

**TRANSCRIPTION
SECTION 108 STUDY GROUP PUBLIC ROUNDTABLE
JANUARY 31, 2007, DePAUL UNIVERSITY SCHOOL OF LAW, CHICAGO, ILLINOIS**

**Topic C: Limitations on Access to Electronic Copies, Including Via Performance
or Display**

Participants

Allan Adler, Association of American
Publishers

William J. Maher, Society of American
Archivists

Sandra Aistars, Time Warner

Steven Metalitz, Entertainment Software
Association

Dwayne Buttler, University Libraries,
University of Louisville

Janice Pilch, University Library of the
University of Illinois at Urbana-
Champaign

Kenneth Crews, Indiana University

Roy Kaufman, John Wiley & Sons

Keenan Popwell, SESAC

Keith Kupferschmid, Software &
Information Industry Association

Keith Ann Stiverson, American
Association of Law Libraries

Tomas Lipinski, University of Wisconsin-
Milwaukee

LOLLY GASAWAY: Okay we're ready for the last panel of the afternoon and this is Topic C. I don't think there's anyone new at this table who has not been here – some of you have moved around a little bit, which is actually good, thanks. But I don't think we have anyone who has not been here before so we don't need to do any introductions. I remind you again of the ground rules, so we know those.

Topic C – a lot of the materials, digital materials in libraries and archives, are not covered by licenses. They have been lawfully acquired, but unlike most commercially produced content, their acquisition was not accompanied by a license to reproduce, transmit, display, or perform. And a lot of this material is the kind of thing that Bill was mentioning earlier this morning – business files, emails, electronic manuscripts, digital recordings, legally captured websites, works that were captured under fair use. It could also be those that were acquired through donation, auction, or if it was the Library of Congress, mandatory deposit. Where a license exists, according to 108(f)(4), the license trumps fair use. But what about when there is no license? That's what we want to begin to look at. Like with any other digital content, temporary copies are a byproduct of access; however unlike CDs and DVDs that are tangible kinds of copies there is not explicit or implied license to make temporary copies of these works. Another unsettled area is the privilege to make temporary copies as a byproduct of not just access but of public display and performance, which some of the people around the table will be the most interested in.

You might note that section 109(c), which I don't think you have before you, but that allows the owners of a copy of the work to publicly display it on the premises one

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image at a time, or on the premises where the copy is located. It is not clear if 109(c) applies to digital displays. That is one thing we want to look at. But there is no similar exception for public performances, just for public display under that 109(c).

So the questions we're going to look at focus on temporary copies of unlicensed digital works that are made in the course of providing access to those works for users, or access through public performance and display. Now note again we're only talking about incidental copies that have to be made in order to provide that access, that's what we're looking at now. So Dick will get to the specific questions then.

DICK RUDICK: There are two related questions and I'm going to read them together and there's no reason not to answer them together. But if you could answer both that would be good. And they're directed primarily, maybe exclusively at librarians, but if we have enough time maybe there are some rights holders who would like to comment. But we really want to hear from librarians on this. And the two questions are, they are distinct, but related. Do your collections contain at this moment, or do you think they might in the near future or distant future, contain any or a significant number of unlicensed digital works so that you would really not rely – not like to rely on 107? But would like to have some legislative attention under 108 to how and when they can be used? And related to that question of fact, do you have any – this is libraries and archives, do you have any policy or practices? What are they? It's always useful to know what people are doing when you're trying to write legislation. Does it make a difference in your policies whether the material is digital rather analog? That's it. Are you just getting tired, or is this --? Do you think we shouldn't have asked this question? But it's our perception that these things exist. That doesn't mean the time is ready to deal with them, but what about it? Kenny.

KENNETH CREWS: This is Kenny Crews. A couple of us were discussing this yesterday. And we're a little puzzled over the question because it sounds like you're thinking these are odd items, but they're not. I mean, if we – the way you phrased the question. Do we have digital items in the collection that were not acquired under the terms of a license? Sure, every CD that we go buy from a retailer and put on the shelf. Every DVD we buy from a retailer and put on the shelf. Every website that we let somebody come in and have access to that we might point to and say, do we call that part of our collection. All of this and there's a lot. There's a lot.

DICK RUDICK: Yes, Bill.

WILLIAM MAHER: There is a lot. I'm not thinking of categories of materials like what Ken just mentioned, but archival records, large quantities of unlicensed electronic material there. As we move increasingly to have to capture institutional records of which would include email and databases and files of that nature, there is a large quantity of unlicensed material there.

DICK RUDICK: Corporate records – .

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WILLIAM MAHER: That's an additional form. And we expect that that is going – in order to maintain a viable position to document institutions and society we are going to need to be capturing records and information and documents in the forms that are being created.

DICK RUDICK: As I listen to the last two comments, I realize the Federal Register notice was in some ways a better formulation of the question than the paraphrase. Because we said what types of unlicensed digital material are you acquiring and how will these be acquired and so on? I think we did know that you had a lot. It's just that we don't necessarily have a clear idea of what they are and what the issues are related to them. So that's – .

MARY RASENBERGER: And the second part of the question is under what theory do you provide access now, whether it's implied licenses like DVDs, CDs or fair use.

DICK RUDICK: Yeah that's really what we meant to ask.

