

**Transcription**  
**Section 108 Study Group, Public Roundtable #2**  
**March 16, 2006, Rayburn House Office Building, Washington, D.C.**

**Topic 2: Amendments to Current Subsections 108(b) and (c): Access to Digital Copies**

Participants

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Ken Frazier, Association of Research Libraries and American Library Association

Allan Adler, Association of American Publishers

Logan Ludwig, Medical Library Association

Sarah Wiant, American Association of Law Libraries

Curtis Kendrick, City University of New York

Carol Richman, SAGE Publications

Dwayne Buttler, University of Louisville and MetaArchive

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

Paul Gherman, Vanderbilt Television News Archives

Roy Kaufman, John Wiley & Sons, Inc.

Donna Ferullo, Perdue University

Victor Perlman, American Society of Media Photographers, Inc.

Patrice Lyons

Keith Kupferschmid, Software & Information Industry Association

Janice Pilch, University of Illinois at Urbana-Champaign

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MS. RASENBERGER: Everyone who is participating in Session No. 2 should be at the table. We have another member of the Section 108 who has come. Nancy Wolff, could you introduce yourself.

MS. WOLFF: Nancy Wolff, I'm on the Section 108 study group.

MS. GASAWAY: We do have a slightly different group at the table. Some of them are retreads. (Laughter.)

MS. GASAWAY: But some of you are new to the session. I'd ask those of you who are new to introduce yourselves. (Introductions made.)

MS. WIANT: I'm Sally Wiant, director of the law library and professor of law at Washington and Lee University, here on behalf of the American Association of Law Libraries.

MS. COVEY: I'm Denise Troll Covey, I'm principal librarian for special projects at Carnegie Mellon.

MR. GHERMAN: I'm Paul Gherman, university librarian at Vanderbilt University, representing the Vanderbilt Television News Archive.

MS. LYONS: Hi, Patrice Lyons. I'm an attorney in Washington, D.C. I'm corporate counsel to the Corporation for National Research Initiatives is my principal activity, but today I'm here in another capacity.

MR. LUDWIG: I'm Logan Ludwig. I'm here on behalf of the Medical Library Association. I'm the associate dean for library development at Loyola University.

MR. KENDRICK: Curtis Kendrick, university librarian, the City University of New York, and trustee Yonkers Public Library, the city of Yonkers, New York.

MS. PILCH: Janice Pilch, representing the university library, University of Illinois at Urbana- Champaign.

MR. LANGEVIN: David Langevin from Houghton-Mifflin Company, I'm the director of markets.

MS. GASAWAY: Topic 2 deals with the preservation and replacement sections of section 108 and off premises access to digital copies of those. Let's review just a little bit for those of you who don't have section 108 memorized as those of us who work in this all the time probably do. Subsections (b) and (c) of the Copyright Act permit qualifying libraries and archives to make additional copies of work that they have legally acquired for their collection for preservation or replacement purposes respectively.

Section 108(b) applies only to unpublished work, so this is the archival section predominantly, and it allows a library and archive to

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make up to three copies in digital or analog form of an unpublished work already in its collection for purposes of preservation, security or for deposit in another library or archive. Subsection (c) is slightly different.

First of all, it applies only to published works, not unpublished. It permits a library or archive to make up to three copies of a published work already in its collection for replacement purposes if the work is either damaged, deteriorating, lost, stolen or obsolete, in an obsolete format, after the library has made a reasonable effort to determine that an unused replacement cannot be obtained at a fair price. The digital copies made of the analog work under subsections (b) and (c) may not be used outside the premises of the library or archive.

It's been noted that the on site restriction for digital works really does not reflect how people are using digital materials today. For example, academic libraries may make materials available to students and faculty electronically whether or not they're on the campus. So we're trying to square these two things. The notice that a company, the paper describes some of the ways that off-site access might be limited, but broader than the four walls.

MR. RUDICK: We have three questions. They're so interrelated I think it probably makes sense to go through all three of them. And, of course, the fundamental issue is, are there circumstances under which off-site access should ever be permitted for section 108(b) and (c) digital reproductions.

Remember you just had a little precis from the greatest living or non-living authority on the subject, and 108(b) is unpublished. 108(c) is works that are damaged, deteriorating, lost, stolen or even obsolete format and the library cannot find an unused copy.

The second related question is, are there ways to permit this without increasing risk of infringement for rights-holders, which ties into a related question, which is under what conditions? What should be the applicable conditions to limit the risk?

A third related question is, what type of restrictions would serve those purposes?

I'll just tell you that we've considered a number of things, but you shouldn't confine your discussion to those things. We talked about simultaneous user limits. We talked about defining the user community, which might work in some cases. We talked about access controls and other technical control measures. We talked about using agreements with the library or archive patrons. You shouldn't think of these as alternatives. There may be things that are used together in some way. Again, you may think of things that we haven't thought of.

All right. Why not just take all of this as one piece and do your best to do it in three minutes in your first shot. Curtis, Sarah. Have I missed anybody?

Sally, Patrice.

MR. KENDRICK: Electronic access to digital preservation or replacement copies should be permitted under subsections 108(b) and (c) outside the

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premises of libraries and archives subject to conditions that sustain access to information which promotes the progress of science and the useful arts while providing reasonable protection to rights-holders from harm to their existing markets or potential markets.

The following conditions or restrictions should apply -- electronic accesses provided without any purpose of direct or indirect commercial advantage. No fees are charges for accessing the material. Prior to accessing the material, the user must acknowledge that he or she will use the material in accordance with copyright laws. The library or archive has, after a reasonable effort, determined that useful access to this material, regardless of format, cannot be obtained at a fair price and should useable access to this material, regardless of format, become available at a fair price, the library or archive will no longer provide access outside the premises of the library or the archive.

I'll stop there and maybe comment later on.

MR. RUDICK: Okay. Sally.

MS. WIANT: I'd like to speak that access should be allowed. Faculty, students and other users simply use materials in ways that we need to provide access. I would agree with Curtis that we need to have responsible controlled access.

I'd also like to observe that a limitation of simultaneous users just really doesn't work. You might have a small class in which you have a number of users all of whom actually need to be using the information at the same time. It seems to me that we need to work on a way of defining community of users and a way of limiting access to the defined community of users.

MR. RUDICK: I think we had Patrice Lyons.

MS. LYONS: I was going to talk about 108, and I listened carefully this morning, as referenced to conceptually data structures that are well known and are invaluable like books, journals, movies, phonograph records -- very carefully. I'm not saying they're work. That's expressed in the form of the book or the journal because the book and the journal is a data structure in which the work is expressed. For copyright protection to subsist it has to, under the current law, be fixed in a tangible medium of expression.

