TRANSCRIPTION
SECTION 108 STUDY GROUP PUBLIC ROUNDTABLE
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Topic B: Amendments to Subsection 108(i)

Participants

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Sandra Aistars, Time Warner

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Susan Carr, American Society of Media Photographers

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Denise Troll Covey, Carnegie Mellon University Libraries

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Eric Harbeson, Music Library Association

Tomas Lipinski, University of Wisconsin-Milwaukee

Dr. Logan Ludwig, Medical Library Association

William J. Maher, Society of American Archivists

Steven Metalitz, Entertainment Software Association

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Keenan Popwell, SESAC

Nicholas Sincaglia

Keith Ann Stiverson, American Association of Law Libraries

LOLLY GASAWAY: The first thing we have to ask you to do is to turn your nametags so we can read them. Thank you. Not too much Judy, or it gets long. That's fine, just tilting it – that's perfect – yeah tilting it so we can see it them down at this end because the people doing the transcript and your coaches here need to see them.

I'm Lolly Gasaway and this is Dick Rudick and we're the co-chairs here, as most of you in the room know. I want to remind you about the cell phone rule. Make sure your cell phone is turned off. We'll all do that together. We're done with that. And for those of you who are new, I'll have you introduce yourselves, but the first part of your agenda has the ground rules and we want to make sure that you're familiar with those. So take a look at those. And now, let me go around the table, just if you were not in the morning – the first morning session, to introduce yourself. So I'll start with you.

KEENAN POPWELL: Hi, I'm Keenan Popwell for SESAC, one of three U.S. performance rights organizations for music and we also represent certain publishers **(inaudible)**.

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LOLLY GASAWAY: You're going to have to speak up, though.

KEENAN POPWELL: Okay, should I start over?

LOLLY GASAWAY: Yeah, just your name and affiliation is all we need.

KEENAN POPWELL: Before or after the train?

LOLLY GASAWAY: Through the train is what we've been doing.

KEENAN POPWELL: Okay, I'll --. My name is Keenan Popwell, an attorney with SESAC. It's one of three domestic performance rights organizations representing music. We are the smallest of three. The only privately-owned, and established in 1930. And we also do represent some publishers and mechanical licensing and synchronization licensing. But our core business is performance rights.

LOLLY GASAWAY: Okay, enough. Who else is new? Let's start with Logan first.

LOGAN LUDWIG: Okay, I'm Logan Ludwig. I'm from the Health Sciences Center at Loyola University and I'm representing the Medical Library Association.

LOLLY GASAWAY: Thanks Logan.

SANDRA AISTARS: And I'm Sandra Aistars. I'm Assistant General Counsel at Time Warner, and I'm speaking largely on behalf of Warner Brothers. And I've also been asked to speak more broadly for the motion picture industry.

LOLLY GASAWAY: Okay.

JUDY FELDMAN: And my name is Judy Feldman. My company is Feldman & Associates. We're a photo research firm. And we get photographs that are used by publishers. And we get them from the libraries too.

SUSAN CARR: Susan Carr, I'm representing the American Society of Media Photographers.

LOLLY GASAWAY: Great, anybody else need --. Okay in the agenda we're now going to take up Topic B and my job is to really describe sort of the overall statutory framework, etc. As we did this morning, as I said, the old law teacher says, take out your statute. This is the very last subsection of 108, so it's on the very back of the agenda. Subsection (i) says that the rights of reproduction and distribution that – under section 108 do not apply to a musical work, pictorial, graphic or sculptural work, or motion picture or other audiovisual work, other than ones dealing with the news that – we'll get to that. But there are within that a couple exceptions. Subsection (i) does not

exclude pictorial and graphic works that are published along with an article. So in other words, the library is not forced to cut out those when they reproduce an article under section 108. And the second exclusion to that is that the preservation and replacement sections apply to these non-print works, just as they do to other things. So it's the copies for users piece that we're addressing, not the preservation piece. We – some of you were here – we already talked about that back in March. And fair use is certainly still available for making copies for users for works – those works. And it was contemplated in the House report that fair use was still available for those.

Now there is not a lot of legislative history for the 1976 Act dealing with those exclusions and why those were excluded and not other things. Or why – well just why those were excluded. We do know, of course, that in 1976 the technologies we have today were not available. And now it is easy and cheap to make copies of some non-text works and we are getting requests from users for some of those.

The questions we want to focus on are things like: do these exclusions hamper research in related fields? Are students and researchers in art, photography, music, and movies disadvantaged because of the exclusions that are there? And we're specifically asking as sort of the general, and for you to be thinking about, whether 108(i) should be eliminated in whole or in part. And if so, then how would we amend subsections (d) and (e) so that they would apply to non-text works? If you think they should be. So that's sort of the overall description of the statute. And I'll turn it over to Dick.

DICK RUDICK: All right, well in aid of the major question that Lolly just described, specifically should any or all of the subsection (i) exclusions be eliminated? Which ones, why? And if we treated all works, or more works, equally under 108(d) and (e), what concerns should we keep in mind? And please raise your hands, as the spirit moves you, or if the spirit doesn't move you, we'll talk about something else. Eric?

ERIC HARBERSON: Well, I don't think that it will surprise anyone that we favor the removal of subsection (i) at least as far as the musical works are concerned. And we actually favor removal of subsection (i) altogether. I'll speak to the musical aspect of it. We believe that the musical – . We believe that researchers are hampered by the exclusion of musical works. Musical works – scores – are used by researchers in a functionally very similar way to the way that text materials are used. A researcher might be comparing different editions of a work in much the same way as that they might compare different editions of a textual work for the purposes of making additions, for example. They may be – they'll use them for criticism in the same way that they'll use textual works. Many of our researchers essentially read the score the same way that they read a newspaper. My music theory teacher was always saying that his goal is to teach us to read music the way we read a newspaper. And many of our researchers do, in fact, do that. So in the sense that we exclude musical works, and I'm speaking especially on scores right now, we feel that it is an arbitrary distinction that really has no basis.

MARYBETH PETERS: Can I ask a follow up question? You – do you not use fair use to deal with those kinds of issues? In other words, the whole way that it was set up was there is certainty in 108, but there's always 107. And even the legislative

history talks about the works that are not covered in 108, still may have uses made of them if they fall within 107.

ERIC HARBESON: You know, not being an attorney I really can't speak to that. I don't think effectively I would hazard a guess that since section 107 has to be interpreted – since there's so much fuzziness around 107, we would prefer to see textual works and musical scores treated equally. We may very be able to reach 107 the same way you could reach 107 with a textual work, but we don't feel that it's fair to exclude musical works.

MARYBETH PETERS: Okay.

DICK RUDICK: I don't know if I have it in the right order, but Bill Maher and Kenny Crews.

WILLIAM MAHER: I want to follow up immediately on Marybeth's questions, and in fact, when we deal in the archival world with these kinds of 108(i) excluded materials, the only way in which we can provide them is through a fair use justification. As a practical matter in responding to an inquiry, it creates an additional layer of communication that has to go back and forth, in which we inquire at greater depth about the nature of the project that the person is involved in. If the person is calling from ESPN, it's quite a bit different then if they're calling for a copy of a football game that their uncle participated in. We know those kinds of things are different. So yes, it is true that we do rely on fair use. That is the only basis. Eric is right in pointing to the fact that fair use, section 107, is very murky. And you know, we don't know what a fair use decision is going to be until it goes to court and a decision has been made. So it's not a terribly sound and predictable practice.

I want to go back to something that Ken said this morning, Ken Crews, and that is that the – in my case I can talk about the archival community, is very interested in trying to figure out how it can be good citizens and comply with the law. And when they – when I get to section 108(i) and describe all those things we talked about earlier are [treated] kind of very different in these works. But people say photographs are one of the most desired objects which we have for research in our collections. Musical works and sometimes audiovisual works are highly desired. They interconnect or they connect very closely with a lot of the research community out there and the public. And in order to – or if one has this layer of exclusion of providing user copies, it represents a very significant barrier. And for that reason, the archival community – now that I'm falling off the table here – the archival community believes very strongly that section 108(i) would be better gone away.

