

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

Topic 1: Eligibility for Section 108 Exceptions

Participants

James Gilson, Natural History Foundation
Richard Pearce-Moses, Society of American Archivists
Patricia Cruse, California Digital Library
Kathleen Bursley, Reed-Elsevier, Inc.
Kenneth Crews, Copyright Management Center
Jared Jussim, Sony Pictures Entertainment
Jeremy Williams, Warner Bros. Entertainment
Brewster Kahle/Jeff Ubois, Internet Archive
David Nimmer
Liza Posas, Autry National Center
Gordon Theil, Music Library Association
Sherrie Schmidt, Association of Research Libraries and
American Library Association

Lolly Gasaway: All right, let's jump into topic one, which is eligibility for the section 108 exceptions. As you've read, if you didn't already know, section 108 currently does not define libraries and archives; instead it lays out certain criteria that libraries and archives must meet in order to qualify for the section 108 exception, specifically the library or archive must either be open to the public or to researchers doing research in specialized field and the exempted activity must not have a direct or indirect commercial advantage. Concerns have been raised that libraries and archives increasingly have been used in a broader sense, in a more generic sense than was originally intended in the statute. It's not clear whether these non-traditional types of libraries or entities and archives should be covered by section 108. The Study Group has discussed this at some length and whether the statute should clarify what types of institutions are covered by the section, and whether this clarification should be achieved by adding new criteria or by adding definitions of qualifying libraries, archives and institutions. So, let's talk first about whether eligibility should be restricted to non-profit or government libraries and archives and I'd like -- we'd all like -- to have your views about what would be the benefits and the drawbacks of limiting 108 to non-profit and government bodies. So, open up for answers from anybody around the table.

Mary Rasenberger: Ok. Gordon first.

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Gordon Theil: We are particularly concerned about ...

Mary Rasenberger Remember to identify yourself if you would. Sorry.

Gordon Theil: . . . No, I'll probably forget every time. This is Gordon Theil. Libraries and archives should be defined based on the nature of, and access to, their holdings not under institutional mission. That would be my argument. We are particularly concerned about unique materials that may be held in institutions not considered eligible under too narrow a definition, materials that should be preserved for current and future creative instructional or scholarly uses. We don't wish to see the content devalue or various user communities made unavailable simply because of the type of owning institution. Examples of archival materials held in for-profit institutions that are valuable to the performing arts community include: music publishers' archives, which when they exist can have materials with scholarly value such as original manuscripts, correspondence with composers and performers, documentation about commissions, documents used in productions and promotional materials. Similarly, recording companies hold historically significant information about composers, performers and recording sessions. Film and television studios may archive the only written versions of music composed by notable figures for motion pictures and television series. Such studios also hold a wealth of information related to the collaborative creative process, including a variety of production materials, manuscripts and treatments, set designs, and costume designs. These sorts of collections contain materials of great value to current and future scholars critically examining the historical, cultural, and sociological significance of these works and the institutions that created them.

James Gilson: I'm Jim Gilson, I'm the General Counsel of the Natural History Museum Foundation here in Los Angeles, and welcome to Los Angeles for those of you from out of town. I want to underline a few things that Gordon just said. I think we have to look to the purpose of the

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libraries and archives exceptions and recognize that there are realities today that I'm not sure existed when the exception was created, and not play around with what an institution may choose to call itself. We have what everyone in the world thinks of as an archive, the Seaver Center for Western History Research that is part of our museum but we don't use the word archives. That archive is associated with and is part of the University of Southern California's Special Libraries Collection. We do not collect in the same areas as the special libraries at USC across the street does, nor do they collect in our areas, intentionally, so as to maximize the utility of our limited collecting funds. We also share a research relationship with many of the studio archives that are for-profit organizations, because we have a significant collection in early material relating to motion pictures. It's not as formalized as our relationship with the University of Southern California Special Libraries, but the fact that Warner Brothers, for instance, or others have an archival collection that is in a for-profit institution and ours, our complementary one, is a non-profit institution, should not really be the determining factor as to whether a member of the public or a qualified researcher is able to do one kind of work in one place and not able to do it in another kind of place. Smaller museums may not have those kinds of relationships that we have where we might be able to, at least theoretically, piggyback on other relationships or change the name over our door in order to take advantage of an exception when the audience, the usefulness and the purpose of the collection is the same, whether it's a large institution that shares a relationship with a university, or shares a relationship with a for-profit organization; a smaller institution in a perhaps less urban setting might not have those same advantages, so since we happen to be in a large urban setting, I want to speak on behalf of the other institutions that don't share the benefits that we do. I am mindful that one of the most important cultural institutions in this town is the Huntington Library Art Collections and Botanical Gardens. Another one is the Getty, which has a Research Institute, a Conservation Institute and Art Museum; and another one, my colleague here to my right works for an institution that used to have the name "Museum" in it, in fact is the marriage of two

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museums and now calls itself a National Center, and if we look to the purpose of the section 108 library and archives exception, I think we need to be clear for the guidance of all of us in this world that in today's and tomorrow's world, the words library and archives are not really the bases on which the exception was created and we need to recognize that and give guidance to those of us who may not choose to scrape off the granite word "Museum" and put on the granite over our door "Museum and by the way we have a library and/or an archive or we work with other libraries and archives".

Jeremy Williams: I'm Jeremy Williams. My reaction to the two things that have just been said is that it seems to me that it's two different questions that were being answered with the things that have just been said, but one was the question that you began with, which was for-profit versus not-for-profit distinction, and the other had to do with whether the definition of a library or a museum or something like that, or an archive, might be too narrow, and I wanted to respond briefly to both because I think they're somewhat different from each other.

Jared Jussim: My apologies, I'm a New Yorker, so they said "head to the ocean" and I immediately turned east.

Jeremy Williams: They are asking you to introduce yourself.

Jared Jussim: Oh they want me to introduce myself, I thought I just did. My name is Jared Jussim, I'm the Executive Vice-President of Intellectual Property of Sony Pictures Entertainment.

Lolly Gasaway: Welcome. Jeremy, we won't count that in your time.

Jeremy Williams: I thought I was finished ...

Jared Jussim: Oh, did I interrupt you Jeremy, I'm sorry.

Jeremy Williams: So, responding to both, because you might've anticipated a little bit a future question, I

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think from our point of view, if one sticks to the not-for-profit side and combines that with a non-commercial activity in the public interest, I think our point of view would be that making narrow distinctions between something that is classified as a library, or an archive, or museum or something like that, does not makes sense. Simple example: I don't see any particular difference between the New York Public Library and the Metropolitan Museum of Art. I think from the point of view of section 108, their functions are fundamentally the same. And we can score that a little bit further later, I'm sure.