You raised some questions at the end of your sentence in here pertaining to 108(b) and (c) inquiring about whether there should be a distinction between a digital --

MR. RUDICK: Yes. We're going to deal with that. We're not there.

MS. LYONS: I just want to hearken back to some basic ideas before I get to there. It's the fact that, if we're going to talk about things -- I think simply talking about having access outside the premise to certain

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things I think you'd have to clarify what those things are. You also have to clarify, to some extent, what the rights are involved.

For example, one of the general examples I can give -- it's not like going into, say, a store and ordering a can of spinach, where it's in a can. You take the can out. What you do is you oftentimes will say you want creamed spinach. You come in and run an operation on that unit to produce results.

So the library, the archive, the repository of service information or however you want to call it actually may not be providing a thing that is embodying the work. It may be running a process on it and there's new forms of creativity emerging that would need to be taken into account. Not to go into too much further detail, for example, there's a young lady who's putting together a new form of creativity. Instead of having a journal, what she's doing is providing access to a repository of information, which is persistently identifiable and each one of the elements in it -- it's on the genome project and each one of the simpler data sets involving the particular area of the genome project is identified using the DOI, the Digital Object Identifier, which is the publisher's branded version of the technology. She also is preparing patent rights to have access to an eminent professor, to actually provide advice on that particular area of the genome project, and access to data bases to actually go and find some information pertaining to it.

Say, for example, a library has this unit of information in its archives. Somebody would come in and ask a question and each time what they'd get back would be different, theoretically, and the actual unit is different, depending on what it is.

MR. RUDICK: Just a reminder. Three minutes.

MS. LYONS: My point is not to constrain the future by once again having rules that are tied to data structures that are static and look to the past.

MR. RUDICK: Maybe it would be helpful if we just noted, just reminded you, what the other questions are in this session, which are, should the rules be same or different if the copy from which the digital copy is made was an analog copy versus a digital item? And then, should the rules be the same. I'll ask these questions again. If the digital reproduction is a tangible copy of a work that the library or archive initially had in the same format, for example, a CD or DVD.

Just to let you know, those are coming later. But, if you could focus on the initial question in this part of the session. I hope I have you in the right order. Roy and Logan. Have I missed anybody? Janice, okay, and David and Paul. All right. It's a queue that is growing probably faster than we can get through it, but go ahead.

MR. KAUFMAN: I'd like echo, I think, what we've heard from the library side. From the publishers side, subject to the issues that we're going to talk about later, being satisfactory, I don't think, from Wiley's

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point of view, we object to having that electronic copy available to that defined user community for that library as long as we've adequately defined the user community and have the controls that are in place.

I think we should recognize that there is a need for a library in Wisconsin to make access available to its professor who happens to be on sabbatical in Italy to that material as long as Wisconsin isn't making it available to all of Italy. (Laughter.)

MR. KAUFMAN: I think if the other control is in place I think that's reasonable in this context. There are, again, tricks in there and some ancillary issues that I won't discuss. The only thing that I've really heard that I disagree with so far is that the idea that multiple users should have access to that. What I'm thinking here is, if you're making a replacement copy of one book and you want to make that book available to an entire class, you either buy that book or you make photocopies under license. That's pretty well established. I don't see that replacement copy should then substitute for a completely different market need. So, if you're replacing one copy, I think one concurrent user makes sense as a limitation.

The library does this. You check out a book. You return it. It confirms limitations. I don't think it should be expanded.

MS. GASAWAY: I'm just a little bit confused. If (c) says you've got the first try to buy it, I don't know how what you're saying works because you tried to buy it and it doesn't exist.

MR. KAUFMAN: So you tried to buy it. It doesn't exist. The library can make its digital copy available to remote end users just as if it wants to physically deliver its archival copy. It's only one person at a time who can look at it. What I'm saying is, if you're going to make available to a bunch of people, that implicates copying in a way that's licensable freely, but beyond what we're trying to accomplish in this limited exception.

MR. RUDICK: Thank you. Logan.

MR. LUDWIG: Yes. Should it be circulated outside. I agree with that. If we don't recognize that, we're not recognizing the culture of the way society works today, particularly in the health sciences area. Most of our users are not within the traditional confines of the facility. That's true in the educational section. It's true on the clinical side and on the research side it's becoming more and more true. You have to recognize the way you now use that.

I agree with Ms. Lyons here that the container is not the value that should be measured here. It's the content. The content is what is at issue, not the format it's contained in.

MR. RUDICK: Janice.

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MS. PILCH: To echo something that has been said by libraries, yes, it does seem very important to relax the premises issue. It almost seems artificial going into the future for libraries to restrict access of preservation and replacement copies to four walls. Finding ways to do that, defining a user community is not a difficult thing to do, but would we need to have a combination of definition of user community and simultaneous users? That's the question. On the aspect of simultaneous use, that does become a problem for smaller libraries, not necessarily research institutions. Smaller libraries that don't really have technology people to put those kinds of restrictions in place, and we might be undermining public libraries by setting a simultaneous use requirement in this provision.

MR. RUDICK: May I ask a clarifying follow-up question. You mentioned public libraries. You said that defining a user community isn't hard. How would you define a user community for a public library? Pick any public library or a couple of examples.

MS. PILCH: To use an analogy, people who have library cards -- any library serves the community and usually the people who take advantage of the library are identified in some way, by some sort of identification number.

MR. RUDICK: By the way, could a person in Japan have a New York public library card?

MS. PILCH: Probably not. I don't know actually how that works because they're not a resident of the city or the state.

MR. RUDICK: David, Paul, then Keith.

MR. LANGEVIN: I'm here to represent publishers and I'm here to give some context to the problems that can arise for publishers if libraries were to make digital copies of both published and unpublished works and then distribute those online.

This has been a successful business for Houghton Mifflin in licensing our content in digital format to all sorts of companies' electronic markets, particularly of library markets for us have been very successful in driving revenue working with companies like EBSCO and ProQuest and Gale. You have libraries who have made our digital files available to library users. If this were to happen, and it was, I guess, an open community, it would have very substantial financial affect on Houghton Mifflin and our bottom line. These electronic efforts contribute about 15 to 17 percent of our division's bottom line. So I'm really here to protect our economic interest and my own.

If a library user can get this same content available for free through a library and not go through EBSCO and buy a subscription or go to Yahoo and get this information, we would suffer economically. Even when you get free use on the internet from a place like Yahoo or one of Google's partners, that content is driven by advertising revenue. It

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can be substantial. To cut that off by not including that commercial use in the license would definitely be harmful to publishers.

MR. RUDICK: Paul.

