

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

**Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies
for Users, Including Interlibrary Loan**

Participants

Allan Adler, Association of American Publishers	Tomas Lipinski, University of Wisconsin-Milwaukee
Paul Aiken, Authors Guild	William J. Maher, Society of American Archivists
Tracey Armstrong, Copyright Clearance Center	Dr. Marc Maurer, National Federation of the Blind
Dwayne Buttler, University Libraries, University of Louisville	Steven Metalitz, Entertainment Software Association
Mimi Calter, Stanford University	Mary Minow, California Association of Library Trustees & Commissioners and LibraryLaw.com
Mary Case, American Library Association and Association of Research Libraries	John Ochs, American Chemical Society
Denise Troll Covey, Carnegie Mellon University Libraries	Janice Pilch, University Library of the University of Illinois at Urbana-Champaign
Kenneth Crews, Indiana University	Mark Seeley, International Association of Scientific, Technical & Medical Publishers
Eric Harbeson, Music Library Association	Nicholas Sincaglia
Roy Kaufman, John Wiley & Sons	Keith Ann Stiverson, American Association of Law Libraries
Keith Kupferschmid, Software & Information Industry Association	

DICK RUDICK: Now would be a good time to just go once around the table and we're not asking you for a biography, but if you could just state your name clearly and your affiliation and that will help with the transcription. So, I'm Dick Rudick. I'm a co-chair.

MARYBETH PETERS: Marybeth Peters, out of the Copyright Office.

CHRIS WESTON: Chris Weston, Copyright Office.

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ROY KAUFMAN: Roy Kaufman, Legal Director for John Wiley & Sons.

STEVEN METALITZ: Steve Metalitz with the firm of Mitchell, Silberberg & Knupp, here representing the Entertainment Software Association.

MARK SEELEY: I'm Mark Seeley. In this role I am representing the International Association of STM publishers.

PAUL AIKEN: Paul Aiken, Executive Director, Authors Guild.

MIMI CALTER: Mimi Calter, Stanford University Libraries.

TRACEY ARMSTRONG: Tracey Armstrong, Chief Operating Officer of Copyright Clearance Center.

KEITH KUPFERSCHMID: Keith Kupferschmid with SIIA, the Software & Information Industry Association.

ALLAN ADLER: Allan Adler with Association of American Publishers.

MARY MINOW: Mary Minow, California Association of Library Trustees and Commissioners and LibraryLaw.com.

MARY CASE: Mary Case, University of Illinois at Chicago representing the American Library Association and the Association of Research Libraries.

DWAYNE BUTTLER: I'm Dwayne Buttler. I'm the Endowed Chair for Scholarly Communications at the University of Louisville, Kentucky.

KEITH ANN STIVERSON: Keith Ann Stiverson. I'm Chair of the Government Relations Committee representing the American Association of Law Libraries.

DENISE TROLL COVEY: Denise Troll Covey, Principal Librarian for Special Projects at Carnegie Mellon University Libraries.

JOHN OCHS: Jack Ochs, the American Chemical Society.

ERIC HARBESON: Eric Harbeson, Music Library Association.

JANICE PILCH: Janice Pilch representing the University Library at the University of Illinois at Urbana-Champaign.

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WILLIAM MAHER: William Maher, I'm the University Archivist at the University of Illinois at Urbana-Champaign and I am representing the Society of American Archivists.

NICHOLAS SINCAGLIA: Nicholas Sincaglia, I'm not here representing any organization, but I've worked in the online music industry for 10 years.

KENNETH CREWS: My name is Kenny Crews with Indiana University.

TOMAS LIPINSKI: Tom Lipinski, University of Wisconsin - Milwaukee.

MARC MAURER: Marc Maurer, the President of the National Federation of the Blind.

MARY RASENBERGER: Mary Rasenberger.

LOLLY GASAWAY: Lolly Gasaway, from the University of North Carolina and my job is to move us in to the first topic. Will you – was there anything else you needed to do Dick?

DICK RUDICK: I don't think so.