But, when we get into the not-for-profit versus profit distinction, I think then we need to be concerned. And the reason is, the example that I think is implied by the comments that Mr. Theil was making, is of some difficult to find, very scholarly sort of work which might be found only in the collection of a for-profit organization such as our own, and you have a lot of things like that. But, that's just one, you know, item in isolation in this whole discussion, if we found at the end of this discussion that all that we were talking about was some sort of completely non-commercial, difficult to find, one-of-a-kind item, maybe that would make some sense, but maybe not, at the end of the discussion; and my prediction is that when we start talking about the permitted activities, and the permitted eligibilities, and if it's not going to be limited to that, and you face the prospect of having for-profit organizations engaging either indirectly or directly, in activities that might permitted by 108 with respect to many many works, the vast majority of which may be commercial in nature, available now or maybe not, maybe next week, so we strongly favor, particularly since we think this is good to take one step at a time as we go into the digital changes that are needed, to stick to the fundamental not-for-profit company institution not-for-profit activity.

Kathleen Bursley: Kathleen Bursley of Reed-Elsevier, oh sorry.

Lolly Gasaway: I think Kenny was first.

Kenneth Crews: There is no difference

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Kathleen Bursley: Got to get your pointing cord.

Lolly Gasaway: Kenny, Kathleen and then Richard, how about that?

Kenneth Crews: My name is Kenny Crews. I think that - I like what I'm hearing, I think this is very helpful, it seems to me that we need to sort this question in relationship to a couple of other factors and not see it by itself, that may ease some of the differences here. One is the question of - and the way the question has been presented, is: should section 108 be limited to the non-profit, government work or stand beyond that; but the current law does extend section 108 beyond non-profits, can apply in other kinds of libraries as long as they are, to use the short hand phrase: "open to outside researchers". But there is more to it than that, there is the next layer of protection or limitation on that, is that the copying itself is not done for, I'll paraphrase, "direct or indirect" commercial advantage. So it would say a for-profit entity may do certain things, but can't do them specifically to embark in a commercial enterprise is, roughly speaking, the way I read the greatest significance of that provision. And then there is another layer on top of that too, and that is: we might have a different answer to that question, when we look at the question as it applies to different types of activities, we may say we have an answer to your question if we are talking about large scale preservation endeavors that are open to the public, but then maybe we have a very different answer to the question if we are talking about preservation activities that have some significant limitations on access. We may have yet an altogether different answer to the questions if we are talking about the isolated kind of copying for interlibrary loan purposes. We might not have much concern about the taping around the table if the question is: can a for-profit entity participate in interlibrary loan activities when we are talking about single copies from esoteric materials that happen to be in a highly specialized corporate library. And then we may say, "Well OK we can live with that" but we may have a different more restricted answer when we are looking at

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large scale open access kind of approaches. So I think we need to look at this question in a little bit more nuanced manner than just an up or down.

Kathleen Bursley: Kathleen Bursley, Reed-Elsevier. I think I'd like to emphasize one point that Kenny made in particular, which is the requirement at the moment that the activity not be done for direct or indirect commercial advantage, and I think many of the points that have been made about different types of collections that might be held by a for-profit entity or an entity that doesn't call itself a library or archive but performs substantially the same function from a book and journal publisher's point of view, matter less to us than would removing or diluting the requirement that it not be done for direct or indirect commercial advantage. It seems to me that really is at the heart of the exception, especially as regards copying and preservation, and I think to rely on the title of the institution, even if you added things to the list besides library and archive, would get less at our concerns than would any dilution of direct or indirect commercial advantage.

Richard Pearce-Moses: Richard Pearce-Moses, Society of American Archivists; and we're of the firm belief as somebody at the panel has written recently that libraries and archives had a social mandate to preserve knowledge for decades and centuries, and so we are, as archivists, looking at this as a long haul rather than necessarily the immediate use of these materials and duplication of these materials. And as that we believe that libraries and archives exist in many forms and many flavors; and in fact, the more diverse definitions we use, the more inclusive ways we use the headings libraries and archives, the richer and more diverse the history and knowledge of the past. My organization has 4500 members, many from small organizations that, as Mr. Gilson has said, might not have such a title in its name, that is why SAA strongly encourages we look at the function that the collection is used for, not the institution, in defining whether it is or is not a library or archives. A small organization may not have the resources to have a formal organizational unit, but may have a very good, rich collection of materials.

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SAA is very concerned that corporate archives, for-profit archives, be allowed to remain within the section 108 exception. We do have a bit of a concern because there is an assumption that corporate archives have copyright to most of their holdings and, in fact, because many of those materials are received in the course of business, the presumption is generally that the creator who sent that to the corporation is the owner of the copyright, and this creates enormous complexities in preserving those materials that are required to have copyright permission. And I'm limiting my comments here to preservation principally because my understanding is that we would not be discussing the notion of access to the materials in these meetings, so my concerns are primarily on the notion of the ability to reproduce for preservation purposes.

Jeff Ubois: My name is Jeff Ubois and I'm here representing the Television Archive, which for the last five years has been making off-air recordings of worldwide television programs. We've been working with many researchers and academics; we've made a portion of the Television Archive news programming covering the week of September 11th, 2001 available over the Internet. The Television Archive today contains hundreds of thousands of hours of television that isn't preserved elsewhere and section 108 is critical for our existence and operation, so on behalf of the Television Archive I want to make a few quick points and answer directly some questions posed by the working group, so the question . . .

Lolly Gasaway: . . . would you stick to the first question . . .

Jeff Ubois: . . . yes, yes, so should we cast into law the definition of the entities that can take advantage of the section; and that goal is a good one, we want appropriate and future institutions to be able to take advantage of the provisions that are in section 108 while making the abuse of it less likely, that seems to be the real identity here, but on balance we don't believe that the institutions need to be defined more restrictively in law than they are already. While it's comforting in the short term to explicitly permit institutions we want to protect to do

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what they are doing, definitions that can strain innovation in the future in an area that is changing as rapidly as the digital library world is now would seem to prevent innovation from happening in the future that we all want; so to Jim Gilson's point: adding museums to title makes sense, but it might not be necessary to compress the definition further.

As for abusers, we don't see enough of a problem to warrant the cost of additional constraints. I don't believe that the common defense held by criminals that they are really a library therefore deserve protection under section 108 or they deserve sanctuary, right? When the Television Archive was first contemplated, we went out and asked lawyers "What does it take to be covered by section 108?" and they said "there is no registry or firm definition, but if you walk like a duck and quack like a duck, you are a duck." In practice that seems to have worked pretty well, so when people ask the Internet Archive what's appropriate to put in the collection, we come back with, well, in the tradition of library collections, wholesome materials that are assembled for public access, so any move - this is the crux of it, for us - any move to allow only what's explicitly permitted, is a big shift from a tradition that says let's deny everything that is not explicitly permitted, so that kind of a change would pose real problems in a library or archive I believe, so we don't want to make it more difficult or impossible for the next Andrew Carnegie to step up with some innovations and start collecting materials in new ways. I have additional comments about the preservation; I guess I'll stop there. Thanks.