DICK RUDICK: Okay, Kenny.

KENNETH CREWS: Wow, given what I just heard I'm just going to say just a few sentences because I think what you've got, Marybeth, is a really good answer to way you asked the question. You asked the question, if I'm remembering correctly – do you use fair use? And I think what you got from Eric indirectly was, no we don't.

MARYBETH PETERS: Well, I asked the question because if in fact you want to add it back into 108, the question – the very first question is, so 107 doesn't work, right?

KENNETH CREWS: But then on the other hand Bill said, well we use fair use. So, so what you've got on the – if I can use a pun from the photography example – you've got snapshot of what's going on out there. That the answer is some people are comfortable and knowledgeable reaching for fair use and some people are not.

MARYBETH PETERS: But we also got that it's more work and less certain.

KENNETH CREWS: I think that's right.

DICK RUDICK: Sandra Aistars – did I pronounce that right?

SANDRA AISTARS: That's Aistars, yes. And I'll comment on what the two of you gentlemen just said, from obviously the opposite perspective. The fact that there is consideration of expanding section 108 to include audiovisual works is very concerning to us on the other hand. Because while were comfortable dealing in the realm of fair use and understand where the boundaries, fuzzy as they may be in any given case, may lie, we are far less comfortable understanding how, for instance, a library or an archive in the digital world might be distinguished from a commercial service. Or from a – you know in the worst case, peer-to-peer service that's dealing in, you know, unlicensed and pirated works perhaps. And so this very same concern that you raised about 108 with certain types of uses, I would raise from the opposite perspective. And point to things like, what do we mean by the degree of notice that the library or the archive needs to have about the intended use of the work? What do we mean by private study in the context of an audiovisual work? Is taking home the latest Warner Brothers release to watch for entertainment purposes private study as, you know, delivery of it on an on-demand basis and essentially competition with cable service or electronic sell-through or video on-demand service? Is that private study?

DICK RUDICK: As we go through this, we – the question we're asking really is why should there be a distinction between these enumerated types of works and those not enumerated? So – but we'd like guidance on in particular is why these works should be treated differently as distinguished from general considerations that might apply – that any rights holder would have? Do you want to continue and then Judy is next.

SANDRA AISTARS: I'll conclude just very briefly. I think the one distinction that is relatively easy to point to with regard to audiovisual works is that they are produced and distributed in quite a different way than print media are. And in the production of audiovisual works, you often have to rely on the availability of various different commercial means of distribution. And so to the extent that we find commercial means

of distributing these works in some fashion in competition with their public availability through a library for the same sorts of uses, that's troubling.

DICK RUDICK: Okay, I have Judy, Susan Carr and Mary Case in the queue.

JUDY FELDMAN: To respond to your question, photographs are a component of an editorial work, a published work. They are a component that was purchased and the licenses were carried out in order for them to be included. Those licenses still have to be respected. The copyright of those pictures has to be respected. And in addition, when we get pictures from libraries, they will cite the publisher information, the author information. That document is cited. But photographs are not cited in the same way. They're not respected in the same way. In the academic community we have – teachers expect students to understand cited works, but they'll tell a student to go grab some pictures out of a magazine, stick it together and make a school report. So there are many organizations now that are working on metadata to be included in the photographs so that there is some way where this information will follow the photographs along. But, to this date it is not universal yet. The organization PLUS, which is Picture Licensing Universal Systems, is trying to include this to an enormous population that have signed on already, but try to implement it so that people use it. But until then the works that are – the component of the pictures that are included in the published work is not recognized separately. And we need to figure out a way where that copyright, which is legally held, can be used by an end user without violating the copyright.

DICK RUDICK: Susan?

SUSAN CARR: We feel that it's not practical to exclude photographs from 108 any longer because of the ease of –

LOLLY GASAWAY: Could you repeat it because the train got you.

SUSAN CARR: Oh, sorry. We don't – ASMP doesn't feel it's practical to exclude photographs from 108 because of the ease of digital, you know, sharing now and the fact that photographs can be used in research and there's value in that. Our concerns are that a digital copy of a photograph is a clone and can destroy the market value for a professional, of that image. And so safeguards, special safeguards would have to be put into place, namely the metadata component that Judy mentioned. And it's the downstream distribution that we are concerned about.

DICK RUDICK: Right, Mary – Mary Case, I think you were next.

MARY CASE: Mary Case. I just wanted to comment on the notion that we do think that section (i) should be eliminated. In essence that there really – in terms of the perspective of a researcher or education, there's really not any more real distinction between what kinds of resources researchers may want to access for their work. So we

feel that this really isn't a strong enough distinction at least from what we can see at this point to have to have those still be excluded.

We do recognize that there still is subsection (e). And when we're talking about an entire work, whether it be the motion picture or the an individual photograph, depending on what we're talking about, that we would still need to go through that step to find out if there is a copy that's available at a reasonable price. And hence, would not then make a copy that we would then send on through. So I think there's still that protection at least from the current – for the current marketplace for those kinds of items.

DICK RUDICK: Before I continue with the queue, I have a sense that it might, just from some of the responses, that it is very difficult to respond to this question without responding to the next one, which I haven't read yet. So I'll read it and then you can, if you – you can sort of merge it. I think it works better that way. The first question we're asking --. After we solve the copyright issues, we'll deal with modern, with urban transportation. Rubber tires, they have those in France. The second question just takes it a step further. What would be the effects of eliminating the exclusions? And how should those effects be dealt with in the statute? Because always you want to say well, yeah, all right there'd be an effect, but can you ameliorate those effects? Will allowing copies, digital or otherwise, for users of music have a greater impact then it currently does for text-based – text-based works? We've already started to talk about that. But now, if so, what restrictions could be implemented to alleviate that? Low-resolution thumbnails, right to photographs, streaming only, all for the purpose of squaring any restrictions with the scholarly need to retain copies of source materials.

The second question, are there ways to differentiate the kinds of things we've been talking about for scholarly purposes from entertainment purposes, works? And then these – the interaction with 108(d) and (e), which were written with text-based works in mind. Would they need to be revised if we eliminated the current restrictions in (i)? It's a bit of mishmash, but I know you've thinking about this and I'm sure you've thought about all these things together. We have in the queue Keenan, Sandra and then Steve. Anybody else, have I missed anybody? – and Ken. Keenan – and Logan.

KEENAN POPWELL: I can't really speak to scores because we don't represent print for any of our works. But as far as music works in providing sound recordings, the markets online are still developing and for the vast majority of commercially exploited music, I feel as though there is a lot of market solutions that are still – haven't completely come to fruition. And I think that there is a lot access. Advertising supported models, for example, that will allow researchers to access these works. And I question whether a wholesale exemption for musical works really is justified by the public policy concerns and whether or not the current rental model, if you will, in the libraries whereby a user checks out a copy is not a better position. So I'm really here to get sort of, get more perspective from everyone on that. But that's my initial thoughts.

LOLLY GASAWAY: Could I just follow up to make sure I understood? You said musical works, but did you mean sound recordings?

KEENAN POPWELL: No, the copies –

LOLLY GASAWAY: Are you talking about scores?

KEENAN POPWELL: -- the copies.

FEMALE AUDIENCE: He's talking about the music.

FEMALE AUDIENCE: He's talking about the composition.

KEENAN POPWELL: The composition and --.

LOLLY GASAWAY: You're only talking about the composition, right okay.

KEENAN POPWELL: Right.

LOLLY GASAWAY: All right just to make sure we were clear.

DICK RUDICK: Okay, Sandra, I think you're next.