LOLLY GASAWAY: Okay. Being a law teacher the first thing I want to refer you to is the statute in your package. It's the last 3 pages. It is very important and I want to describe the three sections – subsections of 108 that we're going to be looking at and talking about in our first time together this morning. We're going to look at subsections (d), (e) and (g).

Section 108(d) says that at a user's requests, a library may make a single copy of an article from a periodical issue or other collected work, like a chapter of a book, if the copy becomes the property of the user. The library has no notice it's going to be used for other than scholarship, research, study, that sort of thing. And the library displays prominently where the orders are placed and on the order form a warning in accordance with the Register of Copyrights' regulation. This applies both to copies that the library will make directly for the user and to interlibrary loan copies that the library obtains for the user.

Subsection (e) expands on (d) and says that at a user's request, a library may make a copy of an entire work or a substantial portion thereof after it first tries to find a copy at a fair price. So it conducts – makes a responsible effort to find an unused copy at a fair price. Then those same requirements apply that we saw under (d). The copy has to become the property of the user. No notice that it is going to be used for other than fair use purposes and the warning must be on a place where the orders are placed and on the order form. Again, it applies to interlibrary loan copies as well as to the copies that the library itself might make for the user.

Neither 108(d) nor (e) applied to musical, pictorial, graphic, sculpture or audiovisual works unless the pictorial and graphic works are a part of an article that is

TRANSCRIPTION
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being reproduced. And we'll talk about that when we talk about (i). 108(g) then says that the copies made under (d) -- are not related or concerted copying or distribution; are not systematic copying or distribution. And interlibrary loan meets these standards only if the purpose or effect of the copying is not in such aggregate quantities as to substitute for subscription to or purchase of a work. Now I think the librarians in the audience, we could do this as a responsive reading kind of -- because we -- these are the sections of the statute that we spend the most time with.

We also have to at least at mention CONTU guidelines for interlibrary loan. We are not here to talk about revising -- that this group would revise the guidelines -- but you can't talk about interlibrary loan without mentioning the CONTU guidelines. So we have to at least have them on the table as we are talking about interlibrary loan copying. Under the interlibrary loan guidelines, a borrowing library may make five requests from a periodical title going back over five years, each year. So that's the so-called suggestion of five. And the requesting library, the borrowing library has to maintain interlibrary loan records for three years. That's a part of those guidelines.

Now as we begin to talk about these sections of the statute, what we want to be looking at and talking with you about is how digital technology is changing the way copies for users are made. How users are requesting copies. And what problems this causes. For example, the statute says a single copy may be made for a user under (d) and (e). Well, if you produce a digital copy to deliver to the user, several copies are actually made in that process. They may be incidental, temporary copies, but more than one copy is made just in the way the technology works. Common current practice may be to digitize a work, to fax it or print it out and deliver it to a user. But more and more works are already coming into libraries in digital form in the first place and so the question we would be looking at is without dealing with license agreements particularly. If you don't have a licensing restriction, then can you deliver an electronic copy to a user from an electronic title that the library has. Also the general practice in libraries seems to be shifting to digital delivery, more and more. So that users are requesting that even an analog work be digitized and e-mailed to them or posted on a website so that -- with a secure website so that only that user has the code to download it; has the password to do that. And this certainly is cheaper and faster and more efficient for the user and maybe for the library.

The main issues we want to be looking at now is whether and how (d) and (e) should be amended to permit making the copies that are necessary to digital delivery to the end-user. If it's permitted, what kind of limits should we be talking about? Are there additionally limits that need to be placed when it is digital delivery? Sort of those broad questions. So let me turn it over to Dick to raise the first question with you.

DICK RUDICK: Okay, I just noticed that one -- I think now the entire 108 group is here. That's Troy Dow taking his coat off in the back. And thank you.

LOLLY GASAWAY: And before we go on, let me just say about the members of the group. They -- all of the members who are here, they worked incredibly hard and I have neglected to thank the group members sufficiently. It's really -- it has been almost two years, which is longer than anybody I think thought they were getting into and every

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SECTION 108 STUDY GROUP PUBLIC ROUNDTABLE
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single one of them on a volunteer basis, as I said, has worked really, really hard on the group. So thank you guys. Sorry.

