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**Written Comments in response to Section 108 Study Group: Copyright Exceptions for Libraries and Archives, 71 FEDERAL REGISTER 7999 (February 15, 2006).**

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**Topic 1: Eligibility for the 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)?*

It may be more useful to suggest an alteration in the title of section 108 from its present focus on “institutions” to one that reflects the valuable functions those institutions contribute to society. This would also be consistent with the underlying policy behind the provision: continued access (a privileged “function” under the copyright law) to information by qualifying societal entities. Subsection 108(a) should clarify that sub-units within larger institutions (e.g., a school media center within a k-12 district, and archive or library within a museum) can also seek the privilege of section 108, but not necessarily the institution as whole. This can be accomplished by crafting a definition that is functional as well as institutional. (See additional comments below.)

*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?*

Adding a concept of “nonprofit” or government as does section 110(2) suggests an institutional model, while use of the term “noncommercial” (or “*no purpose of commercial advantage*”) suggests a functional approach. Considering the present reality that reproduction and dissemination undertaken without any purpose of commercial advantage can nonetheless undermine the value of a copyright owner’s interest in the

work (e.g. Joe Blow digitizes vast collection of content and places it on his website for the entire world to use) and that likewise an institution designated as non-profit can as much as any other user have great impact upon the copyright owner's interest especially in a limited market—the precise sort of market in which some traditional section 108 entities exist—a combined but limited approach may be more effective. (This can also eliminate the need for structural differences in the statute relating to physical versus virtual collections or spaces. See comments regarding Topic 2, below.)

Recent amendment of section 110(2) inserted a similar institutional approach (“government body or accredited nonprofit educational institution”). The Conference Report reiterated the Register’s Report that “nonprofit educational institutions” are no longer a closed and familiar group, and the ease with which anyone can transmit educational material over the Internet” requires placing some limitation on the type of entity that can avail itself of the TEACH section 110(2) rights “in order to provide further assurances that the institution is a bona fide educational institution.” Conference Report, H. Rpt. No. 107-685, 107th Cong., 2nd Sess. 228 (2002) (citing, U.S. Copyright Office, Report on Copyright and Digital Distance Education 159 (1999)). A similar “nonprofit” qualifier is used in section 1201(d), the “nonprofit libraries, archives, and educational institutions” exception to the section 1201(a)(1)(A) circumvention rule.

Recognition of a similar transformation occurring in traditional section 108 entities (see discussion below of DMCA legislative history) makes incorporating an institutional qualification reasonable. Existing “108 libraries and archives” should have little trouble in meeting such a requirement. TEACH legislative history for better or for worse talked about “bona fide” entities, and similar discussion could be included to ensure that such qualification is not too restrictive. Redefinition of qualifying section 108 entities would easily allow for inclusion of museums within its privilege, perhaps adopting institutional criteria from existing federal statutes linking qualification for funding under other federal statutes such as those relating to IMLS or LSTA.

Including a functional approach in light of present realities also appears reasonable, but should be crafted carefully. As stated above, a nonprofit can just as easily compromise the copyright as can a commercial entity. In fact the tax laws relating to tax-exempt organizations reflect this reality (e.g., UBIT).

The existing functional limitation in section 108(a)(1) should be modified to resolve possible confusion as to qualifying or disqualifying activity. A functional definition should emphasize (and the legislative history would hopefully offer further explanation or example) of non-commercial versus commercial uses, the latter being excluding qualification and distinguishing these concepts from an arguably broader concept of (direct or indirect, as the statute does not distinguish) financial benefit enacted as part of the section 512 safe harbor provisions or a combination of terms used in the “nonprofit libraries, archives, and educational institutions” exception to the section 1201 circumvention rule: “purpose of commercial advantage or financial gain” in section 1201(d)(3).