Lolly Gasaway: OK, we'll get to that. Thanks.

Jared Jussim: Can I make a remark? I was waiting my turn; I didn't know how, I came in late, I apologize.

Lolly Gasaway: You didn't hear the question posed, though; we are only commenting on whether we should change the definition to mean non-profit or government only; that was the question, we'll get to other questions but that's what we are responding to right now and certainly you may.

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Jared Jussim: OK, I was going to say I don't have too much faith in the concept of profit or non-profit itself, because frankly, I know some large not-for-profit corporations, perhaps even this one, that are extremely profitable. Certainly I know some colleges and universities that are extremely profitable, so I don't put too much faith in it, but I will ask this: what is the purpose of it? What are you doing? And if its purpose is a public good, if its purpose is not being fulfilled by somebody else who has an interest in the property and will actually preserve it? Then perhaps it's not necessary. When I went to Greece there is a beautiful beautiful Greek temple, the last one actually remaining fully intact, and the archeologist in charge make this remark, "I've learned over the years that the one thing, the one thing that helps to preserve the building is if it's used, and this building has been used always." Now, in the case of Jeremy's company, and my company, and by the way my competitors; not that we two aren't competitors, let me be frank, I can tell you some blood that has been shed. We are spending, when people talk about archiving and, really, copying a DVD to me is not archiving, is not preserving. Later in topic 3 there is going to be a gentleman called Grover Crisp from my company, he will tell you what it costs to restore and preserve a work. On the average, we budget sixty thousand five dollars per film, and we spend each year from twelve million to fifteen million dollars to preserve our archives, that's because we have an interest in it, I make no bones about it. But on the other hand, we also, if you will, have a great benefit that we confer, we continue to make low cost entertainment, high cost to produce, but available to the masses at a very reasonable price. And for those of you who look and snicker, I merely say this: look at a legitimate theater, look at sporting competitions and ask how much they charge for admission compared to my youth. When I was -- and I was once young, I know it's hard to believe, I even went on dates with girls, we called them girls in those days. And I would go to legitimate theater; sure I sat next to God, I don't deny it, but you can't afford it now, it's too expensive. We in the motion picture business continue to make that product available, and the reason we make it available, frankly, is because of our libraries; we have good years, and we have bad years,

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and what supports us during the lean years are what we did in the fat years, and what that is, is our libraries. So I'm very sensitive to this property, very sensitive to its preservation; on the other hand, I did come here to listen, I did come here to learn, and if you have good suggestions, we are willing, at least I am, and I know Jeremy always is, to listen and to learn and to hear what you have to say.

Lolly Gasaway: . . . Professor Nimmer . . .

David Nimmer: David Nimmer from UCLA, I subscribe to the considerations that Jim Gilson and Gordon Theil laid out at the outset. I'm wondering whether those calls for the need for any legislative amendment, so far I haven't heard any; if we imagine Aaron Copeland composed in 1940, and the original manuscript is in Warner Brothers archives, first of all it was probably a work for hire and Warner Brother owns it so it doesn't need one or the other, but even if that wasn't the case, and if you brought in some music that he composed before and it happens to be in Warner Brothers archives, the fact that Warner Brothers is for-profit does not take it outside the section 108 exemption. Warner Brothers could, as long as it wished to make a certain room open to the public and to allow access to that room without purpose of direct or indirect commercial benefit to Warner Brothers, could take advantage of section 108 how it is currently formulated, so it's a fascinating discussion and I'm open to hear more that calls for the need for an amendment, but thus far in the discussion I haven't heard it.

Lolly Gasaway: We are going to let everyone speak once, then we are going to do follow up questions, then we are going to probably have to move on.

Brewster Kahle: Yeah, Brewster Kahle, Internet Archive, Non-profit. In speaking of the dangers of this topic, something, part of this - what would be the downside of going . . . I had a fascinating reading and I recommend it, it's Jessica Littman's book *Digital Copyright*; she tried to describe in her book: How did we get in this mess? Because over the last hundred years, hundred years ago -- I realize I'm sitting next to Mr. Nimmer, Professor Nimmer -- it used

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to be based on broad principles and in the last hundred years has basically been a set of compromises hammered out in committees over the last hundred years, and this committee is no different; that's sort of how this has evolved, and she put across a couple of historical points of what sort of happens in these sort of committees, and there is usually a sort of a raising of hypothetical threats that aren't necessarily real issues that are coming up, so there is a sort of hypothetical thing coming up and then the group that is at the table tries to make sure that what they are doing is allowed, but not necessarily going to vociferously protect other things that aren't necessarily of their interest, and things shrink in terms of what it is that happens. So this is sort of my model, it's human nature; I've been on these committees, all of these committees of sort of what happens, so if this is the model, then what is the downside of what it is we are doing here in terms of defining what a library is? For one, I'd like to try - is there a hypothetical or is there a real problem? Are we seeing organizations getting judgment by judges, getting access to 108 provisions that kind of require legislative squashing? I mean, are Google, ProQuest, Dialog trooping to court, going and doing things that we would find objectionable, and some runaway judge is doing things that basically we want to bring them under control? I'm unaware of this, so I don't know that there is real problem, that there is a threat here, I think the idea of adding museums to it, you know, is a no-brainer, but the key thing here is innovation.

We are in a key position where libraries are in a position that we can go and have specific intuitions that are interesting for the next hundred years or not, and this provision is about the only thing that protects some of the -- section 108, that protects the Internet Archives, Television Archives, and other sort of interesting things, we are reshaping our industry, such that we have shared resources that are going to be shared between libraries. Are they going to be subscription based? Well, we'll get a little bit more into the uses that are talked about. But in terms of the definitions, I would suggest that now is not the time to screw this down anymore, especially if there is not a problem. As Jeff mentioned, when we got advised as to "How do we get section 108 protection in the

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Internet Archives?", universally they came back with "walk like a duck, quack like a duck, you're a duck". I'll say that is good enough for now.

Lolly Gasaway: . . . Patricia. And then we'll move along.

Patricia Cruse: I'm not going to say anything new. Patricia Cruse from California Digital Library and I agree with pretty much everything that has been said here. We don't want to see a narrowing of the definition of section 108 that would prevent us from innovating and working with other partners to preserve materials that are of interest to the University of California and help us fulfill our mission of serving the faculty research and the students, so I think its really, you know, if it's not broken, don't fix it.

Mary Rasenberger: Any follow up questions Dick?

Dick Rudick: Well this has to be quick. We are asking this question in context of a new all singing, all dancing, bigger section 108. Brewster, you spoke of hypothetical threats, is there anybody who has any concerns, exposures that feels these are hypothetical?

Kathleen Bursley: Kathleen Bursley, Reed-Elsevier. I would say that if we are limiting that question to the initial question that was asked, which was about adding limitation that would be not-for-profit and government. I can't see that that protects our interest any more than what is in there now; as I say, I think most people here seem to be saying, one way or another, that it's the purpose of the activity in our case, not for direct or indirect commercial advantage, that really should govern eligibility for the exception.