DICK RUDICK: All right, this is where the rubber meets the road. Lolly and I are going to paraphrase the Federal Register questions just to streamline the process, but I think you will recognize the source of the questions. Where there are groups of related questions, we're actually going to go through the whole group of questions first so that you can focus on the – on the concept and the overall – how they relate to each other. And then we'll ask each question individually and hopefully you'll answer each question individually. That's the idea anyway.

The first topic is a series of three questions and the ultimate question that these three questions together should help us answer is, whether section 108 should be revised to facilitate digital reproduction and distribution of copies for users under subsections (d) and (e), which Lolly has reviewed. And if so, how? And the three questions are as – well the first group of questions are as follows. I said there were three series of questions and this is the first series. And this series gets at how 108(d) and (e) are currently applied and how library and archive practices would be affected if they were amended. And those three related questions are as follows. To what extent – and by the way you'll notice that these questions are primarily, particularly the first two, directed at libraries, so probably most of the comments we'll get will be from the library community. First question is, to what extent do libraries and archives rely on the 108(d) except when you're making direct and interlibrary loan copies? If digital reproduction or delivery is allowed, what impact will it have on those activities? Second question, really for libraries, to what extent do you rely on 108(e) to make and deliver direct and interlibrary loan copies? If digital reproduction and delivery is allowed, what impact will it have? And the last question I think you all might have an interest in. Right now 108 requires that a copy made under (d) and (e) must become the property of the user. The purpose of that was to prevent the ILL process from enabling libraries and archives from adding those copies to their collection and thereby reducing purchase in the market of those – for those copies. In the digital world of course, if you keep requiring that the user to keep a copy doesn't mean that the library won't have one too. So the question is, Should we or should we not amend 108 to clarify that libraries and archives can't retain digital copies. And I imagine we will get a variety of opinions on that.

Okay, going back to the first question – To what extent do libraries and archives rely on 108 – on 108(d) in making direct and interlibrary loan copies? If digital reproduction is explicitly allowed, what impact would it have? So, you're off – don't be so shy. Mary Case.

MARY CASE: Libraries actually do depend quite a bit on 108(d). We do interlibrary lending to provide resources for our users that we don't hold locally. So this is a very important part of the law for us. We don't believe if we – that this is going to – if we move to making changes in the law that permit more digital activity that this is really going to change the volume of what we do. Interlibrary loan is really based on a need identified by a user, not necessarily on the format of the content or on the format of the delivery. So in essence even right now in our making materials available on those

TRANSCRIPTION
SECTION 108 STUDY GROUP PUBLIC ROUNDTABLE
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Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

protected websites really hasn't, in essence, affected the volume. I think some volume has been affected by the wonderful electronic A&I resources that are available to people. So the ease for them of identifying resources from a vast array of information, which we don't all actually own. So I think it's – we don't see that moving in this direction would have certainly an impact on a volume increase. It certainly will help us in terms of efficiency and hopefully for user's efficiency.

DICK RUDICK: Okay, Mimi.

MIMI CALTER: I would echo what Mary says. I – we don't see a move to electronic delivery changing the volume and we do rely fairly heavily on 108(d) particularly and 108(e) to a lesser extent just because we get fewer requests for full – for full copies of works. We're primarily dealing with articles here. However, what we do rely on, on a day to day basis pretty heavily is the – is the CONTU guidelines. And since we did mention them, that does guide on a daily basis, how we manage ILL operations and what people are doing. The records they're keeping. The – you know, the files we're retaining and deleting. That has a much heavier impact at the detail level.

DICK RUDICK: Okay, is that Keith Ann, or Ann?

LOLLY GASAWAY: Keith Ann.

KEITH ANN STIVERSON: Whatever.

DICK RUDICK: Whatever. Whatever.