Language requiring that qualifying reproduction and dissemination exhibit *no purpose of commercial advantage* as the Section 108 Study Group question posits may need adjustment. Unless the concept of *no purpose of commercial advantage* is defined in clear terms or elaborated in the legislative history it may be subject to an interpretation that is too broad thus undermining the intent of the privilege the statute is designed to impart. Other section of the copyright law, such as section 109(b)(1)(A), use the phrase “purposes of direct or indirect commercial advantage.” Is the contemplated section 108 revision assuming an unstated but nonetheless included “direct or indirect” qualifier? Any confusion should be eliminated in the drafting of a revised section 108. The point being that numerous section 108 reproductions and disseminations can be construed to have some indirect advantage. What is included in a new privilege as well as what is excluded should be articulated by either the statute itself as discussed in its legislative history or supporting documentation such as the Section 108 Study Group report. Lack of statutory (or in the alternative, in the legislative history) definition of similar terms observed above would contribute to growing confusion. It should be clear that simply because a reproduction or dissemination of some sort under section 108 impacts a market for the work or otherwise impacts conceivably on the copyright owner’s financial interest, this reproduction or distribution is not necessarily the same as commercial advantage. Reproduction and dissemination under section 108 seldom occurs without some advantage to one stakeholder or another. Under the posit of the Section 108 Study Group what then would be the “non-commercial” advantage the statute would then in theory allow? As the statute reads now, what is the difference between a “direct” or an “indirect” commercial advantage and what would then by logic be a direct or indirect noncommercial advantage? This underscores the confusion regarding this concept that the legislative history only exacerbates (and which the Section 108 Study Group: Information for the March 2006 Public Roundtables and Request for Written Comments, pp. 5-6 observe as well).

Revision of section 108 should also avoid a definition or phrasing too similar to the “financial benefit directly attributable to the infringing activity” of section 512(c)(1)(B) and (d)(2) or similarly unhelpful “purpose of commercial advantage or financial gain” of section 1201(d)(3). This would be far too broad a concept, as a reproduction or dissemination of copyrighted content under section would conceivably have some financial benefit to either the entity or the end-user, i.e., patron, student, etc. It also cautions against a definition that is subject to too broad an interpretation, as virtually any activity regarding reproduction and dissemination of copyrighted material implicates a conceivable advantage to someone, either the copyright owner or the user.

The present definition does focus upon the “purpose of” the reproduction and dissemination and this concept should be retained. Since it is recommended that the definition of qualifying reproduction and dissemination reflect an activity (function) the measure should not be judged by its “result” but rather the process (judged by its intent, i.e., its purpose) the activity attempts to effect. Perhaps the phrase “commercial activity” could be used instead of *commercial advantage* or at the least offer some concrete distinction between an acceptable non-commercial advantage and a prohibited (non-qualifying) commercial advantage. Use of a competition standard (e.g., “as long as the

use is not in direct competition with. . .” or similar phrasing) may also prove problematic as it may sweep too broadly and exclude what would otherwise be thought of as acceptable reproduction or dissemination under section 108 (a section 108 copy or phonorecord will always be a substitute for a purchased or licensed copy). Such language should likewise be avoided.

Limiting eligibility to an institutional approach would of course offer the benefit of increased access, it may also offer the advantage of organizational controls to ensure the reproduction and distribution is kept within the parameters of the statutory design. While section 108 should not be amended to mirror the myriad of compliance obligations that section 110(2)(D) now imposes (policies, notices, informational materials, adoption of technological controls) or the involvement in the take-down or disabling response and related sequences of the section 512 safe harbors it could include similar qualifying language operating on a patron copying under current section 108(d)(1) and (e)(1), i.e., “no notice that the copy or phonorecord would be used for any purpose other than. . .” An appropriate commercial activity standard could be imposed but any obligation should be narrowly crafted so as to not interfere with subsequent fair uses a patron might make of the copy or phonorecord. As it stands now the current 108(d)(1) and (e)(1) restriction limits uses to those of “private study, scholarship, or research,” an arguably smaller subset of fair uses patrons might make of reproduced content.