SANDRA AISTARS: I guess I would respond to the points that Ms. Case raised by saying that while I think in other media there may be some comfort taken from the sorts of reasonable investigation that a library might do to establish whether there's a commercially available source for the work, I'm not sure exactly how that translates into the audiovisual world and the online digital world for a couple of reasons. One, the whole concept of availability with an audiovisual work – the audiovisual work is composed not only of the pictures on the screen, but also a soundtrack and musical works embodied in that soundtrack. And so there's a lot of rights clearance that we have to do to make that work available in a digital form. And so it may very well be that we are in the process of clearing a work for digital distribution, while you're in the process of seeking to determine whether its available in the marketplace. And that we may end up working at cross purposes. And actually the works will be less available rather than more available because content owners will have either a harder time clearing rights or the incentive to take the effort to clear rights for a work to make it digitally available might be limited. There's also the concept with regard to audiovisual works and resting works before you distribute them again, re-release them again, and so it may very well be that the work is planned for release in the coming year or so and therefore not on the market. And I think that's again, a distinction perhaps from other – other works that we've grown more accustomed to dealing with under section 108.

DICK RUDICK: Okay, I have in queue – hopefully in the right order, Steve, Kenny and Logan – oh, and also Judy. Okay, well it's the right order or the wrong order that's the order. Steve – .

STEVEN METALITZ: I was just – when I got in the queue and I think we were still in the first question, what brought me up – and you've actually, and what you read is very, very much relevant to this. You had a word in the first question group that was not

in the Federal Register notice and kind of brought me up short, and that was treating all types of works "equally" under 108(d). Of course I know "equally" doesn't mean identically. But it strikes me just from what Sandra said and others, that even if there weren't a categorical exclusion any longer for audiovisual works, for example, such as the output entertainment software, it – you would have to apply these criteria quite differently in some cases. Or maybe you'd need somewhat adjusted criteria. Maybe the commercial availability question wouldn't be the same and shouldn't really be measured the same way in the case of audiovisual works for example, than it would be in the works that currently are covered by 108(d) and (e). And similarly, this question of whether the use is for private study, scholarship, and research and what is the obligation of the library, archives, or museum to either to know about the use or figure out whether it's within that category may also apply differently for audiovisual works.

I think in terms of the works of the Entertainment Software Association members, we think that the slice of people that are – really want to get access to video games for private study, scholarship or research is extremely small. And so to have the presumption that somebody comes to a library or somebody who is part of a library community or an academic community is presumptively making a use as private study, scholarship, or research we think just doesn't accord with reality as far as those works are concerned. So I guess what I'm saying is that if they are to be covered, they may need to be covered in a different way and by different criteria then is presently the case. And I wouldn't say they would apply equally.

DICK RUDICK: Kenny, Logan, Judy.

KENNETH CREWS: Yeah but let me – I'm Kenny Crews for the record. Let me tell you what I'm hearing running through all of this conversation. That for – as Lolly told us – for largely unstated reasons, in 1976 Congress saw this format-type as a determinative issue. And so that's what we've been living with for 30 years. But these examples and a few more that I've encountered are really showing us that a format as a determinative question just doesn't work. I mean, look at what we've talked about. A professional photographer – the work of a professional photographer as opposed to an item – a snapshot plucked out of the family scrapbook. ESPN video versus the scratchy video of the uncle's football game. *Casablanca* – a Warner Brothers film, I think. Did I get that one right – it's on your list – as opposed to a home movie. A Shostakovich composition as opposed by an obscure work by a little known composer who never found a market in the first place. And one that I've been struggling with in my own library, a recent feature film that's really out of print and its not in the Disney vault. It really has little prospect of coming back into print. And so you know can we make copy of that under 108 or 107, or something else. But my point being that we've just run through a series of examples showing that a determinative line based on medium or format falls apart. Falls apart very quickly and consistently. And instead what we're seeing, I mean my instinct, you follow yours, but you know my gut is telling me we can probably agree to be more liberal about the scrapbook, the football game, the home movie, the item that's out of print. And we might have to be a little bit protective about *Casablanca*, about a professional photographer, about some of the things that are on

the other side of the list. So there's a different kind of line that I think we're gravitating toward in this conversation. I'd like to see if we can pull this out.

DICK RUDICK: There's a clarification. Are you saying you would rather see a more complication, discursive 108, than rely on 107, or not? Did I hear you wrong?

KENNETH CREWS: No, you don't.

LOLLY GASAWAY: Did he say that?

KENNETH CREWS: At most –

DICK RUDICK: I thought he said that.

KENNETH CREWS: -- at most what I'm seeing, what I'm hearing in this conversation is a rule based upon format isn't making sense anymore.

DICK RUDICK: Okay.

KENNETH CREWS: So drop that rule. Maybe we move a different line, a different rule into its place. But it hasn't become complicated. We've dropped one rule. We've added another and maybe there's a rough solution in there. And then I would also just say as a footnote, perhaps just for the record, what I hear us talking about all the way through all of these examples, and it's certainly speaking for myself, it's what I'm thinking, is ultimately a 108 rule that under whatever conditions, is allowing us to make the copy of the whole thing. If you're ever talking about pieces, portions, etc., 108 concluding to say congratulations now you can make copies of a portion of that video, I say don't go there. Save all that for 107. Fair use is about portions. 108 is about the whole thing.

DICK RUDICK: Okay, Logan's been very patient. Before in continuing the queue, I'm in the fortunate position of being surrounded by people who know more – flanked by people who know more than I do. There's a clarification with respect to one of the earlier comments relating to sound recordings. They are available under (d) and (e) if the music underlying that sound recording is in the public domain.

MARYBETH PETERS: In other words sound recordings are not excluded. Music is excluded.

MARY RASENBERGER: So the sound recordings that are subject to words –

MARYBETH PETERS: And that is not a text format.

MARY RASENBERGER: Right – it includes – (d) and (e) includes sound recordings but doesn't include musical works, for instance audio works.

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DICK RUDICK: All right Logan, I was about to say you're a study in patience, but you're showing signs of impatience. So, please.

LOGAN LUDWIG: Lots of patience in health centers. Just to follow up on what Kenny was saying. Basically in the health sciences area we agree with the elimination of section (i) but not without addressing some of those salient issues in other parts of section 108, either (a), (b), (c), (d) or (f). There are sections in there that could include some of these things that are addressed in section (i). But moving it to a format determination rather than basing exclusions or inclusions on higher level rules are always going to cause you problems because that format, or the format that we deal with, is a snapshot in time. And that format will change over time. And I'm sure that when books came along, the scroll people were all concerned about that. It changes, and to just take it just a step further, when you talk about some of the remedies that I see being suggested for how you would address this in a format section then you get into an even murkier situation depending on its intended use or where it comes from.

I can't speak to entertainment copying because we don't do a lot of that. And I can't really speak to music kinds of things. But I know our researchers, who are looking at scientific information, want the closet to perfect image reproduction that they can get. And if you talk about thumbnails and those kinds of things, I personally don't want my healthcare diagnosis based on that. And so for us, that is an important issue. Retain that and move it somewhere else.

DICK RUDICK: I got it. Okay, Judy and Sandra in the queue.

JUDY FELDMAN: Yes I'd like to speak a little bit to what Kenneth was saying.

LOLLY GASAWAY: Louder please.

JUDY FELDMAN: The concept of the technologies is moving so quickly. I think it could be tabled until there is a technology that might solve this issue. For example, when people wanted to take music and grab it for free on the Internet, and then iTunes came up and found a way that made it work. I don't know if that's a perfect solution. But I think there might be a time in the not so distant future considering how quickly the technologies are changing, when there could be a solution where someone would be able to access either the photographs that are a component of the published work, or music or film. And be able to use it so that it is – . We can solve the problem of people having access to it in a more general way. It – at this point I don't think the technologies exist to make (i) workable to cover all of the instances that we're facing when we look at this entire gamut of (i). I think there's a solution, but I'm not sure that it's right yet.

DICK RUDICK: Sandra back to you and then Eric.