ALLAN ADLER: Can I just ask for a point of clarification? I raised this with Mary earlier. When you talk about lawfully acquired here, are you talking about a lawfully made copy?

LOLLY GASAWAY: No.

ALLAN ADLER: No.

LOLLY GASAWAY: No, not necessarily.

ALLAN ADLER: So it doesn't matter?

MALE AUDIENCE: So it could be an illegal copy?

ALLAN ADLER: It could be an illegal copy even it's lawfully – .

LOLLY GASAWAY: Oh no – . I thought you meant – .

ALLAN ADLER: I'm talking about the copy itself being lawfully acquired.

LOLLY GASAWAY: Yes, that's –. Yes, that was – . I thought you meant did you get it other than by making a copy. And I thought, well maybe the donor gives you their original electronic files.

DICK RUDICK: I mean we know there's a lot of this stuff. We did know that.

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MARY RASENBERGER: No, I think this is an important clarification that Allan is trying to make. That's it is lawfully made and lawfully obtained. So if somebody donates the archives a copy, it may be lawfully obtained but it might have been non-lawfully made in the first place.

DICK RUDICK: And can I suggest we shouldn't focus on websites because really that's been separate subject. Or Mary – unless you.

MARY RASENBERGER: No, we should talk about websites.

DICK RUDICK: Because we did cover website exception earlier.

MARY RASENBERGER: But that's for preservation.

DICK RUDICK: Okay, well then it does include websites. I stand corrected. Janice.

JANICE PILCH: Well I think we have to divide the discussion between tangible and intangible digital resources because there's a huge difference. Through the standard acquisitions process we acquire tangible digital resources, as Kenny pointed out, CDs, DVDs and that type of material. And there tends not to be access issues up front with those. We don't expect to mount them on a server and show them to people. We expect people to check them out or view them on-site in an AV room or something like that. But as far as intangible – the question really comes to, and I think what maybe you're getting at, are the intangible digital resources that we have that we – the only way to provide access is to put them on a server to people, really. Because in many cases they are archival or rare, unique, and we wouldn't loan the sole copy that exists.

DICK RUDICK: What – well the second part of the question was what are your policies and practice when you do that?

JANICE PILCH: For the intangible?

DICK RUDICK: Yep.

JANICE PILCH: I don't – they're not well developed. And they're – it's not a common practice as far as I understand to be putting these materials up on a server at all. I think, in most cases, we wonder what to do with them. And they're sitting until we figure that out.

SANDRA AISTARS: Can I just ask for a clarification? What are you referring to when you talk about intangible assets? Can you just give a couple of examples?

JANICE PILCH: Well, I mean we're talking about born digital materials. I can't even think of any in honesty that we have in this category.

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SANDRA AISTARS: So, but for instance if there was an electronic sell through copy of a motion picture, is that intangible or a tangible asset to you? It's never necessarily been burned to a disc. Maybe it's – you know, in the memory of my laptop that I donate with my personal papers to you.

DICK RUDICK: Let me give you an example, Sandra, because we're talking about scholarship here. What about business records, which could be protected by copyright?

MARY RASENBERGER: Emails, or whatever.

DICK RUDICK: Which we had in electronic form. The Wiley Company, my former employer decides to give – George Bush decides to give to the George Bush Library – it's electronic records. But look, we tend to focus a bit on what we're familiar with, which – and many of us are with commercial organizations so we think of movies, etc. I've got to believe that there are business records – stuff that – so part of what we want to know is what you have. What you're worried about. And then we can talk about each of those things. But you asked, for example, I think business records would be one that have been donated and there are lots of them, manuscripts – .

MARY RASENBERGER: Personal papers, which are now in an electronic format.

DICK RUDICK: And author's electronic manuscripts, for example.

KEITH KUPFERSCHMID: Well along those lines –

DICK RUDICK: We'd better make a queue here.

KEITH KUPFERSCHMID: Somebody mentioned websites as being both unlicensed and presumably that would fall in the intangible category as well, I would assume. But a lot of times websites do have terms and conditions attached to them that allow certain things and don't. So I'm not so sure I would put them in the bucket of unlicensed because there will be terms and conditions that specify what type of usage you can put the website in.

DICK RUDICK: Okay I have in the queue Kenny, Bill, Steve. Am I missing anyone? Or have I added anyone?

KENNETH CREWS: I'm not sure I got slipped in. But there is one thing I – . But this is Kenny Crews. The one – you said that the real question that you wanted to get to is on what terms do we use these works? Is that right? You said – .

LOLLY GASAWAY: How do we make them available to users?

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KENNETH CREWS: How do we make them available and do we do that under 107, 108, etc.

DICK RUDICK: It wasn't so much that. It's what your policies are.

KENNETH CREWS: I'm not so sure I can answer in terms of policy, because that means different things. But if I can rephrase the question, if you're asking do we use 107 to make some of these materials available? The answer is yes. Do we use 108 to make some of these materials available under another set of circumstances? The answer is yes. Do we use 109(c) to make some of these materials available? The answer is yes. Do we use – this one is not your list. Do we take ownership of the copyright in order to maximize use and accessibility of this material? The answer is yes. We as educational institutions and libraries are copyright owners. And we will become copyright owners for the purpose of then being able to set the rules so that we can make this material available. Deeds of gift to archives frequently include a transfer of the copyright. And we like to think we're benevolent, friendly copyright owners. Just like every other copyright owner. It's the nature of the subject. And another – and a specific example that wasn't necessarily archival, my library several years ago was given as a donation a tremendous collection of digital photographs of mushrooms. And – will that show up in the transcript? And in order to maximize availability – this was a donation from the estate of the photographer who took all of these pictures. And we went back to the executor of the estate and arranged for approval from the beneficiaries and from the probate court to transfer the copyright over to the university, so that we could own the copyright and make sure that we could, with assurance, post these materials on the server, and be assured of allowing researchers to be able to use this material in the future.