*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?*

A revised definition based upon organizational qualification (see discussion above) would assuage the fears of Congress (as expressed in both the legislative history of the DMCA (“Although online interactive digital networks have since given birth to online digital ‘libraries’ and ‘archives’ that exist only in the virtual (rather than physical) sense on Web sites, bulletin boards and home pages across the Internet, it is not the Committee’s intent that section 108 as revised apply to such collections of information...The extension of the application of Section 108 to all such sites is tantamount to creating an exception to the exclusive rights of copyright holders that would permit any person who has an online Web site, bulletin boards, or a home page to freely reproduce and distribute copyrighted works. Such an exemption would swallow the general rule and severely impair the copyright owner’s right and ability to commercially exploit their copyrighted works.” S. Rep. 105-190, 105th Cong. 2nd Sess. 62 (1998)) relating to digital libraries and TEACH (“The digital transmission of works to students poses greater risks to copyright owners than transmissions through analog broadcasts. Digital technologies make possible the creation of multiple copies, and their rapid and widespread dissemination around the world. Accordingly, the TEACH Act includes several safeguards not currently present in section 110(2).” Conference Report, H. Rpt. No. 107-685, 107th Cong., 2nd Sess. 230 (2002).). A functional approach alone would allow for expansive reading of section 108 beyond its 1976 origins. Anyone with a computer, a scanner and an open (read free) web site could qualify (read “no purpose of commercial advantage”). Likewise an organizational approach would fail to ensure the

proper balance between owners, users and the institutions (libraries, archives, museums, etc.) that serve them. Incorporating a functional criteria as well as organizational would ensure that a qualifying entity obtains the privilege of the revised section only when it engages in conduct consistent with its public policy purpose of directly offering access to information to its patrons, not merely contributing to its overall eleemosynary mission. Comments at the roundtable reflect this as some morning participants observed the reality of such traditional institutions engaging at times in for profit activities. Crafting a new definition in light of this reality is also consistent with the original 1976 legislative purpose of section 108, and negotiates in present statutory terms the delicate balancing of interests within the section 108 environs. See, e.g., “Under this provision, a purely commercial enterprise could not establish a collection of copyrighted works, call itself a library or archive, and engage in for-profit reproduction and distribution of photocopies. Similarly, it would not be possible for a non-profit institution, by means of contractual arrangements with a commercial copying enterprise, to authorize the enterprise to carry out copying and distribution functions that would be exempt if conducted by the non-profit institution itself.” H. Rpt. No. 94-1476, 94th Cong. 2d Sess. 74 (1976), reprinted in 5 United States Code Congressional and Administrative News 5659, 5688 (1976).

The significant benefit would be that the statute would mirror the reality of interface between these entities and service populations. A recent amendment of section 110(2) was made to reflect the current realities of distance education: “At the same time, section 1(b) removes the concept of the physical classroom reform.” Conference Report, H. Rpt. No. 107-685, 107th Cong., 2nd Sess. 226 (2002). Likewise, contemplated reform of section 108 should proceed with a similar attitude enlightened by how patrons use library and archival resources today. Careful crafting of the qualifying language should ensure that the potential for abuse is minimized. While this may mean that for-profit or commercial enterprises might not qualify under an institutional and functional definition—clarifying the contradictory 1976 legislative history—it is an appropriate trade-off for the significant and increased privileges of reproduction and distribution that section 108 entities would gain.

*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?*

It may not be necessary to include museums as a whole (institution) within a revised section 108 if the definition is restructured broadly enough to include library, archive, etc. functions (used as a verb) with such existing institutions. So too, the lines between “libraries”, “archives” and “museums” (used as a noun) are blurring. Again a crafted definition designed upon an institutional (non profit or noncommercial) as well as functional model could naturally include “museums” or media centers K-12 or tertiary, as urged by a participant at the Washington, D.C. morning session, or other similar entities.

