it is a very big issue and it makes no sense to do anything with regard to expanding 108 unless or until that issue is also resolved.

MR. RUDICK: We need a constitutional scholar, I guess. Paul.

MR. AIKEN: I'm going to echo the sovereign immunity issues. I'm from Wisconsin. I would probably trust the University of Wisconsin to do the right thing, but strange things happen and the lawyers get involved and say what defense can we raise? And, at the top of the list will be sovereign immunity. It's unavoidable. With the best intentions from our librarians, they'll be pushed aside when real liability is faced. There are 50 states out there. There are hundreds or thousands of state institutions. It can't be just a matter of trust on this. It has to be a matter of liability. There are real incentives to not use this stuff.

MR. RUDICK: Very, very helpful. Let me ask Jule and Mary if they would have any observations, clarifications, questions -- Chris. I'm sorry.

MS. RASENBERGER: I do have a couple of follow-up questions if anybody is interested in responding to them.

The first is dealing with the sovereign immunity question. If there were a way to address the sovereign immunity issue without having a bright line of just no outsourcing period, is that something for those of you who are saying that you think that outsourcing should be done through licensing. Does that make a difference if we could some how deal with the sovereign immunity questions? There are many different types of outsourcing and we've been speaking about it today sort of generally because we've got a limited amount of time. But, for those of you who have suggested that they don't think outsourcing should be permitted. That it should be licensed. Does it make a difference that the vendor is on premises? For instance, contractors at

the Library of Congress -- we have lots of people who are officially contractors, but they come to work like any employee. They sign in. They sign out. But they officially work for a contractor and not the Library of Congress. Does that make a difference?

MR. FRAZIER: The University of Wisconsin gets sued a lot. And, if we used sovereign immunity every time we got sued, we would be using it every other week. I think there's a kind of red herring issue. You could use this argument to address almost any kind of change or modification in the law as far as public university are concerned.

MR. BUTTLER: I would agree with him because I don't think 108 is the vehicle to address the sovereign immunity kind of question.

MR. RUDICK: Keith, then Allen.

MR. KUPFERSCHMID: Just to address the question asked about sovereign immunity, to be clear, my comments were not limited to the outsourcing issue. It applies to everything under 108. They are very much tied together. As far as a white line or bright line solution, I don't think that needs to be the case. I think we remain very flexible on the type of solutions that might work to solve the sovereign immunity riddle, but it does need to be solved.

MR. RUDICK: Allan.

MR. ADLER: On the second point that Mary raised, there's two types of licensing that we're talking about here, I think. One is we're talking about the question of whether or not there are certain activities that should come within this privilege when, in fact, they could be achieved form the perspective of the rights-holders and should be achieved through licensing arrangements with the rights-holders. The question is whether or not those activities, in and of themselves, should be privileged in any way. That excludes the needs to have appropriate permission or compensation. That is a separate issue of licensing which is a question of when an entity like a library or archive, which does unquestionably have privileges to do certain activities here, should they be able to have those activities performed for them by third parties who would also partake of the privilege? That's a separate area where certain types of activities that may be fairly routine may be viewed as having minimal potential impact in the marketplace or on the rights-holder. You may view those as not necessarily requiring a strict license regime.

There are other activities, however, whether there's not going to be any meaningful accountability in the process unless there are licensing requirements and those licensing requirements will have to be allowed. Who ultimately can be held responsible if those activities turn out to be outside the scope or privilege or otherwise.

MR. RUDICK: For clarity in our notes, you're saying there are two situations. One of which is appropriate for licensing.

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MR. ADLER: What I'm saying is that there are two kinds of licensing.

MS. GASAWAY: We've got it.

MR. ADLER: There are different purposes that the license serve.

MR. RUDICK: We're out of time. Jule, do you have any questions?

MR. SIGAL: I'll reserve that special privilege for some other time.

MS. GASAWAY: We have a 15-minute break.