MARY RASENBERGER: Could I make one point of clarification? Just so we don't go around and around. I would – we're in 108 territory.

KENNETH CREWS: We are.

MARY RASENBERGER: We're talking about where you're not the copyright holder, so understandably a lot of materials that archives have, like personal papers, do come with copyright. But I think we just want to clarify that we're in the world where the library or archive is not the copyright holder and there is no license through donor agreement or whatever.

DICK RUDICK: Yeah. Bill and Steve are in the queue I think. Bill.

WILLIAM MAHER: I was just going to say that we don't have enough experience yet I think to be able to provide useful advice about what works. The fact that – I guess that's the nice thing about fair use. At least it's fuzzy, but it's there for us to kind of fall back on. I don't think that we're going to ten years from now [think] that

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that's a fully adequate approach. But it – I cannot imagine how we could or how the 108 group can write much of a policy on this right now. Other than to recognize the fact that this kind of unlicensed, digital material is part of the patrimony, if you'll take a sexist word, of society that needs to be curated by libraries and archives.

DICK RUDICK: So premature would be the answer. Steve.

STEVEN METALITZ: Yeah, I think rather than –. I'm hearing that rather than the tangible/intangible distinction there may be two big categories here. One is the stuff that is commercially acquired without a license and just in the regular marketplace. And that would include, by the way, most entertainment software is sold and not licensed. And then the stuff that's donated or might be acquired some other way. But often donated – and that's where you get into all this heterogeneous stuff, including business records and things that are a little harder to fit into these pigeonholes.

But I would suggest that – even on the commercial side, and I guess maybe you're getting to this question later, there may be one aspect here that I thought was under consideration which is the public performance right. Since, except for works in the last 20 years of their term, 108 now doesn't cover them, is there a need to clarify to what extent libraries, archives, museums can publicly perform works in their collections? And it seems to me that is – I mean it is worth asking now. What is the basis on which – what are they doing and what is the basis on which they are doing it when they don't have a – they don't own the copyright. They don't have an explicit license to publicly perform the work. Are the circumstances under which it's being publicly performed on the premises or off the premises? And that – it seems to me is a – might be a feasible subject to look at in the 108 context.

LOLLY GASAWAY: We do need to talk about that, but as a later question.

STEVEN METALITZ: That even on the commercial side. And then you also have the problem of, you know, if something is just kind of donated.

DICK RUDICK: The queue is empty. If – it's really questionable –.

KEITH ANN STIVERSON: I just wanted to make one comment. I mean I'm trying to look down the line and I know that in law libraries we're talking a lot about preservation. And I know this is not a preservation meeting, but down – you know, that's a lot of born digital stuff and we don't really know what we're going to preserve yet. And we're going to make agreements about it. But there's no point in preserving it if there isn't access to it. So this is another instance where we don't have enough experience really, but we're accustomed to now digitizing and making available public domain material and things that are out of copyright. But this other material that's unlicensed, I – we haven't thought it through yet.

DICK RUDICK: Well what I'm hearing is that – sorry. If I could just say something to those – I'll move to in a minute. But for those of you, who are librarians, if

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the message we're getting is that it's premature, you need time to think about it. But it's still useful to know in your experience what – what you're doing. What you want to do based on what's happened to date. So we can come back to that. Roy.

ROY KAUFMAN: Yeah, you know I'm still struggling with this is it licensed or unlicensed? Some websites are, some websites aren't. So if they're licensed, then they're out of it. If they're not licensed, they might be in.

DICK RUDICK: This is unlicensed.

ROY KAUFMAN: Yes, I know. I guess what I'm saying is – and it's not, did you acquire it, be it a tangible or intangible copy, or was it donated? I think the distinction here, at least what I interpreted when I first read this material, was the stuff that someone is out there selling. Be it a CD-ROM, a streaming video, something like that – something where there is a market for it, and then the stuff that I will call – essentially the archival stuff. The stuff that's produced and we want to preserve and maybe want to have exceptions for display and access and all of that. Such as business records and emails and where, I think from – as a book publisher and a journal publisher I want my authors to have some access to this stuff because this is the stuff where there's use for the rights. And it's not really trampling on anyone's expectations or why they created it. So I'm – we keep trying to find out what's the right taxonomy here. And I hate to keep just coming back to market and market and market. But essentially the stuff that's produced for the reason of being viewed and disseminated and copies and read and all of that and the stuff that's produced for a different reason, where I think broader use rights do make sense and display rights and such things. Okay, just trying.

DICK RUDICK: That's useful.

LOLLY GASAWAY: So you were agreeing with Kenny, I think. The whole thing about the market thing.

ROY KAUFMAN: Sadly I keep agreeing with Kenny. It's killing me.

KENNETH CREWS: It's a pleasure.