*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?*

Outsourcing should be permitted under conditions that ensure that the integrity of the transaction is maintained, i.e., that the copyright owner is no more disadvantaged by the outsourcing than if the qualifying entity had undertaken the reproduction and distribution in the first instance. This could be accomplished by inserting a “sole purpose” or “no other purpose” test into the statutory language relating to reproduction and subsequent use (distribution) of the copy or phonorecord. This test would limit reproduction and distribution by the outsourcing entity to uses in furtherance of the section 108 purpose alone. An “awareness” (“has had no notice that the copy or phonorecord would be used for any purpose other than . . .”) burden similar to that already in place in section 108(d)(1) and (e)(1) could be adapted for use in an outsourcing provision. This is preferred to statutory structures that would impose a burden to investigate or require some sort of legal guarantee (in the terms and conditions of an outsourcing agreement for example) or otherwise engage the section 108 outsourcing entity to engage in the sort of interaction between copyright and third party outsourcing entity or function as sort of compliance go-between (notice, counter-notice, etc.) through obligations similar to that of section 512(c)(3)(B)(ii) or 512(g)(2)(A)-(C) for example. Such complicated and intrusive obligations may be acceptable for a service provider but likely prove too burdensome for qualifying section 108 entities.

**Topic 2: Proposal to amend subsection 108(b) and (c) to allow access outside the premises in limited circumstances.**

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

The legislative history of the 1998 amendment of section 108 discussed above indicated Congress’ concern with off-site or off-premise access to digitized material reproduced under subsections (b) and (c). However, and as also discussed above, a revised statutory structure of qualification for the section 108 privilege (status and activity) should create the proper context in which any differentiation of access between analog and digital can be safely eliminated. Availability under subsections (b) and (c) should run across the gambit of both analog and digital, both on-site and off-site, tangible digital reproduction and intangible digital reproduction. Adopting a similar copyright warning notice obligation as well as a “no notice” of knowledge or awareness (“has had no notice that the copy or phonorecord would be used for any purpose other than”) standard as a condition of access—similar to the section 108(d)(1) and (2) and (e)(1) and (2) obligations—could offer a reasonable compromise or balance among a competing owner or intermediary (library or archive) as well as user interests. Such copyright warning

notice provision, crafted similar to the existing (d)(2) and (e)(2) notice could be modified for the off-premise patron, i.e., obligation to post on a patron log-in screen, library or archive home page, etc. Second, the “knowledge or awareness” standard could be related to the exclusion of commercial uses, or in the alternative, language could be phrased to limit use of the material to personal educational and recreational uses, i.e., consistent with the mission of the typical section 108 entity, but broader than the current (d)(2) and (e)(2) restriction (“private study, scholarship, or research” which arguably excludes purely recreational or entertainment purposes even if personal). Revision should avoid however, the complex notice and response (removal or disabling) mechanisms of section 512(c) or the horrendous counter-notification and re-notification processes of section 512(g).

Another issue which the Study Group might consider is that if off-site access is allowed under a revised section 108(b) then material posted on a library web site—the likely form of off-site access to digitized materials made to patrons under either a revised section 108(b) or (c)—then under the *Getaped.com v. Cangemi*, 188 F.Supp.2d 398 (S.D.N.Y. 2002) decision, that posting would be deemed a publication. This might not be the intended result as a mere on-premise distribution of unpublished material in exercise of section 108(b) privileges by a library or archive is not necessarily a publication under the existing copyright law, yet according to this decision the posting would be. Compare definitions of publication found in section 101 (“‘Publication’ is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.”), with the concept of public distribution in section 106(3): “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” In other words, not all public distributions are publications, thus the need for section 108 and its subsection (b). Yet under this precedent the work distributed by a web posting would now be considered published. This result might not be the intention of the institution (much less the copyright owner!) and might operate to impede subsequent use of the material. The result would be that subsequent use by the section 108 entity would now be assessed under subsection (c), governing published works, arguably a more restrictive subsection in terms of the conditions it places upon the library or archive, instead of subsection (b). This might also have unforeseen implications for copyright owners as well. If off-premises access is ultimately incorporated into the section 108(b) revisions, statutory language similar to the following phrase could be included: “any such copy or phonorecord that is reproduced in digital format that is distributed in that format or made available to the public in that format outside the premises of the library or archives shall not be deemed to constitute a publication for purposes of section 412 or any other provision of the copyright law.” The need for this phrasing assumes the institution is in the Southern District of New York or in the alternate and more widely applicable scenario that this precedent constitutes convincing persuasive precedent.