MR. AIKEN: We were talking about off-site access. Allowing off-site access is a dangerous, dangerous area as far as rights-holders are concerned. We can understand motivation of wanting to allow off-site access, but we're beginning to stray well into the realm of publishing and distribution and licensing activity and beginning to talk about really carving out an important part of a market and saying that this is an area that authors cannot profit from, especially if we're talking about multiple simultaneous users. We've strayed really far into the realm of publishing in that case.

The notion of libraries preservation and reasonable use seems far away from the notion of allowing multiple simultaneous users. Clearly, the sale of one copy in that instance could supplant the sale of many copies. I think those, from the user point of view, have to be careful what you wish for here. Because if that happens, if one copy starts supplanting the sale of many copies, what happens is that one copy becomes very, very expensive and could squeeze out the smaller libraries from this market. We have to look at the realities here.

Publishers have to make profit and authors want to make reasonable royalties and deal with it in those terms.

MR. RUDICK: Keith.

MR. KUPFERSCHMID: People who have studied these issues, especially this particular issue, it's a very complex one. It's just like some of the other issues that have been raised. It's raises a lot more questions than answers, specifically, the answer to this question about whether these copies should be allowed to be distributed outside the premises or the archives really depends on what the content is, what format the content is in and how the library goes about delivering that content and what the implications are of this kind of supervision and most importantly for us, how further redistribution and further duplication of copies that are distributed from e-mail to the internet through CDs or DVDs would be controlled by the libraries. That is, without a doubt, the biggest issue.

If there were some very high level assurances that further redistributions and further duplication were prohibited using technology and legally, then and only then might we be willing to consider such an expansion. One must consider potential affects of this type of expansion would have on the copyright owners and the potential and actual markets for the works.

David, Paul and Roy mentioned some very good points here. Right now this outside the premises condition we see as a very valuable limitation because it prevents significant harm to the copyright owners market from occurring. If, all of a sudden, you were to get rid of that limitation, as these previous people have pointed out, that presents a

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significant issue. For example, what you've got is you've got libraries then becoming competitors with the copyright owners in the marketplace. What's really, really bad about this is they're not going to be just competitors by creating competing works. They're being competitors by using your works. That's a significant issue. We all know. You've heard it many times before that you can't compete. That's exactly what would be going on here.

Another concern I had with this in theory is, given the prior statements that are record in different forums, from libraries and others in the user community regarding things like the "first sale" doctrine and backup copying, I am extremely concerned that once these works are distributed out there, there is going to be no limitations and these works are going to be a free-for-all and these works are going to be copied under the guise of being backup copies or under the guise of the "first sale" doctrines and create very significant problems.

Just a couple of more points, I wanted to mentioned on with regard to simultaneous users. I think it should very much work like the analog world -- one copy for one individual. The software industry that I represent, the data base companies that I represent have this type of model. They've been able to use it. It's fairly easy to implement.

And the last point I'd like to make, the user community can be limited to a public library and that everyone with a library card would be permitted to get access to these works. That's a big problem for those of you familiar with the recently decided Edelman case. I can envision website going up with library card numbers being posted there so anybody who wanted to get the work could just take that number, go to that website and access these works. That is, believe me, no limitation.

MR. RUDICK: I think, Paul Gherman, are you next?

MR. GHERMAN: I tell you what I'd like to do is remind the committee that not all archives are book and print based. Not all archives are in the same way physically based on the same media and one needs to keep the definition rather broad. We, in our archives, record the news, which is freely available to the population of the United States. It's given away. We record it and then allow access. So there is a copyright owner, but it was never sold to begin with.

Our community is the population of the United States. We serve everyone. When you start to define user community, it's a rather difficult thing to do. An earlier person mentioned that one of the restrictions should be no fee. We do charge a fee because we do have to recovery our operating, but we're not-for-profit.

I guess what I'm really saying is, in this new digital world, one can't always assume you're going with a print or digital model. You could be going from broadcast media to the digital model to a different form of distribution. All of this, I think, has to fit under the law. We are protected under 108(f)(3), which signifies that there was recognition by Congress that we are different. But I think the law

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needs to consider that in the future there can be other archives similar to this archive coming along -- the Internet Archive would be a good example. While we need protection and understanding of the law and the language to protect what it is we're doing.

MR. RUDICK: Patrice, we're going around the table and after everybody has spoken once, we can go back.

MR. ADLER: Two points, one of which is referenced back to something I said earlier because the question is asked in terms of access -- outside access. Again, recognizing what that means is it implicates more than one right of a rights-holder. It could implicate the public display right. It could implicate the right of distribution. Those things have to be taken into account, depending upon what type of work is at issue and how that work is generally going to be used by users.

The second thing is the way the question was asked here it applied to both subsections 108(b) and (c), which is sort of unfortunate because all too often people conflate those two. I think Lolly did an excellent job of describing the differences between them and the differences are significant. For example, asking publishers that question about 108(b) since 108(b), by definition, applies to unpublished work, I would assume we are the ones who didn't publish them.

(Laughter.)

MR. ALDER: I don't have much input on that as opposed to 108(c) where we're specifically talking about not preservation and not unpublished works, but the idea or circumstances where it's possible to replace a work, presumably, that's in the lending collection not to preserve works. There are restrictions where we're talking about placing something that is intended to be subject to lending policies. There, of course, the issue comes much more acutely into focus for publishers and I think some around the table have done a good job of expressing concerns publishers have.

MR. RUDICK: Denise has been patient.

MS. COVEY: My comments have to do with scope. The way 108(c) reads we can make that replacement copies if and only if certain conditions apply. One of those conditions is we cannot buy them. All right. So all of these claims about we're stealing your market, we're competing in your marketplace strike me as a little off kilter because we would buy one from you if we could. And, if we had enough market for multiple users, we would buy multiple copies, but we can't buy a single replacement copy. So I have problems with this sort of argument you're presenting.

Someone claims we're competing for your market. No.

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MR. RUDICK: We seem to be stuck in the Ds. Next we have Donna then Dwayne.

MS. FERULLO: I agree 100 percent with Denise. I don't think we should lose that distinction. It's not available for us to purchase, so we're making the copy so that we can have that. Just to give you an example, I think restriction to 13 premises is just not real in today's world. We have an Amelia Earhart collection of published works that we have fifth graders who want to see this and they come from southern Indiana or some other part like that. They're not going to be able to get to Purdue University to see that. Most of the time we don't want them touching it anyway.

(Laughter.)

MS. FERULLO: There is an issue. So there is that limitation.

MR. RUDICK: Dwayne.

MR. BUTTLER: I agree with the other Ds.

(Laughter.)

MR. BUTTLER: In fact, interestingly enough, I think it's important to focus on these things that are not available and it's important to distinguish that some of the unpublished works are things that are deposited with us and those sorts of things and they need to be made available for different kinds of reasons. I think it's important that we could define the user community in some kind of sense to that. But the other thing we need to talk about is that we're still looking at lots of stuff that comes in some form that we can hold onto.