Lolly Gasaway: David, Chris or Mary, follow up questions?

David Carson: Just one thought that this is all about to me, looking at the existing language, and it's not in print or in copyright for a library or archives or any of its employees . . . the thought that the conversation is about to me is maybe you say a library, archive, museum or

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similar institution, you got flexibility in there, that is what I captured.

Lolly Gasaway: One more and we really have to move on.

Richard Pearce-Moses: If I can respond to that again: for many smaller archival institutions I'll be hesitant to use "or similar institution" because that suggests, to me at least, that there is some sort of organizational unit, and they are in smaller corporations, smaller private organizations that have just a small person in it and it's a part time job run by one person. So I have no real objection to adding those other adjectives, but when you went to "and other institutions," to me implies that there is an institutional or organizational formality, that does not meet many of my members -- my organization members' needs. Thank you.

Dick Rudick : Literally one minute.

Jeremy Williams: Literally one minute, I just wanted to add that though I know we are going in question order, we are talking: what would be an overall result. And I think, from the content owner point of view, the threat question was raised, that marks in the next part of the discussion. The more flexible the definition of the institution, the more narrow the definition has to be of what the institution can do.

Dick Rudick: That is helpful, thank you.

Lolly Gasaway: We call that the squishy toy. We squeeze on one end and on the other - among our group.

Dick Rudick: That is a little hint of what we've been thinking. Between all of these questions, and we apologize for asking question by question, but at the end, they do all much together. That is a good segue to moving to question two which is interesting. I remember . . .

Mary Rasenberger: Dick, I just want to interject one thing before we move on, I'm sorry. I know some of you came in late and we've gone over some ground rules before you came

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in, so I want to make sure everyone is on the same page. You have in front of you the schedule with some ground rules and the way that we are moving through this, which I think is clear to every one, Dick and Lolly will be asking specific questions which were laid out in the Federal Register notice; we would like for you to respond to those questions and keep your comments to three minutes. He said we can get through everything. It might be helpful to know for this topic, we're going to be going to museums and other institutions. We'll be talking about whether purely virtual institutions should be covered and the general question of whether there should be more definition added. Am I missing anything here? It's helpful for you to know what questions will be coming in this session. That's all.

Dick Rudick: OK. Question number two. People my age, when you say "library", you think of something warm and fuzzy, maybe the New York Public Library where you spend a long time, or rushing to the campus library before it closes so you can prepare for the next morning's class. In the modern world, we realize that library can mean something different. And the question here is: Should the statute cover virtual libraries or virtual archives? By which we mean those that do not have a physical location, which the patron visits, an institution that serves people only online? If your answer is yes, why and what should the condition be and off you go. Anybody?

Jeff Ubois: Non-physical and virtual services are already a big part of what libraries do. There is nothing in the section that says that virtual libraries fall outside the (inaudible) of section 108 already. I think that it's almost understood, again, if you go with the popular understanding of what a library is and what a library does, providing off-premises access is standard for any major library.

James Gilson: Yes, Jim Gilson, Natural History Museum Foundation of Los Angeles. The question has a little bit of an example of something that I'm concerned about more broadly. First, we provide physical access to people walking into our building, sometimes with a reservation,

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sometimes not, much in the same way the co-chair went to the New York Public Library in his youth, and that I went to equivalent institutions in my youth here in Los Angeles; but we also provide access in other ways, more virtual than physical, and for space and economical reasons, more and more of us are moving toward the latter and somewhat away from the former, so I'm not sure - I think, again, that this is something that is increasingly becoming a distinction without a difference. Here is the broader concern I wanted to at least touch upon: if we are going to be making wholesale changes to section 108, and we end up with a new section 108, I think it is important that we not leave the implication that, if we did not change something that was discussed, it means, that we meant that something was excluded from the definition of section 108 or the permissible section 108 activities. If for instance, just to take my parochial and self interested example, we choose to leave the definition of archives and libraries as it is without, for instance, saying libraries and archives may include similar institutions such as museums; having discussed the topic, I would hate to have some future court say, "well, they talked about it and they didn't do it so they must not have meant it." And I have the same concern about digital and non-digital. I think that there are all sorts of great drafting ways to avoid that problem, without necessarily saying that we then only meant these additional things and didn't mean possible future things, but I am worried that we talked -- not addressed it specifically in some way or another and leave a negative implication that we didn't intend.

Dick Rudick: Jim is addressing this specific question and we want to be sure we're not talking about off-premises access which is a later question in topic two, with that in mind . . .

Sherrie Schmidt: Sherrie Schmidt. It strikes me that we are talking about a duck; I mean, because the virtual archives really do the job of maintaining our cultural history that traditional libraries and archives have done over the years. Were it not for Brewster's efforts I would have great concern about what's going on in the preservation of the web. So I think the virtual -- I wish

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we had another word, I wish our language was not so limited so that we could express that it is the collection of the cultural memory, in a different way.

Dick Rudick: If our librarians can't enlarge our language, we'll give it a try.

Sherrie Schmidt: We'll be working on that

Dick Rudick: I guess we have two "Cruses" and Jeremy I think you had your hand up.

Jeremy Williams: I was just repeating my name, Jeremy Williams, for protocol and also was just repeating the point, because I think from our point of view, of my company, the answer to the question depends almost entirely on the answers to the last question, so we visited; and what I mean by that is, you know, virtual collections enable more and more -- or digital collections enable more and more people to build collections and that is a good thing, but it also creates the ability, in the sense because there is a lower barrier of entry, for anyone to declare themselves a library or archive that is collecting things of public interest or otherwise; and depending on what they can do with that, that can be a problem or not, so I wish to return to this when we get to that issue.

Dick Rudick: In alphabetical order, Patricia Cruse.

Patricia Cruse: Patricia Cruse, California Digital Library. The UC system is comprised of ten research institutions that coordinate a ten-campus library system with over 34 million bound volumes, 200 million manuscript items, 2 million maps, on and on and on. A lot of these are digital. At present our shared digital collections are virtual collections assembled by a CDO comprising about 8 thousand journal titles, 250 databases as well as web pages, books, etc., and it's a significant investment. What these virtual collections allow us to do are a number of things: They allow us to innovate, they allow us to drive costs down, they also meet the changing nature of education. Students don't want to come to the library, unfortunately, to check out books, they want to get it

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online. So, it's a need, and faculty the same thing, so I think it's really imperative for us to be able to assemble virtual collections.