DICK RUDICK: Okay, any other observations? Please.

DWAYNE BUTTLER: I think if I'm understanding this correctly, which is always open to a question, if it's an original work and its fixed, then it's protectable whether it's digital or what we call analog in a somewhat inaccurate way. So therefore we wouldn't necessarily have lots of items that are copyrighted and in the collection in some LAMs, some of those are archived ones and some of those are those other kinds of things. But I still didn't understand the part of the question about if, in fact, they're copyrighted and section 108 would apply to them, then it would apply to them. So I didn't understand the other part of the question in that way. So if I can make use of them because they're

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copyrighted works under 107 or 108, I can do that whether they're digital or analog. Does that make sense? I was little puzzled by the –.

LOLLY GASAWAY: It does, but you don't have the intermediate copying issue with analog – it's just a photocopy.

MARY RASENBERGER: Yeah, if you can lend a book, you can – I mean you can even lend a DVD and the use of that DVD is identical to what it would be by anybody who purchases a CD or DVD. The – but we're talking about the kinds of works where you have to make intermediate copies in order to have any kind of access.

DICK RUDICK: I think Keith had a –. I'm sorry, did you want to continue before Keith took over the table?

DWAYNE BUTTLER: Well, no.

DICK RUDICK: Well okay, Kenny and then Keith Kupferschmid.

KENNETH CREWS: I think this intermediate copying thing is a bit of red herring for a couple of reasons. The main – the first one, I do agree with the sentiment that was expressed this morning and that is that all that kind of behind the scenes, incidental, is just necessary transitory stuff – we should just be thinking of that as fair use and move on. And only be talking about the real accessible, usable copies and puzzling over those. But even besides that, you know, you can't photocopy something today without incidental, transitory extra copies. Old fashioned photocopies, when I'd put together a course pack and I had 50 students, I always had two or three miscellaneous copies that floated around. And in the old days even somebody for AAP told us that was easy, fair use, don't even want to talk about it, that incidental stuff. Modern photocopy machines capture a digital image inside of them. You can't photocopy a letter without making a digital incidental, transitory image. It's inevitable. And if we're going to build law that is somehow concerned about that as a determinative factor, we're shutting down all of our daily activities. Incidental copying is inherent in much of what we do.

DICK RUDICK: Let's see, Keith.

KEITH KUPFERSCHMID: Yeah, although I agree Kenny with what you said about when you make a photocopy you do make a transient, incidental copy, I don't necessarily agree with the fact that those wind up to be extra copies. And certainly in the software industry, we wouldn't consider those to be transient or incidental if those were to be the case. But that's – I didn't want to address that. That's an issue for another time.

The one thing – in everyone's comments here, you have a lot of people around the table with a lot of experience and a lot of knowledge in these areas. But the one thing I hear them all saying is I think, I think I understand, I mean – there's – I've heard three different distinctions. That there are tangibles versus intangible, commercially

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acquired versus donated, preservation versus commercial. And the libraries, at least some of the libraries saying this is – this seems to be premature because they're not sure what they want, what they're doing now, or what they want to be doing. This is pretty dangerous stuff if you're going to start to make recommendations in this area considering the folks around the table really can't give you much guidance or really necessarily [understand] what's being asked of them either. I think this is a dangerous area to go. I understand why you're asking the questions, but to go too far down this road, I would say proceed with caution.

DICK RUDICK: Any other questions, comments before we move to Lolly's – to the next question?

LOLLY GASAWAY: This is still building on this lawfully acquired, unlicensed digital copies, building on this. But what uses should we be able to make of those as a library or archive? The EU model limits access on dedicated terminals on the premises only. That's one model. Security or other measures to prevent downloading or distribution, simultaneous use restrictions, remote access – under what conditions? Putting it on a server but then adding some kind of restrictions as to who can look at it, when or – ? Sort of all of those issues. And again, maybe it's too soon, but when we're looking at all of this with section 108, we at least have to recognize that libraries are getting unlicensed digital materials and we need to figure out what it is we're going to do with those if we're going to – . We can say we're not going to touch that in the statute, right, but we at least need to hear from you guys about [what] you think we should do with it.

DICK RUDICK: And I think for this we want to hear from both librarians and rights holders.

KEITH ANN STIVERSON: Anything but dedicated terminals, please. It just doesn't work and we can't operate that way. I think almost any other solution would be preferable to discuss than dedicated terminals. But I'm not the only librarian here.

SANDRA AISTARS: Before we get into the bullet point about dedicated terminals or security measures or whatever, I still don't understand what people want to do. What works are we talking about and how do you intend to use them? Because I think the answer on whether a dedicated terminal that is something that I would absolutely want or not want depends on what the use is, where you got it, what it is and how it's going to affect what else is going on in the marketplace.

DICK RUDICK: While librarians are thinking about that, Steven, you were in the queue.

STEVEN METALITZ: I just wanted to say on dedicated terminals, I am here representing an industry most of whose product is designed to play on dedicated terminals.

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KEITH ANN STIVERSON: If purchased that way and that's the agreement, I mean – .

STEVEN METALITZ: Well these aren't – well these aren't subject to license. It – but if you buy a disc to play on a PlayStation 2, I don't think there's a problem with the library installing a PlayStation 2; buying a PlayStation 2 console and people could play it there. And the – .