In the future there's just going to be digital stuff. And, if that can't leave the library, then I don't know how we're going to accomplish the mission of the library when it's all digital. We're not talking about anti-circumvention stuff, which is another thing of interest. But I think it's important. It's directing us to look at a long view of how this is going to work into the future.

MR. RUDICK: Carl Johnson is next.

MR. JOHNSON: I'm wondering if it would be constructive to look at another area of copyright law. Section 110 talks about exempted performances, specifically 110(4) talks about exemption of public performances of music. The reason I refer to that is that in that definition or characterization of that exemption are to me some nice criteria standards to consider when we come back to engaging rights of the copyright owner and put it into a library context. We've talked about some of these, but just as a reminder of what Ken says: no direct or indirect commercial advantage; no fee paid to the performers or the organizers or the people who are involved with the performance, nor

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direct charge to participate or to see the performance, to receive the performance.

So what does all that mean in terms of what we're talking about here? Again, we're talking about responsible controlled access, defining the community of users, defining an activity. I think there's something instructive about what 110(4) does for us in music performance allowance that may be a good model to consider for how we define an activity -- a use activity in the section 108 context.

MR. RUDICK: We have two people in the not yet spoken queue -- Victor Perlman and Ken Frazier.

MR. PERLMAN: There was an assumption here that is fallacious when it's applied to works of visual art. The assumption that if a copy is not available in the marketplace that the use of that work is not going to have an affect on the market. The reason for the difference is the distinction between a copy and the content. In the world of commercial photography, photographs are very rarely sold as copies. It is the use of the image that is licensed.

Again, the genie comes out of the bottle once the digital file with the photograph goes out into the world. The unauthorized use of a photograph can totally destroy its value in the marketplace for licensing, for editorial use, and especially for advertising, which reduces it a hell of a lot more in the way of revenues than editorial content does.

MR. RUDICK: Ken.

MR. FRAZIER: There's a world of copyright protected content where the authors and the publishers are not protecting that content where there has truly been a kind of market failure where there's no interested party representing the care and preservation of that content and sometimes it involves medical information that can quite literally be a matter of life and death. So, being able to make it available and widely available is potential, at least -- no, it is, a very high stakes matter. In this case we are talking about content that you can't obtain a copy and making that available more widely when the market isn't there.

MR. RUDICK: Okay. We're going to go through the deja vu all over again list. Patrice.

MS. LYONS: Here I go. I'll try to be a little more entertaining. I'm addressing your question, first of all, about when off-site access is permissible. And, in the digital library example you discussed is interesting in this context. What I've noticed in recent years, especially working with folks making information available in structured form in data structures, that are persistently identifiable is that there's a movement to a service environment where the information itself is just out there and nobody really wants to make

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the money off the information. All of the information, whether it's copyright or not, it's the service that they're charging for. So it may be that we have to look at a new type of paradigm when we're dealing with information service providers more generally of which a library, museum or other not-for-profit entity could fall within that ambit. I know quite a few libraries that when they put together their collections they expend a lot of time and money on it and they, indeed, want to charge for that effort because their appropriations and various other means of getting support for this is limited. If there was information that was made available in this structured way, we shouldn't have information that's really not of interest in the monetary sense to people. We should allow them to have access to information that, perhaps, there are substantial charges to have access to it. Part of their task would be to monitor and to manage that access.

Turning to your third question, what type of condition would you put. I'm trying to limit, necessarily, the simultaneous user group, except if you're talking like a distributed learning environment where the actual work itself you have monitor and control the environment or else it's not going to work. The collaboration is part of the essence. It is your offering. The access control element, which I could get to later, is -- rules are there now to provides these access controls at very small levels of granularity as well as very large units as they're expressed in digital form. You could have the access controls built into each unit and it could be managed at that level. This is not really difficult. The socialization of the technology for the larger public for which this 108 committee could provide a substantial leadership role is really what's required, I think, to move ahead.

MR. RUDICK: Thank you. That's very helpful. Paul, I think you're next.

MR. AIKEN: I guess I had a question for the committee. It sounds like it's the case that 108(c) won't be amended to get rid of the "no commercially-available replacement copy" requirement. Does that seem to be what the consensus is around this table?

MS. GASAWAY: We certainly haven't made decisions on anything yet nor have we heard any real push to get rid of that from anyone, not only content providers, but librarians that felt like that was a reasonable -- we haven't heard anybody saying dump it.

MR. AIKEN: It's definitely a concern from rights-holders that, since 108 is being considered in its entirety, that might be something that might go. If that's off the table, that's helpful.

MS. GASAWAY: I wouldn't say it's off the table, but we just haven't heard anybody saying dumping it except one person apparently.

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MR. AIKEN: The second point is that these replacement copies, whatever they are, should not be the case that can change media. When a publisher is making available a print copy, it should not be the choice of the library or other institution that since there's not a digital copy available they will make a digital copy available. That's not a choice for the library or other institution to make. That's a publisher and author choice to make because of all the risks involved in digitizing something. There's a greater risk of piracy being prominent.

MR. RUDICK: Curtis.

MR. KENDRICK: I'd like to speak to the concept of the user community. I'm against trying to restrict the access to a defined user community, in particular, because I think a restriction would be meaningless for the public libraries as already discussed. Also, I think such a restriction would be counter to the spirit of the expectation of Section 108(a) that the collections of the libraries and archives are open to the public. I also don't think any additional protection would be garnered for the rights-holders.

Congress recognizes that libraries and archives have a vital role for our nation's education and cultural heritage. Part of this responsibility so capably borne by our nation's libraries and archives is to assure that items in the collections that are no longer on the market that are preserved. Things that are no longer on the market in any format. I think a couple of comments I heard this morning disturbed me in terms of attempting to extend liability to libraries for the potential misuse by someone for accessing a digital collection. I think that that is not a direction we should consider going. I think that would be analogous to my seeking recourse from Toyota for getting a speeding ticket on the way down because they make a car that goes faster than 60 miles an hour. It's not the responsibility of libraries to curtail how people use or misuse or abuse the particular information that's out there. There are sufficient protections under the law and rights-holders have the opportunity to foresee all those other means.

MR. RUDICK: Keith, you are next.

MR. KUPFERSCHMID: I just wanted to address a point that was brought up about 20 minutes ago about the fact that just because a copy is not available on the market it doesn't repeat what the publisher or copyright owner's existing copies is just not the case. Maybe in some cases, in many cases, it is the case, but it's not always the case. I can speak from experience in the software industry. The software industry oftentimes stops producing a particular copy of a software program because it has 9 particular vulnerabilities or it's got bug fixes. There are new reasons why they don't publish that old program any more.