The TEACH digitalization standards (section 112(f)(2)) should not be imposed here, as the section 108 environment maybe be far broader (county historical society, public

library, etc.) and far less capable in terms of financial as well as personnel resources than the sort of institution for which section 110(2) was amended to serve.

*Should any permitted off-site access be restricted to a library or archives’ “user community”? How should 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?*

Again, an initial restructuring of the qualifying criteria for section 108 entities to encompass both status (organization) and activity (function) will by design limit the reach of off-premise access to a far smaller subset than that of users with Internet access in general. Section 108 entities have traditionally operated within environments of well-defined user communities, e.g., students in the district served by the school media center, residents of the municipality served by the local public library, etc. While the membership may change over time, e.g., from semester to semester, from tax year to tax year, etc., the section 108 entity or its parent institution which it serves is likely to have at any particular point in time a definite and identifiable user community. The limit of that user community is articulated through the entity’s mission statement, policies and procedures, etc. Thus a section 108 library or archive is very likely to have “a limited and well-defined user community.” Even if guests or walk-in use is permitted this is not the normally defined (by its mission statement or policy and practice) user community. A revision of section 108 should allow off-premise access by at least this central and immediate core or subgroup of all potential users.

Revision of section 108 should not impose arbitrary, statutory standards upon such an entity. Section 108 encompasses many sorts of libraries, archives, etc. from the large state university system library to the rural community library, from the archive of a major nonprofit association to the small county historical society. Any amendment must be made with this reality in mind. However, imposing some sort of password or student or registration number requirement upon off-site access does not appear unreasonable. To answer the specific query (“anyone who pays a member fee”) posed by the Section 108 Study Group: Information for the March 2006 Public Roundtables and Request for Written Comments, the following point is made. If a public library system normally allows a non-county, non-system resident access for example, there should be flexibility in the amendment of section 108 to allow for similar off-site access, but certainly not to require it if it is not the typical practice. Likewise if a public library system normally allows non-county resident access but only upon payment of an annual guest registration fee, there should be flexibility in the amendment to allow for similar off-site access, but again not to require it where it is not the existing practice. Further, amendment of section 108 should make clear that fee-structured guest access should not be viewed as an activity performed “for purposes of commercial advantage.”

*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?*

If section 108(b) and (c) is expanded to allow for off-premise access to digital copies or phonorecords it would appear a reasonable compromise that access be no greater than that which would exist for on-premise users. However, the statute currently allows for “three copies or phonorecords.” The three-copy limitation makes no distinction between analog and digital use when that copy or phonorecord is accessed by patrons of the library or archive in “original” possession of the work reproduced. The only distinction is for unpublished works under subsection (b) when the copy or phonorecord is made “for deposit for research use in another library or archives,” i.e., for use not at the “originating” library or archive. This is the practical effect of the conditional clause in subsection (b)(2) that “any such copy or phonorecord that is reproduced in digital format is **not otherwise distributed in that format**,” i.e., an originating library or archive can digitize and transfer a copy or phonorecord to another library or archive under section 108(b) but digital access to that copy or phonorecord cannot then be available at the other library or archive. As a result of the three-copy rule under current law, a qualifying library or archive could in theory allow for three users to simultaneously access the digitized content on-site. Retention of this limit could remain in place for off-premise use as well. It would appear that the same network technologies that are used to effect the terms and conditions of licenses restricting the number of simultaneous users could be used in revised section 108 contexts as well.

*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, copyright, downstream transmission?*

This question appears to ask a different one than the previous statement regarding technology to enforce limits on simultaneous use. The reference to the TEACH Act and “user agreements” suggests that a second generation of technological controls to regulate patron use is contemplated. This would be a disastrous development! The provisions on technological controls in the TEACH Act, section 110(2)(D)(ii)(I)(aa) and (bb), the “technological measures” to control retention and dissemination, respectively, and the section 110(2)(D)(ii)(II) non-interference with technological measures, are both incompatible with the section 108 environment.