KEITH ANN STIVERSON: Too expensive.

STEVEN METALITZ: -- public performance – . Maybe someone will donate it to you. And the public performance that occurs there I think may be – ought to be, within the premises of the library – may be and ought to be covered and explicitly dealt with in 108. But when you get beyond that to either network access or play – or using it on other types of terminals, you're getting into one of two things, either our business model or piracy. And so I don't think libraries should go to either one.

DICK RUDICK: Okay, Allan did you have your hand up?

ALLAN ADLER: Yeah, just in clarification again. This was – we're talking about these are works – . When you say digital works, we're not talking about digital copies of works. You're talking about works that are inherently digital.

DICK RUDICK: Yeah, born digital materials in the library.

ALLAN ADLER: Because again, the way this reads – the question about lawful acquisition and my point about copies being lawfully made – and then suppose you had somebody who, you know, was creating digital copies of analog works and donating them essentially to an institution? Would that be sufficient – without a license requirement of any kind? And doing it on a very massive scale. Assume that the donee institution wanted to now make these available for public display to its community. Is that – you're talking about that only in terms of a work that exists only in a digital form, not in a digital copy of a work.

LOLLY GASAWAY: That's what this question was looking at.

DICK RUDICK: Yeah that's correct.

MARY RASENBERGER: I'm not sure if we're excluding lawfully acquired digital copies of works that initially existed in analog form.

DICK RUDICK: Say, again.

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MARY RASENBERGER: I'm not sure that we're excluding lawfully acquired copies, lawfully made and acquired copies in digitally form where the original was in analog.

DICK RUDICK: Well, take the business records example, just because it's simple. You could – Wiley could donate a set of business records in print or it could give an analog copy of it – digital copy of it. And really, I think we're talking about digital uses of both, Mary, either. Does that help?

MARY RASENBERGER: Um-hmm.

ALLAN ADLER: Well it just – it raises again the importance for me of the issue of whether or not the copies are lawfully made. Because otherwise you run the risk of institutions essentially becoming like laundering operations for illegally made copies of works that are lawfully acquired by them in the sense of the transaction, but nonetheless are illegally made. And I don't see that reflected sufficiently as a threshold question that these institutions are required to even exam it.

LOLLY GASAWAY: So you would suggest adding in not only lawfully acquired digital content that was originally, lawfully made but – .

ALLAN ADLER: Well there are other places in the Copyright Act, as you know, where it specifically requires that the copy be lawfully made.

LOLLY GASAWAY: You're right, and I just wanted to clarify that's what you were saying.

ALLAN ADLER: Yep.

MARY RASENBERGER: Let me ask a question to clarify. Lolly mentioned the EU model and dedicated terminals. But at the other end you could say, well should libraries be able to put electronic copies on servers so that they can provide access for instance, anywhere within their institution or even off-site access? Well, you know – I don't know what the current practices are, if you have any current practices on that. But that sort of takes it another step because I think some would argue that in order to make any use of some of these materials, you have to copy them onto a server, and what are the issues with doing that?

ROY KAUFMAN: This is, I guess, you know, for the librarians because again I'm still struggling with this. Let's say an entity gives you business records or emails or that kind of thing, it may or may not – leaving aside the word license, don't they normally say oh, well, particularly, "here are our business records, but all these people are alive and have a privacy right so don't do this or don't do that." I assume that you guys would honor those. I mean that's part of how you got these and you do honor them. How does that interact with this? I mean, are you getting a lot of these kinds of

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documents without some restrictions, let's not call them licenses, by the donor who may or may not be the copyright owner? You know, we have to assume – .

KEITH ANN STIVERSON: Maybe the archivist is the better answerer on this one because you just have it all. You have every kind of – .

WILLIAM MAHER: I was trying to really grab a hold of Roy's question there. And part of the reason I didn't get a good hold of it is I kind of paused at the notion that copyright is somehow or other being invoked to enforce privacy. The fact that privacy – the privacy issue, a donor in that situation whether it's paper or electronic that they're giving us, may indeed raise that issue or we may more than – if they don't, we'll raise it with them. Because if we're aware that there's a large number of living individuals where those factors will have – we'll try to have that regulated under some sorts of access restrictions. And the electronic versus analog really doesn't make any difference there. The only thing – the only significant difference is that if you're getting somebody's recent email like – . An example I can think now that's not an outside entity, but a president of a university and getting their emails right after they retired from being president. They are the ones that ultimately need to make the decision that if they're turning that over to the archives, they are releasing things that may have been delivered to them as private or semi-private communications. And do they feel responsible enough to do that? It's our responsibility to call that issue to their attention, not necessarily to dictate to them, which way to go with that.

ROY KAUFMAN: No, I wasn't trying to conflate the two. I guess I'm still getting back to the question of should we be discussing this. And so I guess what I was saying is if 108 said you could do A, B, C or D with business records, would that make a difference? Or would you, for the most part, be really looking at what the donors are saying more than anything else? And there are two separate issues here. The donor – in that example, the donor may be the copyright owner of some of it and not the copyright owner of the other parts. And I don't want to put the two together.

MARY RASENBERGER: Roy, I think what you're saying is that how many instances are there where libraries or archives – remember we're talking about museums too – get materials that don't come with, for instance, a donor agreement. And where the donor agreement, you're assuming, might say something about use rights.

