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SIIA

April 28, 2006

VIA E-MAIL

Mary Rasenberger
Policy Advisor for Special Programs
United States Copyright Office
James Madison Memorial Building
LM-401
101 Independence Avenue, SE
Washington, D.C. 20559-6000

Re: Written Comments Relating to the Copyright Office's 108 Study Group Copyright Exceptions for Libraries and Archives:

Dear Ms. Rasenberger:

Pursuant to the Notice published by the Copyright Office in the Federal Register on February 15, 2006, the Software & Information Industry Association (SIIA) hereby submits its written comments relating to 108 Study Group Copyright Exceptions for Libraries and Archives. If you have any questions relating to the attached comments please feel free to contact me.

Sincerely,

Keith Kupferschmid
Vice President, Intellectual Property Policy and Enforcement
Software & Information Industry Association

Enclosure

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WRITTEN COMMENTS
SUBMITTED BY
THE
SOFTWARE & INFORMATION INDUSTRY ASSOCIATION
ON THE
SECTION 108 STUDY GROUP'S EXAMINATION OF
COPYRIGHT EXEMPTIONS FOR LIBRARIES AND ARCHIVES

SIIA is the principal trade association of the software and information industry and represents over 700 high-tech companies that develop and market software and electronic content for business, education, governments, consumers, the Internet, and entertainment. The members of SIIA are both copyright owners and users of the copyrighted works of others. As such, they have an interest in supporting the wide dissemination, use and preservation of copyrighted works under established principles of copyright law. SIIA also conducts anti-piracy programs on behalf of its members, and in this context, has witnessed an abundance of abuses by those seeking to pirate copyrighted software and information content on the Internet by attempting to benefit from broadly-drafted exemptions under the copyright law that were not intended to apply to them—including the special rules applicable to libraries and archives under section 108. Accordingly, SIIA members have a significant interest in working with the Copyright Office, the section 108 Study Group, and other stakeholders in determining what changes, if any, should be made to section 108 of the Copyright Act to account for new digital technologies.

As requested in the Federal Register notice we attempt to answer the questions put forth in that notice. Before addressing these questions, we wish to address various issues and concerns that relate more generally to the issue of altering section 108 and the process for doing so.

First, as SIIA's members are immersing themselves in this issue, two questions in particular are occurring with frequency: what are the specific types of problems that the library and archive communities are experiencing in the digital age that, in their view, necessitate changes to Section 108, and are those problems of a sufficient magnitude to justify the changes to Section 108 that they now seek? These questions are motivated by SIIA's interest in ensuring that the same standards that have been applied in the past to copyright owners seeking legislative change – especially those software and information companies that comprise SIIA's membership – will be applied in the context of this study. For example, because copyright owners have been required to show harm in the form of actual litigation in order to justify legislative proposals, we expect that those stakeholders supporting changes to section 108 would likewise have to provide evidence of harm justifying the need for legislative change. Of course, as a general matter, SIIA is not opposed to making well-crafted changes to section 108 where the proponents demonstrate that such alterations are necessary, appropriate and make good public policy.

Second, the questions in the Federal Register notice cannot be considered in a vacuum—they are heavily reliant upon one another and other issues outside of the section 108 context. In most cases our answer to one question will depend on how the Study Group and Copyright Office choose to answer the other questions. For this reason, it is difficult to provide definitive responses to the questions. Recognizing this, our general approach to answering the question is that if section 108 applies only to a small subset of eligible entities then we will be more comfortable with what that subset can do with copies made under section 108. On the other

hand, if that subset is defined very broadly, then the risks to copyright owners will be multiplied and it will be essential that any allowable activities be crafted much more narrowly.

Lastly, while we are prepared to discuss and address the concerns of libraries and archives and their desire to revise section 108, we trust that the Study Group and others interested in revising section 108 will take into account and adequately address our particular concerns when making any such revisions. We have witnessed numerous abuses of exceptions in the copyright law, including improper assertions of provisions of section 108. For example, most recently, in early December 2005, Nathan Peterson, owner and operator of ibackups.net, pled guilty to two counts of criminal copyright infringement. In his plea agreement, Peterson admitted that he generated at least $5.4 million in software sales between April 2003 and February 2005, thereby making his operation the largest for-profit software piracy website ever shut down by U.S. law enforcement. The site caused software companies to lose sales worth almost $20 million. Peterson was able to make so much money and cause so much damage over a short period of time because he was able to convince people that what he was doing was legal, even though it clearly was not. Critically for our purposes, Peterson sold the pirated software as archival software, claiming that he was entitled to do so under the Copyright Act.