Kenneth Crews: I'm Kenny Crews and I would endorse this movement as well. I think the answer to this question of, what's the word here? it's a library, and library is the big word, and library is the word that's got a changing meaning. And I think that one of the beauties of section 108 in its original form is its openness to that change and its neutrality about technology. I was in fact one of those in the camp that thought that the amendment in 1998 about making the digital application explicit was not necessary. I did not believe that was necessary, that we could apply this, apply the current section 108 in these new arenas. And moreover, on the question of virtual libraries, going back to one of Brewster Kahle's points, where is the litigation over this? The answer is: there isn't any. Section 108 has been mentioned a rare number of times in cases and really has not been the focus of court rulings and litigations. And that may be an indication that it's working pretty well and it's leaving us in the trenches to hammer out some of the details. I think it is inevitable, that we should be very careful about legislating any kind of definition about virtual libraries under whatever label or whatever definition. Because the application of technology is absolutely unavoidable, we can legislate all we want, but it's going to arrive anyways. The libraries aren't going to become great big buildings with lions out the front, they're going to become computer network systems and they're going to be somebody sitting at home with a 500 dollar computer system and an internet connection saying "I'm a library and I got a box full of stuff and I want to see if it qualifies for section 108". That is the movement of the future and it can't be avoided and frankly, it ought to be encouraged.

Kathleen Bursley: Kathleen Bursley, Reed-Elsevier. I'm getting really good at this. I think that there is a little bit of a danger of pushing two things into one. The question of digital collections within, for example, a university library, a university library system, a museum, whatever, is I think one side, and I don't believe there's

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any suggestion that the digital or virtual collections in such institutions are in any way different from the rest of the collection, except insofar that digital materials are different from analog. Where I saw this question going was, an entity that has no physical premises, has no door you can walk in and ask to look at the dinosaur bone or whatever, and does not have any affiliation with any other free-standing institution; that's where I saw the question going. And I would say, I have a concern, albeit an inchoate one, why that is not good, why it should require some affiliation or some physical premises to be eligible, and I think that maybe where it is going is what Kenny was talking about, the thirteen-year-old kid in his bedroom with a box of something or other, is he really a library from the point of view of the statute? And I don't know where you draw a line between requiring an affiliation with a physical institution and letting anyone who has a box of documents and scans them into his computer, be a library. I'm not sure where that line would be drawn. It may be that it's best just to leave things the way they are and see if problems arise with an overextension of the exemption, rather than drawing lines when we don't really know what's going to happen in five years or five minutes, for that matter.

Gordon Theil: Gordon Theil, Music Library Association. In response to this particular question, I want to again point out that content and not format should be the consideration in terms section 108. Digitized or digital content is increasingly taking the place of printed material in academic and research institutions. Also, for digital collections, access and preservation are closely related because use of a digital surrogate allows for the preservation of the original artifact. To exclude virtual libraries from 108 would hinder the development of digital libraries which is definitely not to the benefit of academic and scholarly communities.

Dick Rudick: OK, we have four in the queue and only eight minutes, so that tells you what you have to do. Richard?

Richard Pearce-Moses: Richard Pearce-Moses, Society of American Archivists; and first, I would share a point of

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personal confusion, to echo what Ms. Bursley said, as I was reading this I got very confused as to whether or not we were talking about organizations that were exclusively digital, but this raises an important issue which is that many libraries and archives are both, and so, if we are talking about virtual collections, this does become definitional; and if we are talking about collections as opposed to institutions, so I share that personal confusion with the committee so hopefully others will not be confused or smarter than me.

In my perception it's a born digital world. The state of Washington has a reading room for digital archives. Never in the past, and I will check if you want, but I believe it was in the past four years have they had a single patron. In a born digital world, why are we making people come someplace to look at something? It's very scary and I appreciate that, but why must we require a physical presence, and because we've been talking about this, I would like to add to what Mr. Williams said: I think we look to the purpose of the reproduction or the distribution or the use rather than the collection. SAA strongly supports virtual libraries and archives.

Dick Rudick: Jared.

Jared Jussim: I agree with Jeremy and I was going to remain silent. It really depends on what you do with the collection, but so many people had sort of commented on what they're doing and the thought of the kid sitting in his room with a computer, and even if he is a member of Mr. Pearce-Moses' collection society with 500 things giving everyone access, because if you read the Library of Congress brochures in their collection of articles, they say, if you have an archive which you don't give access to, you have failed in your purpose and I presume that is what I'm listening at. People who are going around giving people access to, if you will, copyrighted works, are violating the copyright. Period. In a virtual room when you send it to the home, that is distribution, that is my business, that's how I make my money and by the way, that is how I produce other works. So, while you are busy collecting, remember the people who are producing the works, who are paying for the people, to make a theatrical

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motion picture, because I hire -- not I, my company -- but I have a personal feeling about it, from 350 to 1000 people, employed, blue collar workers. I'm not talking about talent, I'm talking about carpenters, electricians, computers. The thousand, you have computer operators but the three fifty, they're grips and electricians, they create jobs, they create the works, which by the way, you would like to save, but we are saving them, so, why are you doing it? Why are you sending out the stuff too, because there is a virtual library?

The other thing is, you want to know about suits? You know how much lawsuits cost in this town? They are expensive, we pick our cases very, very carefully and it is a major effort to find somebody, because you have to go through like three steps, you've got to notify the ISP (Internet Service Provider), then you have to come back and bring a separate action to locate them, because they don't give their names, that's their customers. So lawsuits aren't the easiest way with the problem. If you want to say, should there be a virtual library, I think eventually, yes. We recognize the time of the future but we also . . . I'm sorry, cut?

Dick Rudick: You are professional; it looks like you have a lot of work . . .

Mary Rasenberger: There has been some confusion raised about what our question is here. So we wanted to clarify it. Our question arises from the DMCA legislative history, which does say,

"Just as when section 108 . . . was first enacted, the term 'libraries' and 'archives' as used and described in this provision still refer to such institutions only in the conventional sense of entities that are established as, and conduct their operations through, physical premises in which collections of information may be used by researchers and other members of the public. Although online interactive digital networks have since given birth to online digital 'libraries' and 'archives' that exist only in virtual (rather than physical) sense on websites, bulletin boards and homepages across the

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Internet, It is not the Committee's intent that section 108 as revised apply to such collections of information."

So we have interpreted this to understand that purely virtual institutions are not covered currently under 108. I don't take this to mean that libraries and archives with physical premises that also have digital collections are not covered, but the question is, what do we do with purely virtual, since this legislative history for the DMCA seems to be saying they are not covered.

Dick Rudick: OK, this may be, question number three, this may be short, David and Brewster and then . . .

David Nimmer: David Nimmer. Well, it's fascinating to hear the legislative history of the DMCA. I'd like to focus us on where the statute was, where it currently is and how it applies. Once again, it seems to me that there is no need to amend section 108, because we don't have the history of litigation or market failure. However, when the language was first adopted in 1976, when Congress said it was talking about a copy currently in the collections of the library or archives, to quote section 108(b)(1), it's clear they were referring to the dinosaur bones - Kathleen Bursley's phrase - or the Aaron Copeland manuscripts or early recording. Now, although Congress said it did not wish to extend that to a purely virtual archive, nonetheless by the language of the statute it seems that it does apply, if there is an internet archive that currently downloads copies of websites, to me what is on the server of the internet archive is a copy currently on that collection of that archive, so just applying the language of the statute the way that it currently reads, it does seem to me that is a vastly broader than what Congress enacted in 1976 and what Congress may have intended when it amended the language in 1998, so we have to be cognizant of that as we move forward.