SANDRA AISTARS: I was going to comment, I think Kenneth was accurate in describing the sorts of works and issues that we've all been talking about and the

differences and treatment between those works. I don't think that I necessarily completely disagree that there may be a different line to be drawn other than a purely format based line. I think that we have to recognize that we live in a multimedia world and these sorts of lines are going to start being blurred. But I think there is a very big difference between commercial works and works that are more typically thought of as suitable for scholarship and research and so forth. And so I think Steve had it right when he said if you're going to look at changes to how sections (d) and (e) apply, you need to really look at them completely fresh. And understand what each of these concepts means in the context of an audiovisual work or photograph or a musical work. Because I think they will vary.

DICK RUDICK: One of our questions was, whether there was any practical way of distinguishing the entertainment context. And maybe there isn't, but that was a question we had. Okay we've got Sandra, Eric and then Dwayne – oh, and Steve, okay. Oh, Sandra you're done.

ERIC HARBESON: I'd like to got back to what Sandra was saying earlier, especially about – and I'm sorry Keith – about the burgeoning markets and the needs for the rights holders to be able to do things like rest their works. And we recognize that that's the case. Certainly there's a need to be able to explore new market possibilities and to give something a rest while you give it time to build up another market. And then you can exploit again much more successfully. And I know that Disney has done that very well. That doesn't change the fact that in – if – we can't tell our researchers that they have to wait seven years for Warner Brothers release this film again. And if the movie is otherwise out of print, we can't just say, sorry they're resting it. It'll be back maybe in three or four years. Or it may be back tomorrow, but we don't know yet.

The thing is that even given that, I don't really get the sense that what we're talking about is something that will substantially impact the market. If we're talking about a portion of a work, which we are talking about a portion of the work and one of the things is that a portion of the work needs to be determined under (d). Whether it might be possible to say – to apply that to say I need the section of *Casablanca* from when Rick enters his bar to when Peter Lorre's character is shot. You know something to that effect. I don't know. Something may need to be determined on that. But I don't really feel like we're going to be impacting the market. And in the music library community feels that in general the people who come to the libraries who are asking for something by interlibrary loan, who are following the procedures, who are willing to wait a little while, are being good citizens, that are doing things the responsible way. Where they're not – they could go on BitTorrent or Napster, or whatever and download them right now, for free and probably never get caught. If they're coming to the library they're demonstrating that they're showing a certain amount of responsibility.

And with regard to the technology, I think there is – the technology is developing, especially for recorded works, motion pictures and sound recordings, to make it possible to give to – make the item available for a temporary period of time and then have the material expire. Things like streaming something, having something available to stream for two weeks and then remove it. I think that that approach is the solution that you're talking about where something is – where there's a certain amount of control over that.

Where you're not going to have something that's going to replicate itself a hundred, 500 times. And I don't even think that it would do that. But just hypothetically I think that that's giving a certain amount of ability to – at least as far recorded works, that doesn't help photographs, but I'm speaking for music – .

DICK RUDICK: Okay we have Dwayne, Steve and Sandra and Nick. We're running close to the end of our time on this question so if there is anybody after those four, it should be somebody who hasn't spoken yet, if possible. And Allan – okay I think that probably fills up the rest of our time. Dwayne.

DWAYNE BUTTLER: I think that while – I guess you – this entertainment versus kind of scholarship issue is hanging out there. And I don't quite know what to make of it. But I guess one of the things that was on my mind was the idea that, that in 1916 there was this person cranking this camera and no one thought an academic discipline would be built around this film study issue. You know, this film's not going anywhere. In the same sense that there are a tremendous amount of games that were created early on – the early PC or even before that, that have an immense value in a scholarly way so that we know how they were created. We know the history of them. We know those kinds of things. And I'm afraid those kinds of things are going to get lost because there are a tremendous amount of films that just disappear because no one cared about them as a commercial kind of activity. So I think that one of the things that libraries do is to take care of those kinds of frameworks. So I think we have to think about that as well as making those things available in that way.

And you know I would jettison (i) altogether and try to frame it in a way that we recognize that we're an increasingly visual culture. You know part of the reason that we weren't visual early on is that we didn't have the technologies. We could do paintings. We could do those kinds of things. But technology is now catching up. So a picture is worth a thousand words means something. And those are communication tools just like printed work. So I hate to see that kind of distinction that I've always found kind of odd in 108 to continue.

DICK RUDICK: Okay, Steve.

STEVEN METALITZ: Just three quick points, first somehow this – the word format has crept in here in describing (i). And (i) does not distinguish between format; (i) distinguishes between categories and works that are listed in section 102. And while there are some works that straddle those and so forth, it's not always clear, usually you know whether you're dealing with a computer program or sound recording, for example, that is covered by (d) and (e), or whether you're getting into a more unusual photographic or sculptural work that is not covered by it. So – and the work may be in different formats, but it doesn't migrate between categories over its life spans.

Second, on the question of a portion of the work that Eric brought up again, you know he spoke just a few minutes after Kenny said we really shouldn't be thinking about 108 for portions, that should be fair use, 107, which is kind of an interesting tradeoff. If you were willing to say that 107 never applies to copying an entire work, and then maybe there could be a basis of a grand compromise here. But it goes a little bit beyond the

scope of this group. And secondly, I agree that this issue of determining when something is commercial or for – should have a different rule applied to it, perhaps be excluded from it. Because commercial is not an easy question sometimes. But I do think from what Sandra said and others, it is not – it doesn't equate to whether it is currently being commercially exploited. And I think again, I can give the example from the entertainment software industry that there is a now a booming market in these legacy games – the games from the early days of video gaming of 20-30 years ago. You might have said a few years ago, those really aren't being commercially exploited and there really isn't anything there. And there's not going to be any harm. Right now there could be a lot of harm because there are some very thriving businesses that depend on that. And we are kind of at a point where there are relatively few games that were ever commercially exploited that aren't now available in the marketplace. So it's not a question of is it being exploited today?

DICK RUDICK: Sandra.

SANDRA AISTARS: I'll respond a little bit to what Eric was saying. I think the thing to keep in mind at least if you're talking about the sorts of works that I'm most concerned about, you can identify who the copyright owner is. And if you have it in your library and you want to contact the copyright owner, we not talking orphan works, we're talking about large studios that have invested a lot of money in creating that film and you can reach out and work with us on it. And I can't speak for other studios, but Warner Brothers does have a corporate policy of working with researchers, working with scholars, and making works available typically for free for research purposes and for educational purposes. So we've got a full staff that deal with these issues and the turnaround time is typically a day or so. I've seen the request files. And it is not a significant burden to work with the studio on this if you can identify the studio as a copyright owner.

To the point about films disappearing if we don't have this ability to make copies, I don't think what we're talking about in this instance, or at least what I'm talking about in this instance is the work that's done to digitize a library's collection for preservation purposes. But instead the sort of copying and distributing activity that ends up with a work becoming a permanent – in possibly unprotected form – part of an individual library patron's private library for them to do with what they wish perhaps. So if the risk that you're concerned about is more preservation-oriented, again I think all the studios and certainly Warner Brothers, works very closely with libraries to digitize their collections and make sure that our works don't disappear and are available for future generations.

DICK RUDICK: Okay, Nick, Allan, Keith Ann and then I may ask Mary if she has any questions, okay? And that's it. I think that's all we have time for on this. Nick.

NICHOLAS SINCAGLIA: Nicholas Sincaglia. I believe the role – I view the library is to promote literacy. And I think what these types of works I would consider would be promoting media literacy. And we're more and more an audio and visual society and the study of these types of art forms is crucial to being able to tell stories and tell history and explain our culture, and so forth. I'm an instructor for DePaul's music

school and I use films all the time in the classroom in order to show old technology. And Steven's point about not seeing a need to use a video game as an educational tool, I very much disagree. I use films on how phonographs worked, how telephone technology worked, magnetic tape, all these things. So an 8-bit computer game would be a part of the teaching process and I certainly would love to see my students become excited enough to do more self-study in the area of technology and art. And so I don't see a distinction really between text versus other forms of media.

DICK RUDICK: To go back to an earlier question, do you rely on 107 for your teaching activities and for – ?