First, the nature of 110(2) educational environment, is by design and tradition more one of interaction with and mentoring of charges, this is not so with the section 108 entity. While section 108 can encompass the educational institution it can also include an entity that while its mission might have an educational aspect is not in a role of traditional

educator, e.g., a local historical society or public library. That fact that section 108 serves a far wider range of entities than does a section 110(2) “accredited nonprofit educational institution” is critical to understanding that the array of obligations imposed by the TEACH Act is designed for a unique context: where access by users (students) of copyrighted content occurs in an interactive or supervised educational context. Thus it could be argued that in this specific context, imposing extensive compliance obligations on the section 110(2) entity is logical. Such is not the case with section 108. As a result, such obligations would be inconsistent with the far broader context of section 108.

Second, upon closer look the obligations in section 110(2)(D)(ii)—as opposed to section 110(2)(D)(ii) which imposes obligations to institute policies, provide informational materials and provide notice to students all with respect to the copyright law—impose obligations far beyond the simple notice and awareness standard in subsections of current section 108. The TEACH Act requires for the first time (section 512(i)(1)(B) enacted as part of the DMCA in 1998 only requires that the qualifying entity “accommodates and does not interfere with standard technical measures,” there is no obligation to adopt such upon its own merely the obligation to accommodate the controls that owners have themselves instituted) the use of technological measures by the intermediary (the section 110(2) accredited nonprofit educational institution), regardless of whether or not the copyright owners uses such controls in the first instance. Under the TEACH Act the section 110(2) must now use controls in digital environments. Extending such obligations in a section 108 context impose far too high a burden upon the section 108 library or archive. The nature of the relationship between a library or archive and its patrons is more akin to that of service provider (section 512 accommodation and noninterference obligation) than that of an educator. Therefore at most an accommodation and noninterference obligation with respect to technological controls or measures could be adapted for use in the section 108 environment.

Finally, the specific language of 110(2)(D)(ii)(II), non-interference with technological measures is a high standard even for a section 110(2) entity. The TEACH Act provision imposes a higher standard than does section 1201, the provision of the copyright law that deals with circumvention of technological controls in the first instance! Section 1201(a)(1) prohibits circumvention of access controls, section 1201(a)(2) prohibits “trafficking” in such access control, and section 1201(b) prohibits trafficking in a “use” control (“a right of a copyright owner under this title in a work or a portion thereof”). However, there is no language within section 1201 prohibiting the circumvention of a use control. This is by statutory design as explained in the legislative history: “So, an individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully.” H.R. Rep. No. 551 (Part 1), 105th Cong. 2d Sess. 18 (1998). See also, *United States v. Elcom Ltd.*, 203 F.Supp. 2d 1111, 1120 (N.D. Cal. 2002) (“Unlike Section 1201(a), however, Congress did *not* ban the act of circumventing the use restrictions... Congress did not prohibit the act circumventing because it sought to preserve the fair use rights of persons who had lawfully acquired a work.”). Yet this provision of the TEACH Act not only uses an un-prohibited act as part of its qualifying obligation for the section 110(2) performance and display privilege—as the nature of the

operative language (“retention or unauthorized further dissemination”) goes to use not access under the section 1201 framework—it conditions qualifying conduct not upon an action that would indeed circumvent use, but by the plain language of section 110(2)(D)(ii)(II), by “conduct that could reasonably be expected to interfere.” The result is that the section 110(2) privilege to perform or display protected material is denied even if the conduct never did actually circumvent that use control. The statutory test is not whether circumvention occurred but whether the conduct could reasonably lead (“be expected”) to circumvention (“interfere”). Of course one could argue the entire day on the shortcomings of the TEACH Act—one could even write a book on the subject—suffice it to say that from a drafting point of view there is a disconnect between the provisions in the TEACH Act regarding technological measures or controls and the other provision of the copyright law which actually do regulate such controls and conduct.