Dick Rudick : Brewster.

Brewster Kahle : Mary scared the Bejesus out of me (laughter); OK, so the Internet Archive does have premises. It's got a little sign at the door that says that, you

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know, researchers can come and we have very few, but it's there; we always thought we were part of 108, right. There is this part of the DMCA that does sort of go and talk about digital libraries being excluded, which we thought was kind of odd. And I would suggest that we would bring it back home, maybe there was an excursion out in 1998, but let's go back to the "walks like a duck, quacks like a duck, it's a duck." There are certain types of institutions, especially that are coming up, whether it is California Digital Library, it's JSTOR, the Internet Archive, the Television Archive, that have their dominant role in life collecting and disseminating digital work. They may have physical holdings someplace, but we think we are already covered in 108, unless Mary is right. And so we do not need to further specify if virtual libraries are allowed, because we think they are.

Dick Rudick: Richard.

Richard Pearce-Moses: To refocus this on the preservation aspect of section 108, I worked with the long term preservation of electronic records. It has to begin immediately; you can't wait 100 years to be able to duplicate . . . am I missing the point?

Mary Rasenberger: . . . We are not there yet.

Richard Pearce-Moses: I'm sorry, I'm sorry. I'll hold that thought.

Dick Rudick: So, are clear on this?

Lolly Gasaway: We may have talked enough about this already, but we did have as a separate question for you, looking at whether museums are social institutions like libraries and whether we define them or not and add the word "museum" to libraries, archives, and museums. We have, in 108, did we have to have something, I mean we have to have something to identify to what this exemption applies, and we may have talked about it enough, and that is what I'm asking you, have you, a lot of you responded to that in the first question, so I don't want to shut that out.

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Mary Rasenberger: Does anybody have anything to add? I guess that is the question

Lolly Gasaway: A complicated issue that we have looked at is outsourcing from a library. Many libraries and archives are currently outsourcing and are considering outsourcing some of the activities covered under section 108. A traditional one that libraries have outsourced is photocopying: Who own the photocopy machines and maintain them in the library. But as we move in to digital preservation, there is at least some thought that many libraries may want to outsource the digitizing because it is cheaper and more efficient to do that off the premises, or to bring a contractor on the premises. So should section 108 apply to contractors of a library or archives that are acting solely on behalf of the library or archives, as well as their employees?

Gordon Theil: Outsourcing should be permitted under section 108, I can't believe that it isn't at the moment. Not all libraries have material that is appropriate for activities under 108, or have the resources available to develop their own digitization programs. Even large libraries with digitization programs need to outsource for materials with unique formats, for example, cylinder and wire recordings that need to be reformatted; or they don't have the required expertise to handle such materials like disks and tapes with acetate covering and that sort of thing. If the materials are owned by institutions and the institution is recognized as eligible under 108, and the purpose is another criteria of digitization conforming to the requirements of the section, and the vendor is not benefiting from the content of the material, but simply by the payment for the work performed, why should it matter if it is outsourced?

Brewster Kahle: Outsourcing or contracting, I think we have some experiences there. I think the general perception is that it is allowed, so the Internet Archive does work on behalf of the Library of Congress and the National Archives as well as about 12 others, so we are outsourced to and we outsource digitization such as

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microfilm digitization and the like, so as they are operating on behalf of us. So, I think, in general, to the extent that there is a restriction that makes it that people can't contract out, that should be wiped away, but we are not aware of that.

Lolly Gasaway: We are going to pick Jim and then David and then Jared.

James Gilson: I am going to try to be as brief as I was before. Jim Gilson, Natural History Museum Foundation. I just want to pose for your thinking a real-world example. Many of the collections in the Natural History Museum are owned by the County of Los Angeles, whose museum I work at. Some of the people who work in the history collection -- some of which are two dimensional, some of which are three-dimensional, some of which are neither two nor three-dimensional they are digital or virtual -- work for the County of Los Angeles, some work for the Natural History Museum Foundation, which is a support organization for the Museum and might be thought of as being outsourced archivists or collections managers, perhaps. In turn the collections at the Seaver Center are, some of them are being digitized by the University of Southern California digital collections management cooperative, which is not what it's called, but that's in effect what it is, in order to provide broader access to collections to a wider range of individuals. So outsourcing is happening; it's a natural part of what museums do, and as you think about how to address or not address the question of outsourcing, just please keep in mind that the relationships by which materials are preserved and made available is kind of an organic process for what makes sense to the world or what makes sense for the institution, not kind of an imposed "well, this is an outsource, this is some another kind of relationship".

David Nimmer: David Nimmer. I agree with what Gordon Theil said that it should be permissible to outsource the vendors. I read the statute as not permitting that at present. So, if you take a hypothetical example, if the Getty Archives represented by Maureen Whalen behind me, were to hire an outside vendor to do two things, one would

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be permissible and one would not. If she hired the outside vendor to take the software out of her computers and to modify it to work better in the Getty environment, that would be permitted under section 117 of the Copyright Act, which has the following language: "to make or authorize the making or another copy." If the Getty were to hire the same outside vendor to digitize works in its collection as permitted under section 108, I think it would be permissible to the copyright owner to sue that outside vendor and to prevail, because the outside vendor would not be able to take advantage of section 108. So it makes sense to me to modify section 108 to contain language drawn from section 117 or otherwise conveying the same result.

Lolly Gasaway: Jared.

Jared Jussim: Yes, surprisingly enough, we have no difficulty with using outside vendors, assuming that they are true vendors and they are not, if you will, an auxiliary of the museum, you know, another location of the library, if the methods of transmission are sufficiently secure, not the equivalent of the open back truck or state truck taking things from point one to point two. As far as David's points are concerned I'd like to go over the statutes. I think he may be drawing too narrow an interpretation, and my reasoning is this: That if someone is acting as a true -- oh, it's quite all right, it won't be the first time -- if somebody is drawing a too narrow, an agency relationship may well be allowed. It doesn't say you always have to be the principal doing it or a regular employee. Much as if the work was made for hire, you can have, if you will, a regular employee, an independent contractor whose work is controlled and, or if you will, someone who agrees to do the work. So with that type, I'm not saying that that analogy applies. I'm merely saying I would like to at look at the statute before I feel the need of amending the statute. We would have no needs if security is maintained, if the vendor does not have public performances of his work to show how good a job he does and that the copy doesn't stay there permanently or what is equivalent to permanently.