All of a sudden you're talking about legal liability. Also, the software company is going to be on the hook because somebody used an old program which they long since fixed the problems with. The same is

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true in the digital content. There's 10 examples in the textbook. Let's give an example in the medical textbook where a dosage table is incorrect. That could create real problems. The other information is incorrect. Or for other reasons they want to update or produce a totally new book. There are obvious concerns with being able to distribute that version from a marketing standpoint, but there are also other legal issues.

MR. RUDICK: Tom Lipinski hasn't spoken yet and jumps to the head of the queue.

MR. LIPINSKI: I'd like to respond to Paul's comment. I would urge you not to take a step backwards. The digitalization right in 108 right now does not speak to the requirement or format of the work in its origination. It gives the digitalization regardless of whether you're taking an analog or digital. That provision was put in, in '98. Since then Congress has had a chance to speak to that and to teach good utilization of the recording provision 112 and puts particular limits and they felt no reason to amend 108 at that time.

I would say don't take a step backwards and play with that. I don't think the ramifications of 112 points to have really been examined yet, but that's a requirement that requires digitalization from analog to digital only when there's no other digital work available or it's subject to technological protection issues. I'm not sure you want to incorporate that particular provision in there because we're really dealing with somewhat apples and oranges. This is really about education and this is really about library environments. So I'd caution bringing that sort of complement into section 108.

MR. RUDICK: Okay. I'm going to review the queue just so that everybody knows they've been recognized -- David, Paul Gherman, Sally, Allan, Patrice and Logan. No Patrice. David?

MR. LANGEVIN: Three quick points on availability. Libraries don't buy all the electronically available books and content. That's a fact. No. 2 --

MS. GASAWAY: Say that again.

MR. LANGEVIN: Libraries don't buy all electronically available books and content. That was mentioned before. They just want to be able to buy what's available. They buy what's available and they want access to things that aren't available. They don't buy everything that's available for budgetary reasons probably.

No. 2 -- the issue of editions. If libraries were to create a digital version of an older edition they distributed digitally, that would directly interfere with publishers markets for a new edition in analog and digital form. And so, for us, that would be a big issue with the American Heritage Dictionary, which has major updates. We have a

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third edition out there available electronically. We compete with the new edition, which we might publish in the future.

Then the third point is outside the premises. I imagine everyone is familiar with Google and the book search, and their new campaign to allow users to buy books with the approval of authors and publishers. They already have hundreds of thousands of books digitalized that you can get access to by going to their site and looking up terms. Whatever that term is, the appropriate books will pull up in the search. Then, if the user is interested in buying that book, they'll be able to do that directly from their website. I think that is going to compete with the free use in an open system or outside the premise.

MR. RUDICK: Thank you. Paul Gherman.

MR. GHERMAN: Simultaneous use -- we have about \$40,000 of news which we have segmented into hundreds of thousands of segments two to five minutes long that deal with the subject. For the most part, we could easily live with no simultaneous use because the idea that two people would be interested in the two minute segment at the same time is rare, but there are some instances when it does happen. That is when a faculty member would assign let's say a speech by Reagan to that class. Suddenly, 50 people want to look at that two-minute segment when nobody would have before. Or, in another case, where a gentleman dies. Suddenly, everybody in the nation wants to go back and see what they looked like in 1975. You go back and look at some of the news broadcasters. So, essentially, there's interest for three days that otherwise there's no interest in that simultaneous use. But those are valid reasons, I think, to have simultaneous use as interests peaks and valleys. But, for the most part, we could live with limited access.

MR. RUDICK: Sally Wiant.

MS. WIANT: We all laughed when Dwayne, I think, talked about not letting students get their grubby little fingers on things, but I think that's a particular concern. There are times that we need to digitalize information for that very reason. The document is just too fragile and we do need to be able to use something and we can't find it in other markets. So I do want to make that point. Another point I wanted to make is that I don't want us to rely too heavily, and I know we'll talk more about the TEACH Act later, but it takes an entire village to implement TEACH Act and to implement procedures of that.

The other thing I wanted to comment about, and that is, when there is a world of protected information and there is a market failure and we can no longer get that information, particularly in law, if we're going to have a well-informed society, we need to be able to get the information. If the publishers aren't keeping that up, then we need in a way to be able to get that information to make that available. We need to have to that information.

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My concern about a comment that was just mentioned was, well, at some stage the publisher may want to reissue a new edition. That may be true. But how long do those of us need to wait until the publisher decides to issue a new edition? We may need to come up with some method of deciding that there's a window of safe harbor in which libraries would be protected if they decided to digitalize or that we wouldn't be able to go ahead and digitalize until such time as the publisher did decide that they were going to publish a new version of whatever the content.

MR. RUDICK: Thank you.  
Allan.

MR. ADLER: That's a very interesting point. One of the things that is important to understand about this language in 108(c) was that this was written with the notion of out of print material. And, of course, as we all know we are rapidly advancing to a period to where at least as far as the availability of technology for print on demand, the notion of out of print is a legal construct may disappear. The question for Congress, which is a really difficult one and one I concede is a difficult one because they come to this in a lot of different public policy-making venues, is at what point do you sort of officially recognize the way you talk about judicial acknowledgment of something. You talk about legislative acknowledgement. At what point do you recognize that the available of print on demand capabilities means that there is no such thing as an "out of print" work. The idea of whether or not this standard that talks about determining that an unused replacement cannot be obtained at a fair price, whether that construct is going to have a completely different meaning if it is, in fact, acknowledged that "print on demand" capabilities are sufficiently available in the marketplace so that you really can't look at this anymore as a question of whether or not you have to get a new edition that was part of a full print run that a publisher made or whether, in fact, the model is going to be contacting the publisher for a knockoff on a single copy.

MR. RUDICK: We only have time for a few more comments.  
Logan, Curtis, Sally Wiant.

MR. LUDWIG: A couple of things. We don't go backwards. It's been the middle ages since we stopped chaining books to the library desk. I wouldn't go back that far.

MS. GASAWAY: I think it's a good idea.

(Laughter.)

MR. LUDWIG: It is one of the problems of the language of this. That it contains words and definitions that were seen very differently -- published and unpublished has a very different meaning today than it

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did in '76. We seem to always be going back to those things rather than moving forward to what we're really talking about -- whether there's a commercialization value here on some of these things or not. I think we need to think about it in those kinds of terms rather than in the more archaic terms that we see in some of this literature.

Another point I wanted to make while I had the floor is that many of these works that were copyrighted -- you're talking about presentation -- came to us with not the same set of regulations that we're trying to set on it. We purchased those items without certain restrictions and now we're trying, it seems to me, in some cases we're trying to impose additional restrictions on them that were never a part of the original ones. All we're really talking about is a surrogate copy that we're trying to put additional restrictions on and I think we have to have some balance on that.