While the suggestion of a user agreement appears well intentioned, its application would be fraught with problems. First, unlike the perfunctory copyright warning notice that now populates most if not all section 108 environments, requiring patron assent to specific terms and conditions of use (the user agreement model) as a precursor to off-site (virtual) access would result in scenarios where few if any patrons would likely read the terms and conditions of any such agreement. Most if not all would simply point and click assent. This is true of most consumer behavior in the commercial context. See, e.g., Sean F. Crotty, *The How and Why of Shrinkwrap License Validation Under the Uniform Computer Information Transactions Act*, 33 Rutgers Law Journal, 745, 767 (2002) (“We live in a world where consumers do not read the licenses contained in products. They also fail to read contracts, terms of use, fine print, warnings—any scrap of paper accompanying a product. They simply buy and use.”); Robert A. Hillman and Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 NEW YORK UNIVERSITY LAW REVIEW 429 (2002). This consumer (patron) behavior pattern would be more pronounced in section 108 settings where the content is being accessed for free, the typical section 108 context. Thus it can be expected that in practice no library or archive patron would likely take notice of or take to heart much less even read the terms and conditions of such an agreement. Patrons would simply click and later download, copying and transmitting downstream the content regardless of any terms and conditions executed to the contrary. The significant problem is that such a user agreement model—and under a revised section now instigated by the library or archive—will only serve to further instill an attitude upon the copyright-consuming public that such “legalities” mean little, and anyways “who will ever know”.

Second, who will draft and enforce such an agreement? For practical purposes the agreement is likely to be a contract between the library or archive and the patron. This is problematic for several reasons. First, the library or archive should not be put in position of contract enforcer. This is especially true in light of the fact that the rights the library or archive would be enforcing are not its own but that of the copyright owner. In the alternative, if the agreement is between the copyright owner and patron then the library should not be required under a revised section 108 to report any suspected deviation from the terms and conditions of that user agreement. The library or archive should not be put in a position of contract or copyright “snitch.” Again, positioning the section 108 entity in

this role is incompatible with the nature of the relationship between the library or archive and its patrons, i.e., as a provider of services and not as a purveyor or regulator of behavior. Many license agreements between libraries or archives and content providers contain such reporting provisions; some even require monitoring as well or monitoring results as a practical response to implementation by the licensee library or archive as a result of its compliance with a similar license provision. Finally, the incorporation of such activities whether by statutory design or default is antithetical to the fundamental concepts of patron confidentiality.

Third, and as an alternative to the “user agreement” model, an expanded notice requirement could be incorporated into subsections (b) and (c), similar to the existing section 108 (d)(2) and (e)(2) notice requirement, and similar to the notice requirement of section 110(2)(D)(ii) (“notice to students that materials used … may be subject to copyright protection”). At most, the section 110(2)(D)(ii) obligation imposing a duty to institute policies could be adopted (if this approach is adopted the statute or legislative history should comment on the nature and scope of those required “polices”). Again the nature of the section 108 environment does not make appropriate the use of the section 110(2)(D)(ii) (second clause) obligation to “provide[] informational materials to faculty, students, and relevant staff members that accurately describe, and promote compliance with, the laws of the United States relating to copyright.” This obligation again is more appropriate for the traditional educational environment, not the traditional library or archive setting.

*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 and MP3 file) or if the copies originally acquired by the library or archives were acquired in analog, tangible or intangible digital formats? What are the different concerns for each?*

The current section 108(b) and (c) language restricting patron access to digitized content (copy or phonorecord) to on-site or on-premise use (“not made available to the public in that format outside the premises of the library or archives”) does not distinguish between tangible or intangible formats. However a closer reading of the legislative history of the DMCA (section 108 as discussed above, and section 512) as well as the more recent TEACH Act, suggest that while there exists heightened Congressional sensitivity to copyright abuse of digital works, the context of that sensitivity is necessarily a networked environment: S. Rep. 105-190, 105th Cong. 2nd Sess. 62 (1998) (“online interactive digital networks” and “online Web site, bulletin boards, or a home page”) and Conference Report, H. Rpt. No. 107-685, 107th Cong., 2nd Sess. 230 (2002) (“digital transmission”). So too, recent P2P case law underscores this concern: once content is available in intangible digital form piracy is accomplished with great ease, more so than with either analog or even tangible digital formats. See, *Metro-Goldwin Studios, Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764 (2005); *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005). As a result, revision of section 108 should at least allow for tangible digital distributions off-site. Under the current language it is prohibited along with distributions off-site or off-premise of copies or phonorecords reproduced in intangible digital formats.