ROY KAUFMAN: Yeah.

MARY RASENBERGER: And so I think you're asking the question, how often do you get materials that don't come with use rights.

ROY KAUFMAN: Thank you, much better.

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MARY RASENBERGER: Well, in that case I would say if it comes with use rights, you have a license, okay. And the license trumps, so we're not in 108. So I guess that's the question is how – that was the first question we asked. How often do you get materials that don't come with any kind of license, which I think includes donor agreements, if they specify use rights.

DICK RUDICK: It's a question of fact.

SANDRA AISTARS: Can I ask a different question of the librarian and archive representatives? Which is – this issue might go even further because if you're getting, for instance, a donation from someone that comes with some restrictions on how you're going to use my papers. My papers may include things that I actually don't have the right to donate to you because I have acquired them under a contract with a movie studio. I have acquired a reel of 35 mm film that I was supposed to keep for my own personal collection and not donate to some other institution, for instance. Or it could be I'm back to my more readily understandable example. I'm donating to you all of my papers including my, now in digital form, papers on my laptop's hard drive. And my laptop contains my iTunes, records, my – all of my personal emails and letters, might contain digital photographs of mine or my friend who is a photographer, digital photographs. I don't have a – I, as the donor, don't have the right to give you a copyright license to the digital photographs that my sister has created. Nor do I have the right to transfer to you the copyright rights to keep in your collection and display further certain other materials, perhaps. So how do you deal with that when you have a donor agreement because that might help solve some of these issues as well?

DICK RUDICK: Yes.

JANICE PILCH: Well I think the answer to that question is that we know that we have to restrict access and we don't assume and don't feel there is a compelling need to make that kind of material available widely. There are too many risks involved. And so it – if it's donated to an archive, it becomes – it's used by – upon request by people who might need to view that. But it doesn't circulate widely and copying is restricted. And I don't think anyone is really clamoring to make that kind of material publicly available or widely available. It would take too much time to sort out what would be [legal] – how to do that.

KEITH ANN STIVERSON: Yeah, you get archival collections and the library might make a collection record and do a basic description, but it's not going to go through all those boxes and figure out everything in there or make it widely available at all. It's only available to qualified researchers usually, and somebody who needs the material and can show a – show a reason to need to look at the material in the first place.

DICK RUDICK: Bill.

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WILLIAM MAHER: I think that to an extent, there is – from the situation that Sandra describes, there is nothing really substantively different about that whether you're talking analog or digital. We get a box of papers or a filing cabinet from somebody. It has that same mix of kinds of things of the family photographs. The letters sent from other individuals. The way in which – .

LOLLY GASAWAY: Tapes made from television programs.

WILLIAM MAHER: Right, exactly. I mean a hodge-podge of stuff. In terms of how we manage it, I don't know whether this formulates anything usable in terms of copyright policy, but it does deal with the curatorial issues. When we execute a deed of gift, it asks that rights of intellectual property, which the person owns in it, are transferred to us. So your sister's photographs, you're not transferring her rights. We know that and when we turn the material over to a researcher who says oh here's a photograph of such and such in the collection, do you have the rights? And well, no, that was not made by Sandra, it was made by someone else. Assuming one can identify that from the item. Then we don't have those rights. You didn't have those rights to give them to us to begin with and we can't receive something that you didn't own in the first place. The same thing is true in the digital environment. The only really significant difference that the format makes is that if all the collections were digital and we put it onto a server and had some sort of artificial intelligence engine create an access device for it, everything could become immediately available to a large quantity of people, then you would have also all those issues with incidental copies being going on. And if we're not going to accept the incidental copies as something appropriate to put in under fair use, then you do have a problem there.

I think I want to go to point that Keith was making there that the way in which archival collections are controlled is a fundamental principle of aggregate level. There is a summary descriptive record. Every individual piece of paper, every individual document is not controlled. And that – what control is exercised on it, is generally at the – when you get down to that individual piece – at the use point rather than at the intake point.

DICK RUDICK: In those circumstances do you ever supply remote access to digital material? Do you have any experience with that?

WILLIAM MAHER: Um, I really don't have enough experience with it yet. It's just too limited of a quantity of – . Not personally – I'm sure there are some are some folks out there in the field who have, but not personally.

DICK RUDICK: If there's no inclination to discuss this further, we can move to Lolly's next question.

LOLLY GASAWAY: This finally gets to the question Steve was the most interested in, which is the public performance of these unlicensed electronic works that would be akin to the 109(c) public display exception that currently exists. What kinds of

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works are there for which access is normally achieved through public display and performance? And thinking about those issues, it could be a donated student film, it could be all kinds of things that because it is in an electronic form, again assuming it's not on a tangible electronic form, but there is a performance even if you're going to dedicate a terminal. It's still a performance right. So that's the thing we wanted to look at. Does it make sense to add a public performance to 109(c) in addition to public display for that type of format?

STEVEN METALITZ: Well, I just forgot what the first question is again. What is the practice now when libraries that are open to the public and archives that are open to the public get into the public performance issue? When you have audiovisual materials in your collection, legitimately acquired I guess from either method either from commercial acquisition or donation. Do you – ?

DICK RUDICK: People are having trouble hearing you.