The final comment is with regard to simultaneous use I think that has a lot of different definitions for us. I'm not a big proponent in the health care field of doing things by simultaneous use because of a comment that Ken made earlier about how things can suddenly become of great interest. We have a disaster or terrorism attack. I've got a whole set of different parameters to deal with here than what I had two months ago. Or there's an Ebola outbreak. The final thing is that I could control that much easier by user community.

MR. RUDICK: We only have a very few minutes. My thought is to keep this short.

Michael.

MR. CAPOBIANCO: I just wanted to point out that many of the books in libraries have nothing to do with the publisher of the book anymore. The authors have reverted the rights after they've gone out of print. So you have a large number of these books that cannot be obtained as new copies, but could be obtained as used copies through the internet very easily. I think it's important to extend being able to obtain those books through a used book in order to protect the authors who books have gone out of print. That's all.

MR. RUDICK: Okay. The next to last is Curtis.

MR. KENDRICK: Over the past couple of decades, libraries across this country have literally spent hundreds of millions of dollars building costly storage facilities to house materials. These are materials that, on average, are used once every 25 years. We are in the business of preserving our nation's cultural heritage. It's not a question of a new release of the software or a product or a new release of a dictionary. These are our nation's heritage. At times there may only be one copy of this item. There's no real market for this.

From my perspective, I think that for this area of the copyright law that it should be extended so that rights-holders really have the responsibility of demonstrating that the activities of libraries and

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archives are destroying the market for the information that's being preserved.

MR. RUDICK: Sally.

MS. WIANT: One last observation. Only to observe that one time we knew how long we had to wait because we had a reasonable term of protection for copyright. But now that we have extended it so far we have opened ourselves into a whole new world of problems.

MR. RUDICK: Okay. We have a rule here, which was Mary and Jule get to ask the last questions, and Chris. What am I doing here? These three guys get to ask the last questions and make the last comments. Would any of the three of you, starting with Chris, have any -- really it can be either an observation or a question.

(No response.)

MR. RUDICK: You understand everything?

MS. RASENBERGER: I don't know.

MR. RUDICK: Thank you.

MS. GASAWAY: We'd like to talk a little bit about one of the problems that really arose right after the passage of the DMCA for libraries with this preservation and replacement of digital works that were in tangible form. We already had CDs and DVDs. If those works are lost, damaged, stolen or deteriorated and we try to buy a new one and it's not available and we make a new CD or a new DVD, the statute actually says it has to be used on the premises. That doesn't make a lot of sense to many librarians since the original one was not restricted to the premises.

So what we're talking about now is it is a digital copy, but it is digital to digital, tangible item to tangible item. Is there a reason to restrict or not to restrict that to the premise? That's what we want to look at is this tangible item digital copy. Sally and then Roy.

MS. WIANT: Short answer. No.

(Laughter.)

MS. GASAWAY: Give us why or what problems it causes.

MS. WIANT: Well, if you've been accustomed to lending a CD or allowing use and now suddenly it's back to the fact that that's not the way that the students and faculty are working these 14 days either. They do work a lot outside of the physical premises, even if it's a tangible item that they then take home to play on their own personal technology.

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MR. KAUFMAN: I apologize, Lolly. This is the starting digital to analog question?

MS. GASAWAY: No. This is CD to CD. DVD to DVD.

MR. KAUFMAN: I'll hold off. Sorry.

MR. AIKEN: I think this is not too troubling if what we're talking about is if there's some sort of copy protection technology on the original that similar or even more effective copy protective that's on the copy that's been lent out less it becomes a back door widespread piracy.

MS. GASAWAY: Paul Gherman.

MR. GHERMAN: I think the world is -- and some of us even regret this -- that people don't come to our libraries as much as they did, increasingly less. The advantage on the other side is we're open 24/7 when you can utilize our telecommunications systems to deliver this. So, you know, obviously, we're going to say, yes, we want to share this. We want to share it 24/7. You don't have to come to our library to get it.

Some years ago I said my goal was to close the library and whether that succeeded when users can get anything they need sitting wherever they are at whatever time they can be there. It seems to me -- this just goes without saying -- that they ought to be shared.

MS. GASAWAY: Janice, Carol, then Allan.

MS. PILCH: Did I raise my hand.

(Laughter.)

MS. PILCH: It's like an auction.

MS. GASAWAY: Carol.

MS. RICHMAN: I would agree that it should be allowed outside the premises due to the fact that most of these products are delivered to a buyer with a license agreement allowing dissemination of that product. If you need to make a replacement copy, that license should follow with it. So it should be allowed.

MS. GASAWAY: Allan.

MR. ADLER: This is an issue that we certainly have to think through a little bit more thoroughly. The rules are already different in the sense that digital, tangible copies are fully subject to the "first sale" doctrine whereas tangible electronic copies are not. Insofar as

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the "first sale" doctrine is considered to be the basis or foundation for lending rights or the concept of lending copyrighted -- I think we have to take that into consideration. I don't think it necessarily means that the answer is that the section 110 for electronic documents -- that it has to be completely another set of rules. But it seems to me that that is a sufficiently significantly different rule that already exists. That we'd have to take that very much into account.

MS. GASAWAY: Dwayne.

MR. BUTTLER: I think those tangible and intangible copies ought to be able to leave the library as well. But one of my concerns about that, by what means might we be able to make those copies if they have that copy and technology and would it limit how we're going to be able to make those copies so that they can go beyond the library? I'd have to think about the differences between licensing concepts. But, presumably, the license would have to allow that to happen, too.

MS. GASAWAY: Patrice.

MS. LYONS: What if the library or archive or other information service provider in a not-for-profit situation, instead of having the need to buy things, that they just want for management -- if somebody wanted to get a CD, they would click on the identifying information and be brought to the provider and it wouldn't necessarily be a publisher in the traditional sense. It could be a broadcast organization. It could be Joe sitting in his corner with his baseball card collection. It's a whole variety of different sources that people might want to gather and the task of the librarian as the aggregator of the information and the special skills that would put that information in accessible form would then be the thing that would be marketed as a service and the actual provider of the information could then decide whether or not to fulfill that request. That would seem to be something that we could deal with going forward and that would be stepping back from 108 as its now crafted and taking a wholenew set. It has to be resaid anyway.

MS. GASAWAY: Anyone else on this question?

(No response.)

MS. GASAWAY: We've actually focused predominately on analog original that we try to replace with digital copies. And we had Tom saying that he thought the statute said did it not eliminate digital to digital preservation in this instance.