This is just one example of a person taking advantage of broad language in the copyright law and using it as a means for piracy. Unfortunately, there are numerous other examples of abuse. These abuses exist today—under the present statutory regime. Attempts to broaden any current exception, including those in section 108, or to add new ones, if not carefully calibrated could lead to more abuses. It is a significant concern of SIIA and its members that, shockingly, this critical concern was largely discounted by some who testified at the roundtable in Washington, DC. SIIA's members respect the views of all interested parties and we hope that going forward that this type of dismissive attitude proves not to be widespread among other stakeholders. Our concerns here are real and significant and we anticipate that they will be seriously considered and adequately addressed by the 108 Study Group.

Another very significant concern of SIIA and our members relates to the issue of state sovereign immunity. Under present law, as set forth in the Supreme Court Florida Prepaid decisions and the lower court decisions that have followed, state entities cannot be held liable for monetary damages resulting from their copyright infringements. Under current law, a copyright owner's only recourse against an infringing state entity is to seek a prospective injunction that does nothing to compensate the rights holder for harm already caused by the infringing state activity. These judicial decisions directly and adversely affect our members' ability to protect their copyrights against infringing state entities, especially at a time when our members find themselves competing in the marketplace against state-run organizations.

By all accounts, the present situation is unfair. Nevertheless, despite repeated attempts to enact legislation to address this gross imbalance, state entities have refused to make any concessions that might, in some way, alleviate the situation. We see no reason to exacerbate the unfairness that exists under the present system by expanding the section 108 exceptions as they apply to state entities. Unless those groups that represent state entities are willing to discuss enactment of an effective solution to the state sovereign immunity copyright problem, our position is that the section 108 exceptions should not apply to any state entities exempt from monetary damages under current law.

TOPIC ONE: ELIGIBILITY FOR SECTION 108 EXCEPTIONS.

Should further definition of the terms "libraries" and "archives" (or other types of institutions) be included in section 108, or additional criteria for eligibility be added to subsection 108(a)?

Yes, if section 108 is expanded than it is important that definitions of the terms "libraries" and "archives" be included, and additional criteria for eligibility be added to subsection 108(a). This is especially true if section 108 is expanded to apply to so-called "virtual" institutions. Because section 108 presently includes no definition of libraries or archives and the conditions set forth in section 108(a) provide only limited safeguards against abuse, additional limitations on eligibility are necessary if section 108 is going to be expanded.

If the terms "libraries" and "archives" are narrowly defined to a small group of eligible entities then we will more comfortable with what that group can do with the copies under section 108. On the other hand, if these terms are defined very broadly, then the risks to copyright owners will be multiplied and it will be essential that any allowable activities be crafted much more narrowly.

As discussed at the roundtable in Washington, DC, we support the concept of "trusted" libraries or archives that would be certified by the Copyright Office. Only those certified by the Copyright Office would be allowed to avail themselves of the additional or expanded section 108 exceptions. Elements of any certification process would have to be discussed in detail, but as a general matter the certification process should distinguish ordinary activities engaged in by "libraries" and "archives" from ordinary activities engaged in by "publishers." Limiting section 108's applicability to libraries and archives certified as "trustworthy" by the Copyright Office would likely address several—although certainly not all—of our concerns about abuse and, therefore, would enable us to be more comfortable with expanding the activities allowed under section 108.

Should eligible institutions be limited to nonprofit and government entities for some or all of the provisions of section 108? What would be the benefits or costs of limiting eligibility to institutions that have a nonprofit or public mission, in lieu of or in addition to requiring that there be no purpose of commercial advantage?

As stated above, we strongly oppose any revisions to section 108 so long as the benefits of this section apply to state governmental entities until and unless the problem of state sovereign immunity for copyright infringements is adequately resolved. We strongly prefer limiting section 108 eligibility to nonprofit entities. At the very least, it is essential that the current requirement that eligible entities not engage in acts of reproduction or distribution made for "any purpose of direct or indirect commercial advantage" be maintained.