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Sherrie Schmidt: Libraries don't necessarily have all the expertise in-house to do this. And I think all the activities permitted under section 108 should be allowed and that might be the creation of visual objects, cataloging, and creation of data, storage and maintenance of digital files, servicing of these collections and archiving of the files, so there are a number of activities that I think should be permitted.

Kathleen Bursley: I do actually believe that the exception is limited to the libraries and archives and their employees, so I do think that the statute presently does, in its words anyways, preclude using outsourcing. On the other hand, I don't see any reason why this needs to continue, particularly since it's apparently being honored more in the breach than in the observance; but I think there do need to be some conditions which Jared did allude to, first is that the vendor may not keep a copy in any format of the work that they're being asked to digitize or do other things to or with, I guess, and there should be a financial consideration paid. Well, I guess I'll just say, in the case of a certain large search engine which is attempting to make digital copies of the collections of various university libraries, there is no consideration, monetary consideration passing through as far it's been said; but we would view that as an example of why there should be a straightforward financial vendor arrangement rather than some sort of barter or other type of deal. I mean, I'm not going to go to the wall and say: You know you can't, we'll let you use the auditorium for free if you digitize. I mean OK, but I think you see were I'm going with the need of a straightforward business relationship, rather than something more ephemeral or whatever, and I forgot to say my name Kathleen Bursley, Reed-Elsevier.

Patricia Cruse: Patricia Cruse, California Digital Library. I'm not going to speak to the legality of outsourcing but simply share with you some of the challenges that we face in preservation and the sheer mass of digital information coming our way. It's complicated, it's changing, and everybody know this. For example, we selected and crawled a bunch of websites related to hurricane Katrina and we are still doing that on a daily

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basis. We're pulling down about 2 million pages a day, that is an incredible amount of information, and for us to be able to manage that in-house locally, we'd have resources that we simply don't have and expertise we don't have. So we do need to look to third parties to outsource these types of activities to. And I must add, in working with those third parties, we are just as careful as if it was in our own house. And we recognize that it's an important investment that we've made, and we need to make sure that investment is safe.

Kenneth Crews: I'm Kenny Crews, just a brief comment. I agree that the current statute has been problematic at best on the question about outsourcing, and I like the suggestion that Mr. Nimmer gives us about some possible revision to clarify that point. The current language that we should look at, that has given me some trouble, is not merely the opening language about giving an authority under the statute to libraries etc., but the condition in there under 108(a)(1) that the reproduction and distribution is made without any purpose of direct or indirect commercial advantage. I always pause at that language, wondering whether a commercial entity that handles the outsourcing task will therefore be barred, because their copying of the material would then arguably be done for a commercial advantage; if that is not the intent of that language then I think it would be important for the study group to have someone look at that language.

Related to that is the general point that we have alluded to several times -- and I know we'll get to the substance of this point later, but to answer a lot of these early questions, we'll really be needing to answer them in a context of what are you doing -- and maybe what we are talking about here again is allowing outsourcing for certain activities. We may more easily agree, more readily agree, that we would allow outsourcing of the digitizing, but the distribution has been done per condition and by the qualified entity. We might be able to look at it from that point of view again. Thank you.

Lolly Gasaway: Liza first, who hasn't spoken, and then Brewster and then Jared.

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Liza Posas: Liza Posas from the Autrey National Center Research Library. My pause is the word "outsourcing." We are a small operation and without outsourcing we can't really function. Again, what everyone echoed, we don't have the expertise or the technology. Also as a small institution or a small operation, if the projects were to come up where there is collaboration involved where somebody says, I'll put the finding aids up on the web, just give them to me, that could also be considered outsourcing. So I guess for me the issue is the definition of outsourcing and the purpose, we always go back to the purpose. I think we have all had as professional librarians and knowing the issues involved, so I guess that's my sort of way of addressing this issue, is, like, what is outsourcing? And looking a bit more at the definition and if we have to, make it clear to section 108 before making it clear (inaudible).

Brewster Kahle: I'd like to turn to Kenneth's comments, which I agree with, and also Patricia's, another level more concrete. There may be two avenues, there are certain straightforward commercial digitization houses, which are usually commercial, which are usually small, to handle microfilm digitization or the like; that is one type of relationship. There is another type of relationship in the digital world that is starting to come about being needed more and more. And they may want to be handled such as they can only be done by other libraries, archives, and museums or whatever you come around. One specifically is around preservation; preserving these digital works is extremely difficult. One of our techniques for doing digital preservation is to give copies to other archives that are like us, but are managed not by ourselves. It's kind of a surprising world, we'll take the stuff that we hold most genuinely ours, and give a copy to others, just to try to keep this stuff from disappearing.

So preservation is one, another one is resource sharing. I think that is a major trend for our area, where we used to go and buy separate copies in each of our university collections and we are now starting to evolve in institutions that are starting to work in a regional level and the like. And again, those regional institutions may actually be libraries, archives and museums. So, we just

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want to pull it apart, the idea of outsourcing to a large search engine your preservation, I'm not sure it would be what I would intend in this description.

Lolly Gasaway: Richard.

Richard Pearce Moses: Richard Pearce-Moses, Society of American Archivists. I'd just like to echo the need for outsourcing, and many institutions not only use the basis of experience and equipment that might be difficult to purchase for smaller projects or even larger projects, but also, a lot of these organizations do this kind of work on a grant basis and they do not want to hire staff. It really makes it a lot more efficient to do this through contractors rather than having to hire staff. And I'm going to be skating on thin ice. As I'm hearing this discussion, I'm questioning how microfilm does not set a precedent, we've outsourced microfilm for years. And as I thought about that, listening to Mr. Jussim and Ms. Bursley and they expressed their concerns that the vendor not keep a copy, in that microfilm model it is fairly common that the microfilm vendor keep an iron mountain copy for disaster preservation purposes much like Mr. Kahle is talking about, and so I wonder if the real issue is not that they have a copy but they have adequate security to ensure that only that copy is used only as a disaster recovery copy. There is no access to that microfilm except for the owning institution. And you know, with all respect, for the needs for security, I think that the microfilm model suggests that this is working fairly well.

David Nimmer: I'm David Nimmer I already mentioned section 117 as a template, but it also serves as a template for achievable preservation amendments, so I subscribed to the last point and I think we can use that as well to tweak section 108. And very briefly I heard the words "employee" more than three times, at least three times in section 108, 108(a), 108(g). So given that Congress only uses the term "employee" here, and elsewhere in the statute uses terms such as "specially commissioned" or "work for hire doctrine" in addition to "employee" -- I think it would be very difficult for a court to say that Congress intended it to be an employee or something other than an employee here.

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So, for that reason, I think it would be a very good idea to specify in the statute than to intend to go just beyond pure employees.