Does anyone want to specifically about that? Not whether they think the statute precludes it now, but are there different requirements because we've really focused a lot analog to digital. On digital to digital under the same conditions. We've got Roy and then Carl.

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MR. KAUFMAN: I guess the thing with digital to digital now we're not talking necessarily about a CD ROM, but any digital copy. The vast majority of the digital content that I'm dealing with licensing to libraries is licensed. Okay. That's a circular statement, but what I'm allowing libraries access to is licensed and I think we have different business models, quite frankly, that address archival and non-archival. You can do a big license with us, which doesn't necessarily cost more money per title. But it means we sit down and we say what rights do you get. What rights don't you get. Usually there will be some archival part and then there will be the people who come in over the digital transom and these are libraries as well who just say I only want one journal. It's not worth it for me to sit down with you. They might, under that business model, not get archival rates.

Whatever we do here it needs to take into effective that there are business models that exist now. These business models, by the way, include solutions now to a problem that exists for some and in certain environments, but not necessarily others. I guess what I'm saying is, if there's a licensing structure, the license should take precedence. And, if there's a licensing option that the library hasn't taken that covers this, the library shouldn't be able to get a back door archival license by turning down and not entering into a license that discusses archival activity.

MS. GASAWAY: Carl.

MR. JOHNSON: That's a good explanation of the point that I was trying to make about the instability of the born digital and allowance of section (c) on preservation. If the business models are there and they're workable and they're applicable, then that should solve most of the issues. But the preservationists and the archival folks in our institution emphasized in preparation for me being here you can't -- it's very difficult to address replacement and deteriorating and so forth in a born digital product. Once it's gone, it's gone.

My point is, and their point is, you should be able capture it or preserve it early in the process. But, if licensing addresses that, that's a good solution for both sides.

MS. GASAWAY: Anything else on this issue?

MR. CAPOBIANCO: I just wanted to point out that digital to digital is not necessarily a one- to-one thing. You can make a digital copy in a different format that is more accessible to copying. For example, you take a text in a PDF file and you translate it into a text file and then you make that text file available. I don't think that should be allowed. I think you should have to keep the digital copy in the same format that it was created in rather than translating it into some other format.

MS. GASAWAY: Sally then Denise.

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MS. WIANT: One of the concerns that libraries have, even though there may be a workable business model for archival collections, when those publishers no longer exist, we are concerned that somebody may not be maintaining the archival files. Then, historically, libraries have been able to preserve by making sure that there are several copies throughout the country of information so that when publishers do go out of business and there's no longer anyone to whom we can turn to get a copy we still have copies out there. If the business model fails or the company fails, there is no archival model and there's no way to reproduce the information that's needed. So that's a concern.

And, if I may comment on what Michael just said about text files and PDF files and why in law we need to be concerned, because we must have a copy of the original as it occurs even if it's digital information because we cannot cite, except to a specific volume and page number unless, of course, we all move to citing to paragraphs. But, for right now, the court requires us to have a very specific image. We would be constrained by that.

MS. GASAWAY: Denise.

MS. COVEY: I want to address the business about the digital to digital. We have to stick to the same format. One of the justifications for making this replacement copy is an obsolete format. It will do us no good to copy a grade 2 file, copy that so no one can access it. To actually preserve or even create a replacement copy that functions as a replacement copy to access it because we can render it, we need some rights to migrate it, even if the circumstances are constrained, depending on selection or something like that. But, if we have to maintain it in the same digital format we've got it in, this is neither replacement nor preservation.

MS. GASAWAY: Carol.

MS. RICHMAN: I just wanted to address Sally's concern about archiving and point out that many publishers today are working in two organizations. CLOCKS, which is coming out of Stanford University and Portico, which is an offshoot. So I just want to make the comment that these are relatively new archival systems that are growing. CLOCKS is an experiment. Portico is a little bit different and hopefully we'll have more join.

MS. GASAWAY: Paul.

MR. GHERMAN: I think this emphasizes the case that in many ways the library community is in front of the publishing community and we're being held back by their inability or their fear or whatever it is. I think more of the publishing community would work with us in this way the less tension there would be on the legal issues. I think in many cases we're very willing to pay for these services if they would just deliver them for us.

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MS. GASAWAY: Anything else? (No response.)

MR. RUDICK: Mary.

MS. RASENBERGER: I guess I have a question.

I'd like to go back to the topic before on the making of tangible digital copies and follow up on something that I think that Paul raised. That is the concern -- I'm assuming that the reason that no off premises access was permitted for the tangible digital copies was because of concerns with technological measures and the fact that in making the copy the library is like stripping the TPM from the copy. I was just wondering if anybody had any comments on that? How you deal with that issue? You have a DVD, let's say, that's got -- it's protected by CSS and the copy is some how stripped off. Can libraries -- are technologies available for them to put new technological protection measures on those DVDs and the same might be true for CDs? Does anybody want to speak to that?

MS. GASAWAY: I think Mary's raised a question that none of us are technologically capable of answering. Maybe Patrice is.

MR. FRAZIER: The digital rights management -- the example of digital rights management technology are not sufficiently ubiquitous for that to be a problem yet. But it certainly will be a problem because the anti-circumvention law that's now there will, I think, prevent us from preserving a copy.

MR. ADLER: That is an issue that is currently under consideration by the Registrar of Copyright and the Library of Congress pursuant to the triennial rulemaking process that the DMCA provided for dealing with when it was appropriate to create exceptions to that anti-circumvention rule because non-infringement users will be adversely impacted. It's a difficult question to resolve in that context. To try to resolve it on a more sweeping basis in terms of that there would be an established 108 privilege to circumvent, I think at this point, is for us more problematic. Part of that is going to be determined by, as was suggested, how ubiquitous the use of the technology becomes and therefore how difficult or how much difficult it would be used in the technology created.

MR. LIPINSKI: I think the previous two speakers mentioned that's going to be an issue. Obviously, it's beyond the scope here, to see whether we should amend Section 1201(b).

MS. GASAWAY: Please. (Laughter.)

MR. LIPINSKI: But I guess that if you're going to consider incorporating something like that into 108, I would try and at least craft it so that it doesn't create a disconnect between 1201. And I'm

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thinking of some of the attempts that was made in TEACH to incorporate that, with a provision in TEACH 13 against not circumventing or interfering with technological protection measures.

It's so vague, it's phrased on reasonably expected to interfere, so it doesn't even align with 1201.

If that ends up somewhere in 108, at least craft it so that it's not sort of broader or more consistent with what 1201 says now. Then, either through 1201 or 108(c), craft a specific exemption. But where do I begin with TEACH? (Laughter.)

MS. GASAWAY: Patrice, then Curtis.

MS. LYONS: I spent a lot of time working on the information management, which is a larger scope. Digital rights is one part of it.