NICHOLAS SINCAGLIA: For teaching, but like I said the students leave the classroom and they can pursue this interest further. And without these audiovisual or other forms of media, then it won't be accessible to them.

DICK RUDICK: Allan

ALLAN ADLER: Allan Adler with AAP. When the publishers looked at these questions, on an intellectual level it caused kind of a conundrum because we could not really distinguish particular principles by which the 1976 cuts were made here. It just seems the most analogous to the situation that existed for years with respect to separate regulatory regimens depending upon whether what you were sending over wires was voice information or pictures. Which now we've seen in the era of digital convergence had led to a very different form of regulatory scheme. But on a political level frankly, this was not a very difficult call. And since people have justified their positions in terms of what they see as national interest or what they see as mission, scope and all of that, I think it's fair to say by all means, you should eliminate section (i), if for no other reason then to make sure the rights holders in those categories of works have skin in this game when it comes to Capitol Hill. Because if there's going to be a process that is in fact going to sort this issue out, I would hate to see any single constituency of rights holders left out of it by – for reasons that are not absolutely justifiable.

DICK RUDICK: Okay, Keith Ann.

KEITH ANN STIVERSON: I raised my hand a while ago and I was going to make a rather small point for Sandra so that she doesn't worry too much. And that is that there are many libraries who don't lend audiovisual material at all. I mean, we'll let our students go in to a viewing room and view the material. And it'll go back on the shelf and we never lend that to anyone else. We wouldn't think of copying it. If it comes out on DVD, we're grateful because then we can get rid of the bad VHS copy that's crumbling anyway. Or you know, in some cases we might make a preservation copy, we might. But we really do guard that material because it's fragile. It's easy for it to disappear if we lend something in a case like that, and so generally we don't. I think you're more worried about public libraries trying to provide entertainment material to their patrons than you are for other types of libraries.

Topic B: Amendments to Subsection 108(i)

DICK RUDICK: Okay, before turning – one minute – if it's a quickie.

WILLIAM MAHER: I do want to make a quick point. For the kinds of things that are 108(i) category materials that are held in archives, they are generally the only copy that exists or [one of] very, very few copies that exist. And in order for somebody to – in Sacramento to be able to examine a photograph of a prairie dredging machine to find out about technology in 1910, they only way they can do it is to have a copy of the work. And there is no other way than traveling and getting on an airplane. So it's really important for us to make those copies.

DICK RUDICK: I thought I knew how to tell time, but I don't. There's five minutes left if anybody has anything burning to say, Judy.

JUDY FELDMAN: I'd like to follow up on that. We use archival images all the time. An example is particularly in social studies. And we definitely would use the image you described and would love to get it, but we pay for it. And we credit it appropriately to the organization who gives it to us -- the museum or library. And there are some stock agencies that also handle archival materials. I have no problem with someone paying for the rights to use those images. And certainly from libraries they're less expensive than trying to get them from stock agencies or somewhere else. But I think the concept of end users is what bothers me. And I don't think anyone should have the right to use that photograph, whether it belongs to a stock agency who can make considerably more money, or from a library who asks a nominal fee that seems fair, to be put in a textbook, which makes a profit. But publishers are willing to pay for those pictures. And I think end users should do the same.

WILLIAM MAHER: I want to make a follow up here. I'm talking about a researcher who is examining it to be able to make a study – just as they would examine a text.

JUDY FELDMAN: I see.

WILLIAM MAHER: I'm not talking about that researcher then moving to the point of publishing it. At that stage, whenever we provide an image for study, they are always instructed that they have to pursue rights. And in most cases, there's no possibility of pursuing rights for these because who knows who owns them.

DICK RUDICK: Any – Susan.

SUSAN CARR: I – like I said before, we don't have any qualms with that research use. And I agree with you that – exactly what you're describing for research to be able to send an image electronically makes perfect sense in today's world. The question is just – our concerns are that these – that there are restrictions specifically put on those works because once they are in that – someone's computer as a digital form, it can go on someplace else very, very easily and in very usable shape. And also there is the distinction people have been making between entertainment and scholarly and those

– I mean, commercial photography is one of those things that falls into both of those categories all the time. I mean, photographs taken during the Civil Rights movement have high levels of research value, historical value for the country and everything else. They also have a lot of value to the photographer who took the photographs and they license the work still and it is still very much a part of their means of income. So there's a balance that has to be found.

DICK RUDICK: It's an interesting discussion. We have a couple of minutes. Does anybody, Mary Rasenberger, anybody from the Copyright Office have any questions or comments? And if not, I'm ceding my two minutes to my esteemed colleague on my left here.

LOLLY GASAWAY: All right. The next two questions that we want to address assume, first of all that – the first question that we don't eliminate (i). Can we look at another formulation, which would be that expanding the current allowance for use as a pictorial and graphic works that are adjunct to text. So in other words the photographs that are a part of an article, when a library can photocopy an article for a user. Now that we have moved into audiovisual and other types of material, can we extend this concept when we have a textual work that has some of those works embedded in it? So that it still is an embedded piece, it's not a standalone A/V work? Could we look at expanding (i) [to include] adjunct pieces irregardless if it is audio, visual or still the pictorial/graphic kind of work? That's the first question.

So we want to ask librarians and archivists, what has been the experience with providing users with these kinds of multimedia works, making those available? And then content providers, what concerns would you have about broadening this to include embedded works, whether they are audiovisual or the graphic and photographic works that we have now? That's the first question. The second one then moves on to talk a little bit about the CONTU guidelines again and what should happen. So let's keep those two separate because they're separate enough questions. Let's first deal with if we don't eliminate (i), can we look at the adjunct language in this statute. Okay, so Judy?

JUDY FELDMAN: Yes, I have a question to ask you. Your question that you posed for Topic B first, were you saying that photographs because they appear on a page should be eliminated from this discussion? Or are –

LOLLY GASAWAY: No, I'm saying that the statute currently permits the copying of them.

JUDY FELDMAN: Well, I have a problem with that.

LOLLY GASAWAY: Well, but that's what the law says. So you may not like it, but that's what the law currently says.

JUDY FELDMAN: Okay, right. Apparently there has been a case where they have overturned that. So my question is –

LOLLY GASAWAY: For a library?

JUDY FELDMAN: No, not for a library.

LOLLY GASAWAY: But that's what we're talking about, the library exception.

JUDY FELDMAN: Okay. All right, I –.

LOLLY GASAWAY: Sorry, okay. Nobody wants to talk about this?

JANICE PILCH: I'll venture into this. I'm actually trying to think of what kinds of materials we're talking about here, text with accompanying audio, visual and musical materials. I think there aren't so many right now in existence, but they're likely to increase. We have encyclopedias that have CD-ROMs in them, all sorts of reference materials accompanied by CD-ROMs. Increasing use of electronic dissertations that have all sorts of different media – they're composed of all sorts of different media. So I would say our experience right now of providing these multimedia works, not very significant. Almost insignificant – I mean, almost completely insignificant. So I think we're looking at something in the future that we have to think about. It would be helpful if the restriction were eliminated at least in this case. That would definitely be an improvement because I can't envision a future where we couldn't interlibrary loan, in some cases, dissertations. And you can't chop the works up, you know, depending on the media that they're composed of.

LOLLY GASAWAY: Eric?

ERIC HARBESON: Eric Harbeson. I can actually provide an example that one of my colleagues from a major university in the Midwest provided. Where one of her PhD candidates in music theory, I'll just read what she said, "wrote his dissertation on some aspect of very current pop music with many musical examples recorded on the CD. UMI refused to accept it unless he got permissions for all the excerpts. In the spirit of electronic thesis and dissertation **(inaudible)** he tried to get the university to let him be a pioneer, being the first one – first to present one using the university server for references, but that was refused too." What she was getting at – she has a very [particular style], but what she was getting at was that if you – I think, if you – if you have, in that particular case, say an excerpt of a musical score that would normally may be, be embedded into the works itself. But in the case of electronic theses and dissertations, sometimes those are offered as separate files. For example, the thesis itself might be in Microsoft Word and say "See example 5," which happens to be a Finale file, which is a music publishing file. You get that as well in things like the New Grove Dictionary of music and musicians where in the print version the score excerpt is embedded whereas in the online version it's a separate file. And we're concerned that that would provide an additional disparity if the – if it – if one were allowed to copy one but not the other if that makes sense?