However, and in terms of conclusion, it is argued that off-site or off-premise access to intangible as well as tangible copies or phonorecords in digital format is consistent with and can be accommodated within with the revision of section 108 as articulated in reply to previous questions made in this comment. Incorporating those suggestions achieves the proper balance between access (patron and section 108 entity interests) and control (copyright creator and owner interests).

Perhaps as a follow-up to the previous question, it should be reiterated that the provisions of the TEACH Act do not offer a template for section 108 revision, specifically the adoption of section 112(f). Again, the specific context of the TEACH Act is incompatible with the broader context of section 108. Second, while the section 112(f)(1) restrictions (retention and use by originating entity, no further copies, and purpose of use) are logical, similar restrictions currently in section 108 or language incorporating similar standards are offered by previous discussion in this comment. Third, the section 108(c) “reasonable effort” obligation and “unused replacement at a fair price” standard ensure that any reproduction, regardless of format, is subject to appropriate limit. Such language should be retained, though perhaps clarified to indicate whether or not a revised tangible digital version is indeed a replacement or is a distinct and new work, and thus not subject the “unused replacement” restriction. Three examples would be a restored print of a motion picture (same running time), a so-called director’s cut of a motion picture (different running time), and re-release of a motion picture (same running time) but with so-called “bonus” or “special features”, all of which are now released in a tangible digital format, e.g., on DVD. Perhaps for intangible digital formats an obligation to cease off-site or off-premise distribution of the copy or phonorecord of an unused version of the work again becomes available at a fair price and the library or archive is made aware of the fact by the copyright owner, but in no event should the library or archive be under an obligation to undertake any form of monitoring or maintenance of that status. Finally, incorporating standards from section 112(f)(2), further limiting (and distinguishing) when digitalization can occur, would introduce a rather clumsy statutory standard of “availability” (“no digital version of the work is available to the institution”) into what is otherwise a precise obligation (“reasonable effort”) and standard (unused replacement at a fair price”) of section 108(c). The section 112(f)(2)(B) standard is unnecessary in the context of a revised section 108(c) as a scenario where “the digital version of the work that is available to the institution is subject to technological protection measures” is one where the work is likely to be available in the marketplace, a DVD with CSS copy protection for example, thus the obligation and standard of section 108(c)(1) are not met and the library or archive is precluded from making a reproduction and distribution under that provision.

No such limitation or distinction between tangible and intangible works should be contemplated for unpublished materials under revision of section 108(b). First, it should be recalled that reproduction and distribution under sections 108(b) as well as 108(c) both require that the work so reproduced and distributed be in the possession of the library or archive. For unpublished works this command is explicit: “currently in the collections of the library or archives.” For published works it is implicit as the copy or phonorecord must be for “the purposes of replacement” of an item that by logic was obtained for the

collection of the library. Neither provision would allow a library to merely surf the World Wide Web hunting for content to add to its collection, though nothing would prohibit a library or archive from linking to it, other provisions of the copyright law such as section 512 notwithstanding. Second, in the matter of unpublished works, the library or archive is likely to be under the terms and conditions of a gift or donation agreement that indicates whether off-site or off-premise access by patrons of the content in intangible formats is permitted. Third, even though courts have the unpublished nature of a work as a factor in a fair use analysis under section 107(2), sensitive to the as yet untapped market for the work, this works in favor of allowing equal if not greater reproduction and distribution rights under section 108 for unpublished works. This is so because the work is less likely to be the target of unlawful downstream uses, i.e., unpublished works are less susceptible to the desires of the pirate than a work that was once published, e.g., a motion picture, a musical recording, etc. In other words, the sensitivity that may be extended to unpublished work generally under the copyright law should preclude the inclusion of such works in an expanded section 108 off-site or off-premise distribution right (tangible or intangible) because the specific nature of the section 108 (library or archive) possession and use of unpublished works (preservation or security) as well as the nature of the work, e.g., a recently completed but unpublished screenplay or manuscript, does not raise the same copyright concerns as other works.