KEITH ANN STIVERSON: Either one is fine. Law libraries are a little different. We were joking the other day that so much material in law libraries is already licensed that we can't think of much that isn't. So license agreements often take care of this for us or we negotiate when we're purchasing electronic material to ask for an interlibrary loan right and a more relaxed ability to copy. So that's part of our license agreement. But we do depend on section (d) also and we do make incidental copies in order to provide a digital copy, because quite often the user is not in the library and has to get the material from someplace else. So we want to send a digital copy. I don't think that will increase copying at all. The digital copy – I think the worry about a digital copy is exaggerated. And in fact, libraries themselves make copies that turn into a digital copy, but they never keep the incidental copies. I've never heard of an example of a library keeping an incidental copy that's made to deliver a digital copy. And users quite over in a law school will make or print a copy and put it in a file. We still have that kind of a population too. So we don't see that the use of a digital copy is really that much to worry about or would increase interlibrary loan.

DICK RUDICK: Was there another hand up that I missed? Ah – ah, Bill.

TRANSCRIPTION
SECTION 108 STUDY GROUP PUBLIC ROUNDTABLE
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Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

WILLIAM MAHER: The archival world is – while we're lumped together with libraries in section 108, there are some significant differences. Most notably the fact that archives are kind of where you might regard where information goes to ferment or die or whatever, be reborn later on in a new life. And as a result what's in archives and special collections around the country are generally unique materials that are not available in multiple locations. So we have to rely – the only way in which users offsite can work with research is to have copies made. In many instances because a work that's in an archives may be a letter, may be a – well we'll say a photograph for now, and leave for this afternoon – may be a report of some sort; an entire work is involved. So subsection (e) is very relevant to a lot of copying.

I should note that while there's a very large amount of material in governmental records archives such as the National Archives and state archives, a very substantial amount, something on the range of 14 billion documents, are in private and research libraries and that kind of institution. Many of which are very small institutions. And a lot of those institutions, I would have to say there are a lot folks out there who aren't even aware of the terms of 108. And I've spent a fair amount time to talking to some of these folks and they all want to do the right thing. And of course they find copyright law very complex, which shouldn't be a surprise to anybody here. 108 does represent the basis that they justify much of what they do, although many times they mix it in their heads with, "well this is fair use." And if 108 is complicated, fair use is something we don't want to talk about.

DICK RUDICK: Bill, bowing to popular demand, I think we're discussing (d) and (e) together, which is okay. That's the way we'd like to do it.

WILLIAM MAHER: Can I –

DICK RUDICK: Yep –

WILLIAM MAHER: One further point to answer your question. In – in terms of making copies available through digital means as opposed to just analog means, yes that is something which some archives are actually doing now and would very much be of interest. Our users want that. The level of use that we experience in archives has grown over my 30 years in the profession. The immediacy with which people need information has accelerated and the rest of society expects things the electronic way. They are – to have archives and libraries sit back and say oh well now, the law doesn't allow us to provide it to you in a digital form. One gets rather strange reactions from the other end of the phone, including from law firms who are asking for things digitally by this afternoon.

DICK RUDICK: Okay, Janice you had your hand up.

JANICE PILCH: Janice Pilch. I would like to say also to echo what some of my colleagues have said that we rely on interlibrary loan and direct use copies very heavily. We rely on 108 very heavily. Much more so on subsection (d) than on (e) in a

TRANSCRIPTION
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type of central public services situation. I'm not speaking of archives. And much more so for standard interlibrary loan than direct use – far more so. I want to stress how functional, in terms of library operations that rely on copyright law; interlibrary loan and direct use are some of the – among the most functional operations that we carry out. Librarians are very careful to follow the law and the interlibrary loan systems that have been set also are extremely sophisticated to enable librarians to comply with the law. And so we feel that everyone is really careful in respecting the interests of the rights holders. There is only one situation I can identify where there might be increase in digital reproduction into the future and that's with libraries storing more materials in offsite facilities. If this type of thing continues to become the norm, we might be making more digital reproductions of material to supply users who will by definition be remote. And that's the only situation I can think of.