STEVEN METALITZ: Oh, I'm sorry. When you have audiovisual materials in your collection, whether you've acquired them commercially or they have been donated, do you have public performances of those on the premises of the library or archives? It is open to the public, so presumably even if it was on dedicated terminals, it would be a public performance. And if so, how is that dealt with in 108? If it's not dealt with in 108, unless it's in the last 20 years of the copyright terms, so, is there a gap there? But it really – the first question is really what is being done now? Maybe nothing's being done. Maybe it's a non-issue.

LOLLY GASAWAY: Well I think Keith Ann earlier said that in her library these things were checked out.

KEITH ANN STIVERSON: Well there might be a classroom performance of *Twelve Angry Men* with Henry Fonda that we purchased and a student who had to miss the class, might go to our media room and view it there. We don't lend that material ever because it's – it disappears too easily and we want to keep it in good shape. But that's law school. It's not a public library in that sense.

LOLLY GASAWAY: Janice.

JANICE PILCH: Janice Pilch. I would echo that, but just say that the viewing in the media room isn't a public performance. And in my experience, we don't do public performances of these kinds of works, musical or film works. It's not done. It doesn't seem to be a problem. But one thing that I just wanted to bring up in response to what Lolly said when you talked about donated student films, this might be the appropriate time to bring up institutional repositories. Because if we're talking about donated student films or donated manuscripts, donated pre-prints and post-prints and that sort of thing, that university libraries are trying to collect from professors and students, those materials generally will be licensed. We try to get the students and the

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professors to license those materials when they donate them to the institutional repository. So that sort of thing will probably not fall under what we're talking about on unlicensed digital works. And I think we need to realize that too, because this is increasing. And the materials that we acquire in institutional repositories are going to be licensed.

MARY RASENBERGER: Can I just raise an example of a loan on a television archive that gets its materials donated from the production companies. So the companies that actually made the television programming, they do not necessarily have the – they don't have rights to give rights in most cases, so most of their donor agreements do not have any use rights in them. Their practice is that they do permit – they exhibit in private booths on site, knowing however that that actually is a public performance under our current law. But they figure nobody – it's their current practice and nobody has objected. But I don't – it might be fair use. But that isn't – .

LOLLY GASAWAY: Marybeth, did you want to say something.

MARYBETH PETERS: No, I'm okay.

LOLLY GASAWAY: Keenan.

KEENAN POPWELL: I guess what I wanted to say basically is that if a performance is outside of a close circle of family and friends, it is being held as a public performance, fair use aside. But also I would say just from the [SESAC] perspective, as a point of reference, we – I think a blanket license is something that is perfect to cover this type of collection that the archives receives where you don't really know exactly what's there and which student works have musical works embodied in them. And a blanket license – if you get the three blanket licenses you cover all three and that's – at least that's the majority of commercially exploited music. Enough said on that so – . And it's an option to consider or at least an issue to consider before considering a sort of blanket exception or exemption from public performance.

LOLLY GASAWAY: Sandra.

SANDRA AISTARS: To the question of whether an exception needs to be added – I presume in this question to section 108 – to permit public performance that is akin to 109, I think it is important to note that 109 is – only applies to copies that are lawfully made. And so to the extent that someone is acquiring works and not doing the appropriate sorting and categorizing of those works to ensure that you actually have the rights from me to put those works on your server or to make those works publicly available, I think that would be an important question to consider here in the context of 108. And I would be far more uncomfortable with a change to 108 than if we had a different group discussing 109 and what should and shouldn't happen under 109. I'm not saying that I'm at all comfortable with discussing it under 109 either, but at least 109 is modified by the copying of the work having to be properly, lawfully made.

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LOLLY GASAWAY: Dwayne.

DWAYNE BUTTLER: I think to the extent – and we're talking about museums in addition to libraries, so I think that's an important factor as well, not that I speak for museums at all. But to the extent that we have – I always run into this problem – displayable and performable, if I can make up words. If we have those kinds of works and we can lawfully make them under 108, depending on all the other conditions we were talking about earlier today, then I think that you might want to add that notion that you can do that in that context. Because there are a lot of other conditions that we talked about earlier today that we don't know how those are going to come out, so I don't know this piece of it. But I think we're contemplating some kinds of works that are performable.

JANICE PILCH: I have one other thing to say because I read this question and immediately thought the reason that we do public displays is for exhibits, primarily for exhibits. And when we exhibit books people see two pages of that, two facing pages of that. They don't see the whole work. I don't – I can't think of an exhibit where a person would see a whole work. And I interpreted this question to mean, would it be appropriate to have a public performance of excerpts of a work so that people could see that you own material, it would make an impression. But they would see snippets. That's what I thought this question was asking. In which case, I'm totally in favor to exhibit pieces off of an audiovisual or film or musical work.

WILLIAM MAHER: Thinking about the historical society museum community, I would second what Janice just said. There are definitely instances where as part of a display and exhibition, having brief audiovisual clips is very helpful. To illustrate the point, I'm thinking in one instance of a museum I'm associated with that has musical instruments in it showing different kinds of valves on trumpets, different kinds of mouthpieces, or an exhibit on Hawaiian steel guitars. To be able to illustrate the effect of different mouthpieces, if you will, or tubes versus transistors in the guitar amplifiers, that's done through an audiovisual-type clip.

SANDRA AISTARS: Is that clip something you're creating or something that you have in your archives already?