Should non-physical or "virtual" libraries or archives be included within the ambit of section 108? What are the benefits of or potential problems of doing so?

No. Entirely non-physical or "virtual" libraries or archives should not be included within the ambit of section 108. Absent a specific definition of "library" or "archive," opening

the 108 exceptions up to "virtual" libraries or archives is an invitation for abuse. The existing criteria to qualify for the section 108 exception are so broad that "virtually" anyone could claim to be an eligible library or archive.

Presently, the "premises" requirement in section 108 is the primary safeguard against abuse of the exception. In order to include so-called "virtual" libraries within the ambit of section 108 one of two changes would be necessary: the premises requirement would need to be removed from existing section 108 or, if a new exception were to be created for "virtual" libraries, the "premises" requirement would not be included in that new exception. In our view, either option necessitates the addition of other narrowly-tailored criteria to ensure that only legitimate libraries and archives are able to avail themselves of the section 108 benefits and that those who are pirating works under the guise of being a virtual library do not benefit from this major change as well. Such new safeguards would also ensure that those "virtual" libraries and archives do not exceed those activities normally engaged in by a library or archive and begin competing with publishers.

For example, one criterion for a virtual library would be that it has a direct and legally cognizable institutional affiliation with an entity that has an established physical presence sufficient to ensure the virtual library's accountability. It would also be necessary to require that these virtual libraries develop processes for verifying the authenticity of their users. Failure to authenticate could lead to abuses not unlike those that go on today at FTP sites and websites that "share" software serial numbers. Further, it is not enough to merely require that the virtual library not make the copies available for commercial advantage. It is also necessary to assess the impact on the potential and actual markets for the copyrighted work to ensure that in expanding section 108 to virtual libraries we do not in advertently create a loophole in the law similar to one exposed in the LaMacchia case, United States v. LaMacchia, 871 F. Supp. 535 (D. Mass. 1994), that was subsequently addressed by the No Electronic Theft (NET) Act. These are just a few factors that demand consideration if section 108 is to be expanded for virtual libraries.

Should the scope of section 108 be expanded to include museums, given the similarity of their missions and activities to those of libraries and archives? Are there other types of institutions that should be considered for inclusion in section 108?

Because SIIA members do not publish literary works that are likely to be the primary focus of museums, we have no strong views on whether museums should be eligible for the section 108 exception other than to say that, to the extent museums are included in section 108, they should be subject to the same conditions and limitations that currently exist or that may be applied to libraries and archives under a revised law.

How can the issue of outsourcing be addressed? Should libraries and archives be permitted to contract out any or all of the activities permitted under section 108? If so, under what conditions?

We have significant concerns about allowing outsourcing. We have just begun the process of discussing revisions to section 108 and yet—in the context of the publishers' and authors' copyright infringement case against Google—we have already seen a glimpse of the type of misuse of section 108 that would occur if we were to expand section 108 to allow outsourcing. As a result, we believe that entertaining discussions of

expanding section 108 to outsourcing is acceptable, but only so long as there is an acknowledgement of the substantial need to draft any outsourcing provision very narrowly.

At the very least there must be clearly defined terms and conditions that ultimately hold the library or archive accountable for any wrongdoing by the agent outsourcer. For example, if outsourcing is made permissible, at a minimum, it must be conditional on requiring that:

- The agent does not retain any copies for any longer than is necessary to complete the outsourced activity.

- The agent does not make or use the copies for any purpose other than those for which they were hired or for any purpose that exceeds section 108.

- The agent must make certain warranties with regard to security to ensure that access to copies is restricted and, in the event someone circumvents those restrictions, the agent is required to take certain immediate steps to notify the library and the copyright owners and to re-acquire and prevent re-distribution of the copies. This is especially important in the event that the agent is being used to store the libraries copies.

- Copies must be made accessible by the library or archive only on its premises and not on the agent's premises or website.

- The library or archive must verify that the agent has never been found liable for copyright infringement in the past. This could be achieved through a certification process, not unlike the certification process for libraries and archives, suggested above.