LOLLY GASAWAY: Logan.

Topic B: Amendments to Subsection 108(i)

LOGAN LUDWIG: I guess my general principle on this is to ask you exactly what you mean by expanding (i). If expanding (i) is still based on a format concept, you – it's not going to help you. I think you have to go back to the other sections of 108 and build on that otherwise you're like the man looking for his wallet under a streetlight, when he lost it in another place but he said the light over here is better and he's really not going to find it there. You're not going to get to what you want to solve because there's another rule, a higher level rule. And something that **(inaudible)**.

LOLLY GASAWAY: I thought you maybe were going to respond because there are a lot of health sciences types articles that have embedded with them a short video or something.

LOGAN LUDWIG: We're seeing much more of that not only in the Shark videos, but we're seeing many textbooks that come with illustrations in them, there are CD-ROMs. We are trying to address well how do we deal with that? Do we use them separately or do we keep them together? And it's still a question of, okay how do we get to allowing the whole thing to be used? And to go back certainly to Sandra's concern about commercialization, everything is, with the expansion of the copyright law, everything is commercialized now. The copyright is extended so long that everything that is newly produced is going to be covered under that for a long time. And I think libraries are a key source of making sure that those parameters are followed. I think we do a great job with it. I can't be responsible for once I give something to somebody or whether you borrow it from Blockbuster, what that person is going to do with it in their own home, as far as making it. If they put some stop copy kinds of things on it, that's a commercial – that's the commercial industry's decision. But I think here, we're talking about how do libraries deal with that and what's the best way to facilitate that?

LOLLY GASAWAY: Allan?

ALLAN ADLER: Allan Adler. The question as you posed it Lolly raises something that I think members of AAP have been curious about in light of this re-examination of the policies embodied in 108. And that is why are text-based works inherently discriminated against in this provision? In terms of copyright interests and in terms of what goes into creating the works, there doesn't seem to be any rational reason why having excluded these works in (i), the second part of (i) then pulls back in some of them, but only if they're embedded in a text-based work. And now your question raises the possibility that since that was done, maybe you could pull in these other excluded works simply by embedding them in a text-based work. And I would like to know what the public policy is that distinguishes the treatment of text-based works for this purpose generally? And certainly what would justify the notion that you can overcome any arguments made for the exclusion of these other works, simply by the fact that they are embedded in a text-based work? Remember the publishers of text-based works that have these embedded works in them, in most instances have to get licenses to include them to be sure they use fair use in some instance. In other instances, these works may be often works for which there is nobody to obtain a license from. But the mere fact that

their inclusion in text-based works, as a policy line delineating why these works should either be in or not in section 108, frankly makes no sense whatsoever to the producers of text-based works.

LOLLY GASAWAY: Marybeth could you comment about why you think it was – things were excluded – ?

MARYBETH PETERS: Well, I – .

DICK RUDICK: There's two questions – could you and would you?

MARYBETH PETERS: I'm willing to say what I know, but I'm not sure I know very much. Remember that this section came about actually – when I'm looking here – when *Williams and Wilkins*, that case was going on. And a lot of the focus was on articles and materials that are used for scholarship. I'm not sure why they let sound recordings go in there with that because that really wasn't an issue. And sound recordings only [have] the rights through production and distribution. This is a reproduction and distribution right. But remember it's a photocopying – it was a photocopying exemption. The problem was photocopying. And my recollection was, especially with regard to things like photographs and music, it was that that wasn't the overriding problem with regard to photocopying. With regard to photographs, the issue really wasn't just making it – the photocopying techniques weren't what they are today. So it wasn't front and center. So – I was meeting with some librarians. 108 was driven by librarians, what they said they needed. And unless there was somebody there making the case it's not there. But I do remember the discussion of music and why it was out. And it was all the discussion about people performing from scores and, if in fact it is a researcher who wants to look at the score, then 107 answers the question. You don't – and it's more appropriate to go through those factors.

ALLAN ADLER: But it happens to be, I think, a case or at least a fair argument to be made that the treatment of text-based works under the law like this is tending to lead a lot of people to believe in our Internet culture that text-based material that appears online can be taken. Whereas I think people pause, at least for a moment, before they do that with an audiovisual work or a musical work.

MARYBETH PETERS: That may be true. You know, what's interesting is that we're talking about the world we live in and if you really go back and read the legislative history, there was a person who foresaw what was coming and – Barbara Ringer who really was very concerned with making sure that 108 only dealt with photocopying, and only with the things where the case had actually been made, and at that point it was journal articles that was the driving force of *Williams and Wilkins*, and well okay, it's okay for medical stuff where maybe you're on the operating table and someone needs something. And you say we don't want that. But it wasn't discussed much more than that. It's like – I'm not much help, but – .

LOLLY GASAWAY: I think it helps put it in the historical context of kind of why. And I would assume that other industries came in and said – .

CHRIS WESTON: There is some evidence in the record that there were music publishers. People who own audiovisual works came in and said we need this to be excluded here. Why it wasn't excluded from preservation and replacement also I don't know.

MARYBETH PETERS: Audiovisual works and music, they were the two keys. They were there and saying no, no, no, no, no, and audiovisual works, because of the layers of people who were involved in making that work, and all of the clearance procedures, and it was felt that any use of that should be more under fair use than basically allowing people to make on-demand copies if an unused replacement copy is not –. Well this isn't unused. This is if a replacement copy is not available at a reasonable price. But you have opportunity write on a new slate.

LOLLY GASAWAY: Bill do you have your hand up or are you just stretching?

WILLIAM MAHER: No, no I'm just contemplating lobbying.

DICK RUDICK: You know I sometimes forget – I sometimes forget how long ago 1976 was.

LOLLY GASAWAY: Prior to the 1960s. I remember it everyday.

DICK RUDICK: No, no, no if you can remember the 60s, you weren't there.

LOLLY GASAWAY: Okay, Steve.

STEVEN METALITZ: If we're in a bit of a lull in the action, could I go back to something?

LOLLY GASAWAY: No.

STEVEN METALITZ: Since there's a pause. In was in an earlier group of questions and I don't think anyone's talked about it. I'm sure you've talked about it earlier in this process, but it would be helpful to explain a little bit. And that's the reference to the scholarly need to retain copies of source materials. And I wondered about that. Thinking about, for example, all the film scholarship – the pioneering film scholarship that did go on in the 50s and 60s, you know. Andrew Sarris and Pauline Kael, people that really had invented film criticism, I guess. They didn't have copies to take home with them because that was not really – . Then it was only 35 mm prints and if you wanted to see *Citizen Kane* 52 times in order to write about it, you had to go to a room and someone would screen it or you would watch it on it on the old Moviola machine or something. But you probably didn't get a copy to take home with you and work on as you were studying. And certainly if you got back even farther – it just seems

to me that there are a lot of instances where people have done a lot of great scholarship without being delivered into their hands, a physical copy of what it was they needed for their research. Is that – has that changed in terms of scholarly – scholarly bona fides? Could I no longer write an article – a credible article about *Citizen Kane* – unless I had the video with me and was able to take it home? Or – obviously I might prefer that. It might be more convenient in some ways, many ways, but is that kind of a scholarly requirement that you be able to have a physical copy of what it is that you're researching?