DICK RUDICK: Okay, as I'm listening to this it occurs to me there may be people from the right-holders community who might want to comment on this. But we should really try to go around and make sure all – everybody from the library community has a chance to answer these questions and I think there will be time left to extend it. Anyone else, Dwayne and Marc?

DWAYNE BUTTLER: Dwayne Buttler, University of Louisville. Should I wait for the train? The –

DICK RUDICK: It's supposed to ease off after rush hour.

DWAYNE BUTTLER: That's right, they slow down. So let's see – the question out there – . One, I'd like to echo what William said because I think that we have to realize that real people actually use this law and real people need to understand the law. So in a fundamental sense, you know I've probably said this in the other hearing and I say it all the time. The law needs to be comprehensible because you know, one of the principles of law is that we know how to comply with it. So I'm – I sort of lay that out as the foundation. You know, I think interlibrary loan is fundamental to the library world in that sense and I also think underlying this question is the idea that, that maybe digital reproductions are possible right now. And as a combination of 107 and 108, or even under 108, digital reproductions may very well be possible under the law as it exists today.

DICK RUDICK: Okay, Marc?

MARC MAURER: Yes, I'm the – as I said the President of the National Federation of the Blind and we don't know very much about the intricacies of copyright law, although we own a library on blindness. The interest that I want to raise is this. The digitization of documents offers an opportunity for us who are blind to get at them for the first time. Libraries are already digitizing them for our use. University libraries throughout the country do that and after they're digitized they are put into a collection which is a voluntary collection that is being used by other blind people. I don't know

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

whether anybody has ever tested the question of whether it's legal. It is desirable none the less. And I talked to some of the university librarians about the current digitization projects under way and they said what they will do if there are digitized books, is to make one copy of the digitized books available. And if it is out then it's out. I suspect that that will cause disharmony in the community of those who like to read the book. And I'm trying to find a way to expand at least the opportunity for blind population to get at these collections much of the time for the first time. So I would urge that a use of the subsections of 108 be expanded so that digitization isn't a thing that people fear. The librarians with whom I've talked wonder whether or not they are going to face copyright violations charges and I urge that that not be the case.

DICK RUDICK: I think we're actually – Mary – yeah, I think we've actually slid into – and I don't think it's a bad thing – we're actually answering the first three questions all together. And that's okay. It seems to work better that way. So we're really focusing on (d) and (e), both interlibrary loan and direct copies and just deal with them all at once. We've been doing that. Mary, you had your hand up?

MARY CASE: Yes, Mary Case. I wanted to go back to a minute to separate interlibrary loan copies from direct copying. And, at least within the academic library community, most of us don't do a lot of direct copying for our users. We leave them – we have photocopy machines where there is the copyright notices posted and we leave it basically to them now to do that. Most of us who had copy center operations have gone out of business in that perspective. So the amount of copying we do is actually very, very small for direct users. We do, do copying for members outside of our community. Again, this is a relatively small and in most cases, we are paying royalties on those, so in essence aren't really directly affected by 108. So we do try to make that distinction in what, at least within the academic community, many of us are doing it may not. Others may have some other perspective on that, but I did want to least try to bring out that distinction.

DICK RUDICK: Right, Mary?

MARY MINOW: I would echo that in the public library role. We generally let the users make their own their own direct copies for staffing reasons if nothing else.

DICK RUDICK: Yeah, ah, Denise?

DENISE TROLL COVEY: Yes, Denise Troll Covey from Carnegie Mellon. I gather you folks are interested in facts and some data. So I looked at the data that Carnegie Mellon Libraries gather on their copying activity, both copying for our own community users and interlibrary loan copying and that we don't distinguish (d) and (e) type copying in our data gathering. Clearly most of it is copying of articles, not full documents or substantial parts of documents. But our copying for our own users is only about 6% of our total copying activity and that's been the average over like five years or more. So that gives you some sense. And we mainly do copying for our own users only

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

in cases where their sort of home library is not the library that has the documents. We have three different libraries, so we do have a courier service that will copy something in say, Hunt Library and send it to a user whose main library is the Science & Engineering Library across campus somewhere, though we do very little of that.