- The library must be ultimately legally accountable for an agent's bad behaviors.

TOPIC TWO: AMENDMENTS TO SUBSECTIONS 108(B) AND (C).

Are there conditions under which electronic access to digital preservation or replacement copies should be permitted under subsections 108 (b) or (c) outside the premises of libraries or archives (e.g., via e-mail or the Internet or lending of a CD or DVD)? If so, what conditions or restrictions should apply?

Given prior statements by the libraries and others in the user community, we have significant concerns that allowing remote access will lead to additional problems. For example, if a library is allowed to e-mail a copy of a copyrighted work, copyright owners will rightly demand that the law prevent that the copy not be further distributed under the first sale doctrine and prevent the user from retaining the copy as a back-up copy.

Should this type of broad expansion of the current exception be contemplated, the law must consider many, variable circumstances. Factors that must be considered would include: what the content is; what format is used to deliver the content; how the library delivers that content; what limitations are set forth in section 108 that restrict who, how and when that content can be distributed; and how further re-distribution of copies distributed through e-mail, the Internet or CD would be controlled by the library. For there to be any meaningful dialogue regarding expansion in this area, the statutory language would have to make clear that re-distribution of the content is strictly prohibited and that the libraries are required to take substantial steps to ensure that re-distribution of the content is prohibited technically. Such steps must include respecting technological protections used by the copyright owner, as well as additional technological measures implemented by the library or archive—if necessary—to prevent abuse. Further, we would also want to ensure that any expansion of the 108(b) and (c) exceptions takes into account the potential effect on the copyright owner's potential and actual markets for the work.

Finally, as discussed above, the premises requirement is a valuable limitation because in many cases it prevents any significant harm to the copyright owner's market for the work. If the exceptions are stripped of the premises requirement than there is a much greater chance that libraries will become a competitor in the marketplace with the copyright owner. What makes this situation even more untenable is that such competition between the library and the publisher would involve the copyright owner's own work—not a competitor's work—and that work would be made available by the library for free. Publishers can't compete with free and can't compete with their own materials.

Consequently, stripping the premises requirement from 108(b) and (c), as would be required to allow the electronic access suggested by the question, would raise many concerns for the publishers that SIIA represents. At this time there are too many variables at play and too many significant concerns by the publishing community for this question to warrant any serious consideration.

Should any permitted off-site access be restricted to a library's or archives' "user community"? How would this community be defined for the different types of libraries? To serve as an effective limit, should it represent an existing and well-defined group of users of the physical premises, rather than a potential user group (e.g., anyone who pays a member fee)? Should off-site electronic access only be available where a limited and well-defined user community can be shown to exist?

Like many of the other questions in the Federal Register notice, this question raises many more questions, and with it many concerns. Any "user community" must be a well-defined group and should never be defined as the general public. Even narrowly defining the user community raises concerns if off-site access by this community is not managed strictly and properly. For instance, if users are given a password or other means by which to access library materials off site, there must be assurances and accountability on the part of both the users and the library to ensure that users to do not "share" these passwords. If such "sharing" is permitted, what once may have been a defined group can quickly expand to include the general public.

Should restricting remote access to a limited number of simultaneous users be required for any off-site use? Would this provide an effective means of controlling off-site use of digital content so that the use parallels that of analog media? If a limit on simultaneous users is required for off-site access to unlicensed material, what should that number be? Should only one user be permitted at a time for each legally acquired copy? Do effective technologies exist to enforce such limits?

Yes, if remote access is allowed – and at this point we strenuously object to that—it would be essential that remote access be limited to a number of simultaneous users—much like the case in the analog world. That number should be one—one user per copy owned by the library at a time—just like in the analog world.

There are numerous excellent technologies available in the marketplace that can enforce simultaneous user restrictions—the software (and to a lesser degree database) companies SIIA represents use and rely on these technologies to enforce their license terms and conditions. There is no good reason that libraries and archives should not be required to use access, copy and use control technologies to protect against misuse of copyrighted works they provide to their users. This is especially true should section 108 be expanded to allow remote access to a limited number of simultaneous off-site users.