KENNETH CREWS: Are you looking for a response to that? Yeah, yeah, this is Kenny Crews. And I'll tell you that, that really has changed the nature of the scholarship and what is possible under the scholarship. The fact that you can have ready access, by whatever means, you pick any equation including buying a DVD at Target, is a form of easy access compared to just not too many years before. And the easier access to this material and the access to a richer, wider variety of it has just transformed the ability to pursue education, pursue research on these subjects. Whether it is a subject, just sticking with the film example, whether you're pursuing film studies or whether you're looking at history and using film as a resource tool, or whether you are studying – what were some of the examples? How to drop a needle on an LP, because you know we have a huge percentage of the public now that's never seen such a thing. And so we need a WPA-project film to tell us how that worked. And so you know the access to this has really, really changed film study quite tremendously. And just in my own example, when I – eons ago when I was an undergraduate and took a film studies course, the handful of films that we were required to see – you show up at the Friday at 2 o'clock in this big auditorium room. And that was like the chemistry lab session, except it was two hours of showing the one required movie that everybody had to see. So you were limited by the classroom and the assigned space, and the 35 mm print that happened to be in the collection. There were inherent limitations in what you could study. And we had to write a paper, a term paper about a film. And I was inherently limited. I could walk to the Evanston Public Library and they had a 16 mm print of *Laura* by Otto Preminger and because they had that film, I got to see it about five times. But I had to carry that film and a big reel to the TV – radio, TV, film building and reserve the room and snap it in and watch the film and hope it didn't break. And so there were inherent limits. And things have changed tremendously.

STEVEN METALITZ: No, I understand that.

MARYBETH PETERS: I was just going to say – but can't – maybe you were going to say the same thing. You were focused on why do I have to have a copy? Why isn't streaming technology whereby you can see it whenever you want it under the control of somebody else an answer to that, rather than having to have a physical copy in your own hands?

KENNETH CREWS: All of the above – what we really need to move toward is opening up as many avenues as legally acceptable, tolerable, etc. And sometimes – you know we have *Night of the Living Dead* in our collection on DVD.

DICK RUDICK: I thought you were referring to this hearing.

KENNETH CREWS: Except – we have it in our library collection, except the copy is missing off the shelf. And the zombies got it right? And it's missing off the shelf and so the professor needed it for classroom use, so we put in an ILL request, or purchase request whatever, to replace it. And – I said that's great, put out my email response to whatever was going on, I said that's great, go right ahead and do that but in the meantime, it's a public domain film for failure to put a copyright notice on it. You can stream the whole thing off of Internet Archive. Go to the website, click here and there it is for free. Should we go ahead a buy a copy anyway? Yeah, you know multiple resources, let a hundred copyright avenues be paved. And so we can move forward and really optimize access to this rich variety of resources.

LOLLY GASAWAY: I want to respond to Steve just a minute for someone who writes for law reviews. And this didn't used to happen but now you are literally required to submit the source material if it is not easily findable. So even in legal articles that we're doing – now we don't have video and all that stuff, but I'm just saying we didn't used to do that. They [used to] just – you know, they might cite check you, but they didn't ask you to submit the source material as they do now to a large extent. I'm talking for law review articles, but for dissertations too. I just knew Steve would identify with that. We've got Keenan and then Nick.

KEENAN POPWELL: I guess to address what Ken was saying I know that under Topic B you were supposed to discuss any of these kinds of things applying to the digital world. I guess content holders maybe want to maintain some of that difficulty because if you just leave it open to everyone, how can you reasonably be assured that the library, the people that are using the works, are doing so for scholarly reasons. I mean to make it completely available I think is – I think with certain limitations, do you want – because originally it was a local, it was locally going to your library and requesting something and that's it. You want to try to maintain that on the internet possibly, maybe having both libraries on each side of the transaction involved to be sure the librarian would then contact the other library **(inaudible)**. As opposed to just direct delivery.

LOLLY GASAWAY: Nick?

NICHOLAS SINCAGLIA: My comment is in reference – so we were talking about 1976 and there was one person who could see how the future was going to change some of these things. The way I see things moving forward, I think a lot of what we view, as the media industry today is a product of the technology that we have. So, you know, making films and soundtracks and creating that type of media was something that was costly. And the distribution methods were broadcast methods. And what I'm – it's clear even today – the technology is such that anybody can make these types of – these works. Nokia just came out with a DVD-quality video cell phone. And the work that I do in the music industry, our biggest licensor is musicians that haven't affiliated with any group. So moving forward what I see is that libraries will start to capture local –

I guess local media because there is going to be so much. And there's going to be a million niches and that there – over time these people who have created this history and this culture will have never affiliated. There will be no place to really go to license it over a period of time. And so, you know, the laws can't – shouldn't prevent the one place, which would be a local library, from keeping these archives. It's going to speak enormously about our history and our culture in those areas.

LOLLY GASAWAY: Anyone else? Okay the second question that we were to look at in this time period is, assuming that we did eliminate all the 108(i) exclusions on copies for users, or we eliminated it in part as we were sort of talking about. Should it be recommended that the CONTU guidelines be revised to apply to interlibrary loan of musical works, photographs, or movies? Does everybody know what the CONTU guidelines are? We talked about them this morning, so I think probably so, Dick.

MARY RASENBERGER: The question of whether you would create parallel-types of guidelines for other types of works.

DICK RUDICK: Outside the legislative process.

LOLLY GASAWAY: Yeah, definitely outside.

DICK RUDICK: It's not only a matter of knowing what the CONTU guidelines say, but do you know how they came into being?

MARY RASENBERGER: Could you give a little background Lolly? That might be helpful.

LOLLY GASAWAY: Well, sure. The way I always describe it is Congress said there were two things too hard for it to do. One was to figure out interlibrary loan and the other one was to figure out software and databases. I was like – one seems really hard and one really easily. But maybe the software people thought it was the other way. I don't know. And so Congress appointed a commission. The National Commission on New Technological Uses of Copyrighted Works and the most important thing about that is that it was not a pronounceable acronym. So they had to take the first and the end off of it to come up with CONTU. And CONTU, with the interlibrary loan context, did develop guidelines to help – well, to determine when a library was borrowing to such an extent, that it substituted for subscription to or purchase of a work. And out of that comes what we call the 5 by 5, or suggestion of 5, that says the borrowing library may make five requests from a periodical title in a given year, going back over five years of that periodical title. And so those were the CONTU guidelines. But they applied really to printed works, because we talked about from a periodical title or other work – collective work kind of thing. So the question now is if we eliminate (i), then what do we do about ILL and the CONTU guidelines, our new CONTU guidelines or what would we do about that? Judy?

Topic B: Amendments to Subsection 108(i)

JUDY FELDMAN: I have a question. My understanding of CONTU was that it applied to photocopying, as Marybeth had discussed.

LOLLY GASAWAY: Yes, because that's all that was available then.

JUDY FELDMAN: Right, so it would be as dramatic a change as we're trying to come up with for (i). Am I correct on making that assumption?

DICK RUDICK: Yeah.

JUDY FELDMAN: Yeah, well – ?

LOLLY GASAWAY: It would be creating new guidelines.

MARYBETH PETERS: We'll be creating new guidelines.

JUDY FELDMAN: Okay, but can I clarify the questioning? New guidelines to determine when a library needs to purchase, or question, or license? I mean – .

MARY RASENBERGER: Well, yeah, the CONTU guidelines were meant to give a little lead and some guidance to what it means to be engaging in systematic reproduction for distribution. I'm sorry, where they're receiving copies in such aggregate quantities as to substitute for subscription or purchase. So it would be – really the question is – it's not about amending the CONTU guidelines, but should there be similar guidelines put into place that would address when the copying of a non-text based work becomes too much and starts falling into substituting for purchase of the work.

JUDY FELDMAN: Or license?

MARYBETH PETERS: Or license, yes.

JUDY FELDMAN: Okay.

LOLLY GASAWAY: Janice.