DICK RUDICK: We're interested in not just in what you're doing now, but how – and some of you have responded –

DENISE TROLL COVEY: Okay.

DICK RUDICK: -- how it might change if the statute were explicitly changed.

DENISE TROLL COVEY: We don't really believe the volume of either interlibrary loan copying or copying for our own – directly for our own users would change if the statute changes because much of what we do is controlled not by section 108, but the vendor contracts. And as long as the term of copyright, whatever you write into 108 really is not going to be as relevant as what we negotiate in our contracts. So if our contracts say we can do it, we can do it.

DICK RUDICK: Anybody else? Kenny?

KENNETH CREWS: Yeah, Dick the way you've – I'm Kenny Crews. Dick the way you phrased that last question, you're in what might happen if there is change. Here let me build on the point that Dwayne made about does the current section 108, these sub-provisions; do these provisions apply to digital copying? And I agree completely that indeed they do. There is – there is no prohibition. One thing to watch for if – as you think about change in the statute that if a change in (d) and (e) with respect to digital copying is somehow like the reference to digital copying in (b) and (c), it will really generate a backlash. And, and – because a lot of ILL activity is currently done with digital technology. And if the statute were revised to add an explicit provision, but with added conditions that as your report says, adds friction to the system, there, there – that will reduce the interlibrary loan activity. And if that's your purpose, then it might be successful. But it will be successful at a very high price. And one of those prices would be a real diminished respect for what the law is trying to accomplish. There is remarkably little respect in the academic and the library community for that digital language in (b) and (c) about the premises of the library. It just doesn't make much sense. And if there is that kind of restriction, I think we're going to see problems with compliance with the law and I think we're going to see problems with respect for the law.

DICK RUDICK: Okay. Because I don't see a hand up, I'm wondering if we shouldn't move to – at least for the moment, it looks like we'll have a little time left over in this session – to the next question, which is, It's really, right now; this is focusing on something slightly different. Well anyway, as Lolly pointed out it requires that if you make a copy under (d) and (e) it must become the property of the user. And we talked

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

about – I talked about the fact that the purpose of that was to prevent it from being a way of to, you know, unintended consequences, adding to the library's collection. Now let's suppose that we modified 108 so that digital delivery is okay. Or let's suppose that Kenny's right and that's already true although we don't know it. We're not taking a position one way or the other. But supposing one of those two things –

KENNETH CREWS: Or suppose it's true and we know it.

DICK RUDICK: -- is true. Well, if I were Bill Clinton I'd say, "What do you mean by know?" Ah, and – but seriously, okay. In this other world or in this world that we refuse to admit exists, which ever it is, what about this business of keeping a copy? How do we deal with that? Do we deal with it explicitly? And, and – any comments on that? Yes, Mimi.

MIMI CALTER: I – it seems to me relatively straightforward that if the – and to Kenny's point, that there's – that there is an awful lot of this going on already. It's generally interpreted that the library is not allowed to keep a copy and that applies to digital as well as to print. So you know if you're not keeping a copy, you're not keeping a copy. The question of the temporary copies made along the process of digitizing I think is more interesting from that perspective because if you are doing digital copies, you're obviously going to have copies made along the way. But generally speaking I believe the practice is we don't keep any of that.

DICK RUDICK: And so just clarify your answer, at least in your library you actually destroy the transitory copies and --.

MIMI CALTER: Yes.

DICK RUDICK: You do this, okay.

KEITH ANN STIVERSON: There isn't any practical way to keep them. There just isn't any way to do it. There isn't any way to add to your collection article by article in a sensible way. And so often, interlibrary loan requests are made once, you know. When I see here the possibility of three copies or five copies, it makes me laugh. I can't remember a time in a 30-year career when the same thing has been asked for more than once, really.

DICK RUDICK: Could I ask, do – is that just a general perception of law library? You do not; you actually destroy the copies.

AUDIENCE: Yes.