But this comes up in many different venues throughout society. If you have a physical, tangible copy, which is a material object, a copy of something that's physical, and you want to take the information that's mapped into this physical form and transfer it to another, rather, there may not be digital format change, all that set aside, which has some interesting complications, but existing materials, can we just -

Let's put that aside for now. If we take new material in, say, after we come up and have the genius to come up and tell us how to approach these things and look at it differently, perhaps new material coming in, right at the threshold, you would have agreement as to what you could or couldn't do.

And it wouldn't be at the physical, material object level; it would be putting information -- you might have thousands of different digital objects, but data structures that could be identified in persistent ways, that you then would be able to track and manage.

And you would track and manage, and you'd be able to get back to them if there's any questions. In technology, we clearly permit this. What I'm looking at is the library or archives simply not being passive, but being an active participant with the community, not with just the traditional publishers, but a whole panoply of providers of information, which come into your venue now, in the general sense.

The libraries are being asked to be much more than they were, so I'm think that this new management service structure might be an appropriate thing to consider.

MS. GASAWAY: Curtis?

MR. KENDRICK: I may have misinterpreted your question, but I took it to mean that if an object has a TPM and the Library were to make a copy, should they also be required to put at TPM on the object that they're copying?

I guess my response to that is sort of twofold: First, I don't think it should be a requirement. I think that, again, there are existing -- like a lot of the issues and protections that don't require that. That said, however, I think, philosophically, there would be very

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little opposition to going ahead and putting that kind of a TPM in that derivative object, on the part of librarians and archivists, as long as that process were fairly simple to bring about.

MS. GASAWAY: Dwayne?

MR. BUTTLER: I think -- take Blockbuster. When I go looking for VHS, I don't see many of them anymore. I see lots of DVDs and I see lots of sales of DVDs.

And they have a content system. It's hard for me to envision, not looking at anti-circumvention in the context of 108, particularly for that kind of replacement copy.

To go to Mary's question, assuming that we can make the copy, and then we put the measures on it, it seems to be one step ahead of the earlier question that I think we might --

MS. GASAWAY: Tell us what those are.

MR. BUTTLER: How would you make the copy of the DVD? In other words, do you take kind of the video out of the back, or do you use something like an X-copier or something like that to make the copy? Those may be two different aspects of the 1201 provisions in that context.

MS. GASAWAY: I see what you're talking about. Anyone else on this topic? (No response.)

MR. SIGALL: I'd like to just make an observation. Trying to figure out what 108(c), in particular, means, the way I look at it -- and I don't know if this is helpful or not -- the way I look at it is, what 108(c) is trying to do, is, I think, trying to preserve the benefit of a bargain for both sides in the transaction. In the typical transaction we look at -- is the book being sold to a library -- the publishers benefits, usually there's payment for that book, but also there's the notion that that book has limited access to it, because of its physical characteristics.

Only one person at a time can look at the book and things like that. The Library's benefit is that once they made the payment, they're relatively free to lend that book out and make it available. It's a relatively stable and accessible form that will stay over time and not require additional payments or additional technology and things like that.

I think what they're trying to do in 108(c), is to try to preserve that same benefit for both sides, even as technology changes. The problem is that technology, for both sides, raises concerns, and the publisher's concerns and the owner's concerns are that the access may be much greater than is typically present with the physical book.

The Library's concern is that the access might be restricted, relative to a physical book and the durability of the work may be limited relative to the physical book.

**Transcription**  
**Section 108 Study Group, Public Roundtable #2**  
**March 16, 2006, Rayburn House Office Building, Washington, D.C.**

**Topic 2: Amendments to Current Subsections 108(b) and (c): Access to Digital Copies**

So, in all of these things, it's hard. The way to look at it, is trying to get a sense of how do you preserve the benefits that people have become accustomed to and reliant upon on both sides, even though the circumstance has changed. Sometimes licensing may help preserve those benefits; sometimes it may not. Sometimes, accessibility is necessary to preserve the benefits on the other side.

So, just to make that observation, to a certain extent, we don't want to port over from the analog world, but the good thing about porting over from the analog world, is that people's expectations are settled about the use of the work at that point, and they can live with each other that way, and it's more comfortable.

And the benefits of settled expectations are that there's usually good reasons for them, they're tested over time, they're somewhat over-robust, and they do provide the benefits to both sides, so we should try to emulate them as much as possible.

MS. GASAWAY: Thank you. Anything else?

MR. KAUFMAN: Am I allowed to comment on what you all said?

MS. GASAWAY: You've got two minutes.

MR. KAUFMAN: I'd like to echo what you said. The challenge here is the phrase -- and I think this phrase is really important and there's nothing wrong with it -- it's purpose of replacement.

If you're going from digital-to-digital, what are you replacing? You shouldn't focus on its print. It's something tangible.

A library has a license, whether that's a license to use something on a CD ROM or to use something on the web. The replacement should be replacing the rights, not just the object. The replacement copy has the same rights and limitations as the original. We have already -- under (c), it's a good thing, and I'm not actually criticizing it.

Expand it out a little bit. What we've said is, you can make print, and then you copy print, and we all know what print is. It has inherent physical limitations.

Then (c) was amended to say, okay, you can also make it digital and print the digital. I think we all recognize that they are different, not entirely different, and there are ways you can make the digital replicate the print experience through DRM and other things, and user limitations, okay? Now we're talking about -- but we've already got this digital copy. What about remote access for the user community?

The first thing I said was, that's not a bad thing, but it is an expansion, and so when we're talking about that, realize that if you're going to be expanding beyond the concept of replacement, beyond the inherent physical limitations of what the library got in their purchase and the benefit of their bargain, that there must be some sort of tradeoff somewhere.

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My own view is simply, when you expand, for instance, from print to digital, you don't just try to buy the print; you try to see if you can license the digital rights before you can make that copy available in a licensed distributed model. And if it's not available, it's not available. We can see that, you know, as publishers, we're not making this available to you. You shouldn't just go from one medium to another, without checking if it's available in the new medium or the rights are available in the new medium.

We have no interest in limiting you. We don't want to limit anyone to one consecutive user for our electronic content; we just want you to pay, if you're getting more than one consecutive user and pay the right price for two or three or unlimited, as we have under many of our licenses, and some of them are one.

It's a matter of the model and what you're paying for, so I think things migrate, replacement can mean different things. It means you have an obsolete technology, you have a new technology, but the new technology should try to emulate what the benefit of that bargain was originally, and, as you said, that's what we're trying to preserve here.

MS. RASENBERGER: We will break for lunch now. We're going to start promptly on Topic No. 3 at 1:30.

(Whereupon, at 12:30 p.m., the roundtable discussion was recessed for luncheon, to be reconvened this same day at 1:30 p.m.)