Jeremy Williams: Jeremy Williams. Just a minor point, perhaps not an obvious one, but it seems that what is emerging from this discussion is if there is a need to modify, or a way to avoid, the infringement issue that Dave has raised. It has the unfortunate consequence, perhaps, that it's going to require some detail; left alone it may or may not be broken, but once one says "outsourcing is OK" in the statute, then we are going to need all kinds of qualification. You know it may not be the usual 20 pages of the Copyright Act, but it may take half a page.

Dick Rudick: Just a follow up question in response to Jeremy's comment. This has been alluded to already, but are there any other comments relating to what rules if any there should be about outsourcing, even if it is explicitly permitted. Any other comments?

Jeremy Williams: Jeremy Williams, again. Just maybe one of the concepts is that the party that is doing it - I'm not sure how you would go about doing this in the statute - have this as a limited purpose. The fact of the matter is that in our movie studio business we outsource all the time. But I started thinking about Joe's Lab, of which there are 1000 within 5 miles from here, sounds like a good candidate for this; Google I'm not so sure about.

Lolly Gasaway: And David, did you have a follow-up?

David Carson: It sounds like we are hearing a consensus that outsourcing is fine, but then the question is what kind of outsourcing. Kenny's comments in particular provoked some thoughts on my part. I really hadn't thought much about this in quite the same way, focusing on the direct or indirect commercial advantage for example. I think we probably all agree that if you hire an outside contractor to do some work for you, microfilming or whatever it is, they are going to build a profit into their fee and nobody thinks they shouldn't be able to do that, and that frankly might provoke a little different reaction

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as to whether that kind of outsourcing is permissible, particularly when perhaps the outside contractor at that point is building in his profit by charging that fee to the people who come to him because the library directed them to go ahead. Again, I don't know whether that's a model that's out there now, I'd like to know whether it is. And whether it is or isn't, I'd like to hear people's reactions to whether that kind of outsourcing is something that should be considered acceptable.

Jared Jussim: That type of model, the microfilm model, which I wasn't going to respond to, as a formula, does not appeal to me. I think it violates the statutory rule that it be at a particular premise. Once they put another copy at another location you then have another library, and then you have another institution. And, by the way, why not five vendors, and we'll send one to them, one to them; why not fifty; why not virtual vendors! So we'll have it all over the place, and now we're in the distribution & exhibition business. That's not the purpose of section 108, which is an exemption from the exclusive rights of a copyright owner. So when I say "let us use a vendor," I mean a vendor to do the work and return it. Not a vendor to keep it, not a vendor to exhibit it, not a vendor to make it available. Although, of course, the duplication could be done and then shipped out, but definitely a vendor, a third-party vendor who performs the work. Otherwise, you have vitiated the statute, O.K.?

Now, as to David. He and I are going to get into this because I said that I want to read the section. David, it's all right. I will look at the section, but I wouldn't be so sure that we can't expand it, because we're clever lawyers.

Kenneth Crews: I was so hoping not to say the things that I'm about to say, but I just can't resist. One is: how are we going to respond to this question when that outsourcing provider is on the Cayman Islands? How are we going to respond to the very same . . .

Lolly Gasaway: I think we'd have to visit him, don't you?

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Kenneth Crews: I think so, next roundtable. And the President told us this week that outsourcing of our jobs to India is a good thing. So, how are we going to respond, when that's where they are? And let me say something else. How are we going to respond, from the publishing point of view, from the movie-production point of view - and I do sympathize, by the way, Mr. Jussim, with everything you're saying; we'll get to those points later - but, how are we going to respond when we discover that "the party", whoever it is, whether it's a non-profit library or a for-profit support team, is doing such a good job at working within whatever the framework of section 108 is, that as a publisher, you discover they can do it better than we can. And that we might very well want to outsource the delivery mechanism of motion picture company or journal publisher to this section 108 entity that knows how to be in the distribution business maybe better than I know how. And we need to let these opportunities expand, because we can't predict the future, we can't predict it, and we need to know that other players manage this process in different ways. And we're going to see, inevitably, some major change in the not-very-distant future.

Kathleen Bursley: Just -- Kathleen Bursley, Reed-Elsevier - just that one little syllable I get out before I remember to say my name. Responding to Kenny's thoughts, I do think it's an interesting, and sobering, question, and it's sort of the thing that underlies a lot of the original concern, I'm sure, about outsourcing. I think, though, in discovering that a vendor does a better job than you can at whatever activity it happens to be, if you are the publisher, or the motion picture company, you are perfectly free, and indeed no doubt delighted, to outsource the distribution of the materials that you publish or exhibit or whatever. What our concern is, is that the library, or archive, does not suddenly become our proxy without our permission for authorizing distribution by third parties, in whatever form. For example, in the ancient, ancient days of paper journals, the normal practice was that the printer would actually mail out the subscription copies directly from the printer, without running it back to the publisher for the publisher to send it out. That's a long-standing practice, at least in our business, and I think there's

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nothing, not that there's anything wrong with it when we do it, but to have a third party do it without our authorization is quite a different thing.

Dick Rudick: We're actually running a tiny bit ahead of time, which has actually never happened before. There is no law against taking a break early, there's all kinds of things you can use breaks for: Blackberrys, other things as well, biological needs, but before we do that, we may have covered fully what was going to be our fifth question, which is: Should the statute be amended to include definitions of "libraries," "archives," or other types of institutions? But Mary has asked, she wants to be sure that anybody who wants to comment on this . . .

Lolly Gasaway: Anything that hasn't been said . . .

Dick Rudick: Anything not already said, not repeated, it's not that we'll remember it, but the transcript is being taken, but Mary might be a better . . .

Mary Rasenberger: No, but before we move on to the last question I did want to say I heard some very interesting comments on how you might limit outsourcing, but I ask you if you're planning on submitting written comments, this would be something that we'd really like to hear from you on. How do we define what that outsourcing entity might look like, the vendor, the third-party vendor? I think that would be really helpful to us. Also, to get a sense of what the activities are that libraries and archives see themselves outsourcing.

Brewster Kahle: Just as a point of clarification: this is "trying to outsource to a non-108 institution"?

Mary Rasenberger: Yes, yes.

Brewster Kahle: I take back a bunch of what I said.

Lolly Gasaway: I should say to a commercial entity.

Jared Jussim: Conceivably a profit-making organization.

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Mary Rasenberger: It could be a 108 entity or it could not be a 108 entity. But there might be certain kinds of conditions on what that entity could do, such as people mentioned: For instance, maybe they cannot retain copies, or if they could retain copies, it's only for preservation. What about entities outside U.S. territories? Those kinds of issues we'd love to hear from you, get some more thoughts on. The last question was should we amend 108 to include definitions or should we stick to the way it is now, which is limiting the activities that are covered. And we wanted to make sure - we touched upon that a little bit already - we wanted to make sure, if you had additional comments, that you had an opportunity to share those.

Dick Rudick: Why don't we take a 15 minute break now, come back in 15 minutes, which is by my watch, 10:45 a.m.