Should the use of technological access controls by libraries and archives be required in connection with any off-site access to such materials? *Do the relevant provisions of the TEACH Act (17 U.S.C. 110(2)) provide a good model? Would it be effective to also require library and archive patrons desiring off-site access to sign or otherwise assent to user agreements prohibiting downloading, copying and downstream transmission?*

As stated in the answer to the question above, we do not believe that remote access should be allowed, but if it is, libraries and archives must employ technological access, copy and use controls in connection with any off-site access to such materials.

While the TEACH Act may be a useful model, it may be necessary to re-evaluate whether that model works in all situations under section 108 and whether additional criteria are necessary due to: (i) the differences between the "user community" for an eligible educational institution under the TEACH Act and the broader potential "user community" for a library or archive, and (ii) the differences in the privileged activities allowed under section 108 as compared to the more narrow activities allowed under section 110(2). Requiring library and archive patrons who desire off-site access to sign or otherwise assent to user agreements prohibiting downloading, copying and downstream transmission is an example of one additional criterion that would be appropriate.

Should the rules be different depending on whether the replacement or preservation copy is a digital tangible copy or intangible electronic copy (e.g., a CD versus an mp3 file) or if the copies originally acquired by the library or archive were acquired in analog, tangible or intangible digital formats? What are the different concerns for each?

In our view, the effect on the actual and potential markets of the copyright owner is more important than the format of the media.

TOPIC THREE: NEW PRESERVATION-ONLY EXEMPTION.

Given the characteristics of digital media, are there compelling reasons to create a new exception that would permit a select group of qualifying libraries and archives to make copies of ''at risk'' published works in their collections solely for purposes of preserving those works, without having to meet the other requirements of subsection 108(c)? Does the inherent instability of all or some digital materials necessitate up–front preservation activities, prior to deterioration or loss of content? If so, should this be addressed through a new exception or an expansion of subsection 108(c)? How could one craft such an exception to protect against its abuse or misuse? How could rights–holders be assured that these ''preservation'' copies would not serve simply as additional copies available in the library or archives' collections? How could rights– holders be assured that the institutions making and maintaining the copies would maintain sufficient control over them?

> We disagree with the underlying premise that there is an "inherent instability of all or some digital media." It is well recognized in the archival community that non-digital media—books, papers etc—have issues of degradation that are certainly serious, if not more acute than that found in the current state of digital media. At the same time, however, we do recognize that the software and hardware tools used to deliver and use digital content can be superseded in the market by other technologies. In some cases, the effective obsolescence of software and hardware can make access to digital works much more difficult. The SIIA-supported Open Document Format (ODF) was designed to help address this very issue. Nonetheless, if circumstances should arise whereby access to and use of digital works is precluded because of changes in technology, it might be possible to craft provisions that allow for copying of the work into another format, only when the material is no longer available at a reasonable price in *any* format, not merely that originally purchased by the library or archive to allow access through a software program or piece of hardware available at the time of purchase. That would also aid publishers who will increasingly archive their own digital works and be able to make them available in new formats that meet changing user demands and technology standards.

Should the exception only apply to a defined subset of copyrighted works, such as those that are ''at risk''? If so, how should ''at risk'' (or a similar concept) be defined? Should the exception be applicable only to digital materials? Are there circumstances where such an exception might also be justified for making digital preservation copies of ''at risk'' analog materials, such as fragile tape, that are at risk of near–term deterioration? If so, should the same or different conditions apply?

> See previous answer.

Should the copies made under the exception be maintained in restricted archives and kept out of circulation unless or until another exception applies? Should eligible institutions be required to establish their ability and commitment to retain materials in restricted (or "dark") archives?

> See previous answer.

Should only certain trusted preservation institutions be permitted to take advantage of such an exception? If so, how would it be determined whether any particular library or archives qualifies for the exception? Should eligibility be determined solely by adherence to certain statutory

criteria? Or should eligibility be based on reference to an external set of best practices or a standards–setting or certification body? Should institutions be permitted to self–qualify or should there be some sort of accreditation, certification or audit process? If the latter, who would be responsible for determining eligibility? What are the existing models for third party qualification or certification? How would continuing compliance be monitored? How would those failing to continue to meet the qualifications be disqualified? What would happen to the preservation copies in the collections of an institution that has been disqualified? Further, should qualified institutions be authorized to make copies for other libraries or archives that can show they have met the conditions for making copies under subsections 108(c) or (h)?