WILLIAM MAHER: It would possibly be a – well we're not talking audiovisual. We're talking audio here. But let's expand it and say you had a 16 mm film of a person playing the trumpet. And you might show that and it would be part of the collection.

KENNETH CREWS: Well, my question on this subject then is, are we wise to try to define this activity and put it into a specific statute? Or would we be better off keeping it as a matter of fair use? And if you're not comfortable with fair use, then go get licenses. Because as soon as we define that something is allowed and we go through an elaborate exercise and conclude that okay, you can do exactly X with a video monitor

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in a museum exhibition setting, as soon as I'm doing something else – and one that I saw recently were clips of cowboy and Indian movies, western 50s and 60s, rolling by on a screen, embodied in a great big complex sculptural work – can you define that? Can you predict that in statutory language? I don't want us to. Let's just try to leave a lot of that for fair use.

LOLLY GASAWAY: Sandra, then Keenan.

SANDRA AISTARS: I don't disagree with that. I'd also say if you're talking about a museum context, I would guess that more than likely, just like in Allan's example of a textual work that might include photographs or audiovisual clips or whatever, those are all licensed works. So the artist has come to the audiovisual copyright owner or to the owner of the musical, the sound recording and the musical work and got the right to use it in his artwork.

LOLLY GASAWAY: Keenan.

KEENAN POPWELL: I guess I'm – as far as museums I just want to state SESAC offers a museum license. And as far as I know ASCAP and BMI have also licensed museums for quite a while. And to your point, to Sandra's point about a work, the sound recording that has been licensed, that sound recording copyright holder would have different copyright holders, such as songwriter, but also the musical composition embodied in the sound recording could have different songwriter copyright holders. I think generally now the model is if the museum can rely on fair use or license the works from the copyright holder. So I just think that a lot of times it's – the songwriter is forgotten.

DICK RUDICK: Somebody has to – Mary asked me to exhaust the topic, or have we exhausted it ourselves? But there is one – well, Allan had his hand up.

ALLAN ADLER: Well, I was just going to ask the question. It didn't appear in your formulation of the question for today's agenda, but it was in the questions in the Federal Register. And that was the subject of implied licenses for these works. And I just – from the perspective of the publishers, we just thought that was a sufficiently dangerous and an uncertain route that we would rather not go down at all. Because you have to get into a variety of, I think, of discussions and potential definitions and criteria for what are the indicia of the implication of a right to be able to do particular things with that work. And I just don't know that that's an appropriate topic for the scope of 108.

DICK RUDICK: Well we weren't necessarily saying that it was. It was really a question of what the practice is.

ALLAN ADLER: Yeah, I know and it wasn't in the questions asked.

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MARYBETH PETERS: But remember, feel free to submit written comments on any of the questions that we didn't cover in our face-to-face.

MARY RASENBERGER: I had a question that came up in the last group of topics and I just wanted to put on the table, not necessarily to talk about now. But to have you ponder maybe and submit written comments on, and I would – if there are any other questions that we didn't raise and we have a few minutes, I believe you can raise them very quickly now. And that is, it was a topic that we kind of skirted around, but never addressed directly. Under (d) and (e) copies can be made for research, scholarship, and private study. Now, there – what I heard is that there aren't a lot of problems, and this is talking about adding other media, not a lot of problems with research and scholarship. But when you are talking recorded sound or audiovisual works with private study, does that include entertainment uses? So I just wanted to put out there to think about whether we need to eliminate the private study. Do we need to define it so it doesn't include entertainment? If that's something that from a rights holder perspective would make it – might make it more palatable. So that's a question you can respond now or you can – . Or do we like the way that it is phrased in the statute right now?

ROY KAUFMAN: Keith Ann is looking at me. I am wondering if the private study means if you don't enjoy it. I will make the point, you know, scholarship and educational use – I've made this point more than once, I'm sure Lolly's tired of hearing it – that's what we do. If you have an exception for our market then our market doesn't have to buy it because there's an exception for the market. And we actually think of ourselves as relatively good people who have decided to make educational and scholarly works. No aspersions on those who make wonderful entertainment for mass markets and all of that. But I always just get worried about these exceptions for those of us who just happen to be in this field to begin with. And if you remember, getting back to what we were talking about, what's being used in ILL under these exceptions? Educational materials. It's journal articles, scholarly journal articles, so let's just do what we can to not have – to have reasonable exceptions that don't swallow the rules and not try to make rules about whether or not you enjoy the work.

LOLLY GASAWAY: All right thanks to everybody for your input today.

DICK RUDICK: Well, we've said several times about written comments, I just really want to hammer home on that. This has been so stimulating to me. It's hard to absorb it all and the advantages of written comments are three-fold. First of all, you can cover what we didn't have time to get to. Secondly, it helps us. You have a chance to reflect on what you heard and that will make your comments – your written comments – even more useful than this discussion. And it's – I just really encourage you to do it. We do promise to read them all. March 9th is the cut-off date. Mary – .

MARY RASENBERGER: Well, we will put the transcript with the long silences for the subway to go by in it. So that will go up on the website, not for several

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weeks though. I just want to thank you all for coming and participating. I think this was really, really helpful today. I learned a lot from you. And I want to thank Dick and Lolly for leading today. And again want to thank Barbara and DePaul for hosting us.

LOLLY GASAWAY: So remember, pick up your stuff and