JANICE PILCH: The problem I have with this question is that I think we are assuming entire works, entire musical works, graphics or movies. But if we say the rule of five will apply and after five requests in one year, the work has to be purchased; the point is with entire works, we have to make that determination on the first try. If the work is available the first time someone requests it because it's an entire work, it falls under subsection (e), then it has to be purchased the first time. There won't be five times. But if we're talking about pieces as in articles and periodicals, I think it would be very difficult to do. We're dealing with a situation as Eric here has mentioned – about how do you define the portion of the film that you'll be – and I think that would be completely unwieldy and impossible. Same thing with musical works, and the question has been raised, what is a portion of a graphic work? So I don't think we can talk about parts in

this section. We're talking about wholes and entire works. And the question annuls itself. You buy it the first time.

MARY RASENBERGER: I'm not sure why we're necessarily talking about entire works in terms of the copying. I mean, maybe it's the same work that you're identifying, but it's not – and why (d) wouldn't apply? You're absolutely right. We're in (d), we're not in (e). Where in (d) then would you have to – .

CHRIS WESTON: Because CONTU really mostly applies to (d).

LOLLY GASAWAY: To (d), right.

JANICE PILCH: Right, it only applies to (d), but then the question becomes on how unwieldy it is to discuss portions of musical works, graphics or movies and how libraries would track requests like that.

MARY RASENBERGER: So you're saying that there's an underlying assumption that we couldn't figure out a way to do that in order to – before you get to that.

CHRIS WESTON: No, I think that's the question we're asking, which is – okay, if you've put these new types of works into (d) and (e) and CONTU guidelines apply to interlibrary loan. And you're making an interlibrary loan of this, and then do you have the square peg, round hole question where it's like, wait, what's a portion of this kind of work. That's the question we're asking. How would that be dealt with?

MARYBETH PETERS: For certain types of works like photographs – a photograph is always whole. You're never going to be doing a portion of a photograph.

JUDY FELDMAN: Well museums for example, museums will say that they want to use a portion of it. And there is a term for using just one portion of a fine piece for example. So – .

MARYBETH PETERS: What's a portion of a – how would you describe a portion of a photograph?

JUDY FELDMAN: The term – the term just left me.

KENNETH CREWS: Detail.

JUDY FELDMAN: Detail of – if you say detail of so and so that they can – rather than showing the entire work. If they wanted to focus on the touching of hands and the display that's in the Vatican. They can call it a detail of in that. You can get away with that. You can't – the Met doesn't like you to do it indiscriminately but if you – you have to ask permission to be able to do that and you have to get the rights to it. But you can use a portion. But I don't think that anyone should be getting a portion of a work

of a work that is a photograph when they're asking for it in an interlibrary loan. I think they should get whole piece, but that's my – .

LOLLY GASAWAY: Eric, could I ask a question about music because it might be easier to determine a portion of musical score, if it's a symphony, one movement or something would be – .

ERIC HARBESON: That's actually what I meant when I said that earlier. I fear I may not have been clear. But, for example, with – and I guess what I was thinking was with movies, is you might have on a DVD, you might have tracks – like chapters but with musical works you could – you can't say I only want the strings. You know, you can't really do that. What you can do though is you can say, well there's four movements to this symphony, I only need the second movement.

LOLLY GASAWAY: So there are some ways. I have Denise and then Keenan.

DENISE TROLL COVEY: Well, you remember my comments about CONTU this morning. I won't necessarily repeat them because I think they're really out of scope for this group. But if you would pursue – say you eliminate section (i). You allow (d) and (e) copies of these other categories of things. If you want to recommend that a bunch of people spend some whole lot of time working on that and pray to God they come to an agreement in a year or two or three or five, or whatever [CONFU] took to fail. That's fine with me. My concern would be that once again we make the mistake of giving it the force of law. As long as you remember they are guidelines and that fair use exists and should be applied on a case by case basis, I'm fine. I really think CONTU is – I've said enough on CONTU. But if we tried to give to the CONTU guidelines, the current ones or the expanded ones, the force of law, I have a real issue with this. And I think there's a danger if we develop more guidelines of this type that they will be given the force of law – kind of in an ad hoc, roundabout way. The way things are now, they'll be written into contracts, just the way things are now with our licensing agreements, and we're going to wish we rethought this.

KEENAN POPWELL: I guess with regard to recordings of musical works and the musical works embodied in those recordings, the – I would think that any CONTU guidelines need to address the differences between musical works and literary works. This goes to the combination where CONTU gets to a journal and the articles in a journal. Because there's an established market online for songs and certain compilations of recordings might have one song and not be as available. Whereas another song might not be not be available. So I think you should judge it based on availability of the song, not of the album itself. So I mean, I just wanted to mention that.

LOLLY GASAWAY: Sandra.

SANDRA AISTARS: I guess I have more of a general comment to this, which is this individual question is very difficult to even contemplate in the abstract, as is this whole process actually. Because there's no – it's a very difficult thing to say okay, we're

going to take out a part of these exclusions or all of these exclusions, when in fact you are looking see if particular types of works are – can be treated in a maybe a very different way under section 108. So I guess my answer would be, I would really need to understand what the section 108 provisions would look like. And I think, like Steve said in the beginning of the discussion, I would personally imagine that they would look quite different than section 108 looks now, if you were going to talk about audiovisual works, for instance. So, it's hard to answer this question without knowing what the statute itself might look like.

DICK RUDICK: Kenny.

LOLLY GASAWAY: Kenny, I'm sorry.

KENNETH CREWS: The transcript won't reflect the long pause, but that was – that's because we were copying silent films as – it's time to go home, isn't it? You know, not every one of my library colleagues will like this but I'm going to say what I've said before, only I'm going to say it a little more explicitly because I'm seeing it repeatedly. The line that we keep talking about, whether we're in the library community or in the commercial industry, whatever, whatever, whatever. The line we keep talking about is reasonable availability in the marketplace. Like it or not, that's a lot of what we're talking about. And you may not capture everything from one perspective or another, but it's a large part of what we're saying, what we're saying here. And you know, if it's a Warner Brothers film that somebody is looking for a copy of and it's reasonably available in the marketplace, just buy it. If it's out of print, it's in the vault during that time well then it's not reasonably available. Maybe as a practical matter I will go on eBay and buy a used copy, get it over with but that's not the law, that's being practical. And so I just keep seeing us move back to this. Whether we're talking about – no matter what type of work we're talking about. No matter what the circumstances of use are. No matter whether we're talking a little bit of it or the whole thing. We just keep dancing around reasonable availability in the marketplace. And if we could – I'm beginning to wonder if my position that we should just – we definitely avoid complexity in the law. If we can collapse this down to a one or two variable test, so much the better. And I can't help but think that this discussion is helping us isolate a major variable here.

LOLLY GASAWAY: Bill.

WILLIAM MAHER: From the archival community, I think I would second that. I think if I saw a trimmed down section 108 that really focused on that principle, I would number one have a great deal of – it would be very easy to defend that copyright law to the user-kind of community because that respects the rights of those who have a marketplace on it. And secondly it would address all those incredible quantities of orphaned materials that we have that are invaluable to users.

LOLLY GASAWAY: Sandra.

SANDRA AISTARS: I just wanted to respond to the last two points by saying that at least in regard to the types of works that I'm talking about, we're not talking about orphaned works and the copyright law over it is readily identifiable. And in that instance, I am very uncomfortable with the library taking on the role of the copyright owner in determining whether that motion picture will be made commercially available or be made reasonably available, however you wish to define it. Copyright includes the right to elect not to make something commercially for whatever – we may determine not to make something commercially available at a given time. And so to the extent the copyright owner is identifiable, I think it's necessary to deal with the copyright owner and not put libraries in an intermediary role where they have to decide you know, is it reasonably available, is it not? Is it going to be coming on the marketplace soon, is it not? Is there some Screen Actors' Guild issue or some other complicating factor that's affecting the availability?

LOLLY GASAWAY: We have to call time now. We need to take a 15-minute break and get back quickly. I do need to start alerting you about one thing, we are scheduled to end promptly at 4 and we have to not only end, but we get the heck out of this room because they have to set up the room for evening classes. And so, we really are going to have to vacate quickly after 4 o'clock. So a 15-minute break and we start back at 2:55.