As stated previously, we endorse a trusted third party approach that would entail the U.S. Copyright Office's certification of libraries and archives to determine eligibility for the section 108 exceptions. That, however, does not change our view that there is no basic justification for the addition of a so called "at risk" exception for digital media.

TOPIC FOUR: NEW WEB SITE PRESERVATION EXCEPTION.

Given the ephemeral nature of websites and their importance in documenting the historical record, should a special exception be created to permit the online capture and preservation by libraries and archives of certain website or other online content? Who would the exception apply to?

At this time, SIIA has no formal view on whether a special exception should be created to permit the online capture and preservation of websites. To a large extent our position on this issue is likely to be affected by the proposed scope of such an exception and the questions it raises:

- If the exception applies to libraries and archives then how are these two terms defined? As stated above, we would want the definitions to be narrowly drafted to limit abuse. Perhaps, as suggested above, the Copyright Office should certify a limited group of trusted libraries and archives that are permitted to engage in these activities under section 108.

- What is meant by "other online content"? This sounds like a recipe for abuse.

- How does the DMCA apply to such website preservation? What happens if the website includes pirated material and the website is captured and preserved but the website operator takes down the material pursuant to a DMCA notice and takedown? The copyright owner should not have to send notice and takedowns to every archive that captured the site under this new exception, even if they are capable of knowing each and every archive that has authority to capture web content. The archive that captured the website should have a legal obligation to determine if the material was removed. This is a problem that exists today. In the past year, SIIA had pirated content taken down from a website using the DMCA's notice and takedown provisions. After it was taken down the operator of the website put up a link with an accompanying message informing its readers that

the infringing material had to be taken off its site, but that it could still be accessed at another website that had archived the original website.

In addition to these concerns and questions, we are also concerned about the possible impact this type of exception might have on: (1) those who operate the websites that are being captured, and (2) those whose content is contained on those website. It is essential that the preservation activity have no negative impact on those maintaining or originating the website or its content. For example, just because online content is no longer available for free or at all from a particular website does not mean that a user should be able to get that content from the archive that captured the content.

In short, there are many questions to be answered here. Before we could begin to consider any exception we would have to be certain that the exception would be narrowly tailored and the potential for abuse limited.

If so, should such an exception be similar to section 108(f)(3), which permits libraries and archives to capture audiovisual news programming off the air?

No. Section 108(f)(3) fails to address any of the concerns set forth above. Indeed, we would not support any language that seeks to equate audiovisual news programming with online content generally.

Should such an exception be limited to a defined class of sites or online content, such as non-commercial content/ sites (i.e., where the captured content is not itself an object of commerce), so that news and other media sites are excluded?

Limiting the exception to noncommercial content is a step in the right direction to ensuring that any exception is sufficiently narrow, but by no means should it be the only limitation. The line between what constitutes "news" is continually blurring. Therefore, in drawing the line between commercial and non-commercial (e.g., news) sites, it is important that the impact on the market for the material also be considered.

Should the exception be limited to content that is made freely available for public viewing and/or downloading without access restrictions or user registration?

Absolutely. The exception should be strictly limited to sites that are freely available for public viewing and/or downloading without access restrictions or user registration. Eligibility should focus on the website rather than the type of content. This is because the nature of the website (i.e., restricted or not) tells more about the intentions of the site owner than specific items of content. The exception should not permit breaking down firewalls or other forms of hacking or circumvention in order to obtain access to website content. If these acts were permitted, section 108 would directly conflict with the DMCA and other laws—such as the Computer Fraud and Abuse Act—that prohibit such activities.

Also, the exception should not apply where the website owner preserves the website content on its own accord. Many website operators preserve the content on their websites, and many of these websites license this content as historical information or for other purposes. Thus, even if an exception is limited to publicly available content, the

exception should not apply where there is an actual or potential market for this publicly available content or where access to older content is restricted or prevented by the website owner to ensure a market for the creation and posting of superior content. For example, many newspaper sites allow open access to recent issues (e.g., free access for seven days); require registration and/or subscription to access somewhat older content; and require payment to download articles older than that. Others may have some content available to the public and other content that is only available to subscribers of the print product. Any new exception that permits archival and access to website content should respect and not interfere with these business models.

Should there be an opt-out provision, whereby an objecting site owner or rights-holder could request that a particular site not be included? Should site owners or operators be notified ahead of the crawl that captures the site that the crawl will occur? *Should "no archive" meta-tags, robot.txt files, or similar technologies that block sites or pages from being crawled be respected?*

Yes, there should be an opt-out provision that enables an owner or rights holder to request that his site not be archived. Website operators should be able to use a robot exclusion (much like they do with search engines) to prevent capture of their websites. Failure to honor the robot exclusion would result in the archival copy being actionable to same extent as any other infringement. Further, any library or archive that cannot demonstrate a pattern or practice of abiding by the robot exclusion headers should not be eligible for the exception. Other alternatives to the robot exclusion header include: (1) the Copyright Office could set up an opt-out registration process that archives would need to consult before archiving any sites, and (2) archives could be required to review the terms and conditions of use on the websites that they wish to archive in order to determine whether the website owners allow capture of the website content under this exception.

Should the library or archive be permitted to also copy and retain a copy of a site's underlying software solely for purposes of preserving the site's original experience (provided no use is permitted other than to display/use the website)?

This question is not entirely clear. In many cases, the software used to read these sites is free. For example, Adobe Acrobat Reader, Macromedia Flash or Shockwave and Apple's Quicktime are all freely downloadable by users, subject only to the accompanying license terms and conditions. Obtaining copies of this software is free and easy.

If, however, the Study Group is proposing permitting libraries and archives to copy and retain copies of the authoring software (as opposed to the reader software), then the answer is a definitive "no." A library or archive should not be permitted to retain a copy of the sites' underlying authoring software for purpose of preserving the site. To decide otherwise, could destroy markets for archival software and database software products.

Based on the roundtable discussion that took place in Washington, DC, it appears that archivists wish to create a legislative provision that would allow them to copy and retain copies of old or obsolete *reader* software, such as Adobe Acrobat Reader 2.0. If this is the case, then we do not think a legislative approach is necessary or appropriate since it is highly likely these concerns are presently being addressed by the Computer History

Museum (see http://www.computerhistory.org/about_us.html). To the extent they are not, as a representative of the software industry, SIIA would be pleased to bring our members together for a meeting with archivists to openly discuss this issue and to develop non-legislative solutions and partnerships that will address it.

If libraries and archives are permitted to capture online content, should there be any restrictions on public access? *Should libraries and archives be allowed to make the copies thus captured and preserved available electronically, or only on the premises? If electronically available, under what conditions? Should the lapse of a certain period of time be required? Should labeling be required to make clear that captured pages or content are copies preserved by the library or archive and not from the actual site, in order to avoid confusion with the original site and any updated content?*

Yes, if libraries and archives are permitted to capture online content, there absolutely must be restrictions on public access. At a minimum, the public should not have access to the archived online content unless and until: (1) the person trying to get access first attempts to obtain a legal copy but reasonably cannot; (2) the content owner approves such access; and (3) a sufficient time has elapsed since the capture of the website so that there will be no negative impact on those maintaining or originating the website or its content. We are concerned about archiving of old website material without any consultation with the website owner because there is often good reason why online material is updated and why the owner does not want the previous version of the material made available. For instance, the website owner may have a legal obligation to alter the website (e.g., a limited license to display copyrighted text on the site has expired or (if orphan works legislation passes) the archive is required to expeditiously stop using an orphan work once the orphan work owner emerges), and the archive's copying and provision of public access to the site violates that obligation, thereby subjecting the website owner to legal liability.

Lastly, we are extremely concerned about the misstatement in the background document related to this question that states that "informational sites … have little value once the information is "stale." We are especially interested in how one defines when information is "stale" and how one determines the value of such information. For years, SIIA has advocated a Federal misappropriation-type statute that would protect databases against piracy for a limited period of time, based on the value of that information. Therefore, we are opened to discussing the making available of archived websites once the information on those sites becomes stale so long as there is a complementary discussion of protecting such informational materials during the period of time that they retain their value, and thus are not stale.