MARY MINOW: There's one exception in the public libraries that there is some real oddball question, you do make a copy for a panic file. And that is something

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

that not – not a commercially readily available item, but something that was really hard to find.

DICK RUDICK: Yes.

WILLIAM MAHER: William Maher in the archival area. There is a difference out of considerations. From a preservation standpoint, many times if we were making a copy, let's say a digital copy – it's even true with analog photocopies and the original is in very poor condition. It is our curatorial responsibility to make – capture that copy the one time we handle, not have to handle it again. And we for certain categories of things keep copies that have been made digitally that have been provided to somebody at a remote location. So that preservation issue I can imagine it might get to complicated qualifiers. But that preservation issue is an important factor when you're looking at – at the idea that certain kinds of library and archival material have permanent value even though they have – there's no commercial realm in which they operate any more.

MARYBETH PETERS: Can I ask a Will a question?

DICK RUDICK: Yes, please.

MARYBETH PETERS: Can I ask you a question?

WILLIAM MAHER: Yes.

MARYBETH PETERS: Of the material that archives generally have, is it predominantly unpublished or is it mixed published/unpublished?

WILLIAM MAHER: It's a mixture. It's a mixture. It may be a technical bulletin or an engineering guideline. It may be a script for a play that was produced once. Ah, it may be correspondence. It may be – get into nasty materials we're not supposed to talk about, but photographs and videotapes.

MARYBETH PETERS: So there's not predominantly unpublished? It's --.

WILLIAM MAHER: In terms of sheer volume there is more unpublished than published.

MARYBETH PETERS: Okay, but you --. Okay, but you have plenty of them.

DICK RUDICK: Good. Yes.

KENNETH CREWS: Yeah, if I can reflect on that. Almost what I'm hearing --.

LOLLY GASAWAY: You need to say your name first.

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

KENNETH CREWS: Thank you, thank you. I'm Kenny Crews. And I ride the subway. And Bill, you know almost – almost what you're describing is kind of like here's a request that we fulfill consistent with 108(d) or (e). And then by the way, while we're at it as long as we're making a digital copy that is – we fully believe consistent with (d) and (e), let's make a digital copy that's consistent with the preservation purposes under (b) and (c) and put it away. Now, now the particular random item that somebody may be requesting isn't necessarily going to be lost, deteriorating, damaged, stolen, etc. consistent with the preservation provisions. But it's sort of could have been. Maybe you know it's a close call – tweaking of language, etc. But we're looking – you've described I think almost a pairing of those two provisions. The keeper is under (b) and (c). The delivery copy is under (d) and (e), subject to complying with everything. Now if this is a – even published report from your archives, which our archives has a wealth of that kind material. But it's ephemeral material. It's not on the market. It – but change the facts. If it were a technical journal article from a major commercial publisher, there would be somebody in this room who'd be very, very concerned to hear about this, this scenario. But if it were a technical report of passing momentary publication sometime in the past, few people in this room would be concerned. So as we think about these issues too, in the broader terms we maybe also need to really think about some qualification about the nature of the work, rather than, "is it crumbling." Just how else could we describe that work that could permit the keeper copy.

DICK RUDICK: In a moment I'd kind of like to open this discussion up to rights holders, but first Lolly wanted to clarify something.

LOLLY GASAWAY: I guess the question that we were trying in the question 8, the question about copies becoming the property of the user; would it make any difference to libraries if that were eliminated? Would libraries still try to keep a copy other than in the situations you've mentioned if the statute were amended and that restriction were not there other than in the preservation combination with archives. They're shaking their heads no.

KEITH ANN STIVERSON: Absolutely. In self-preservation, I can't imagine.

DICK RUDICK: Janice.

JANICE PILCH: Could I clarify the question?

LOLLY GASAWAY: Sure.

JANICE PILCH: You said Lolly, would libraries still try to keep a copy? And I think –

LOLLY GASAWAY: No, would they try to keep –

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

JANICE PILCH: -- would they try.

LOLLY GASAWAY: -- a copy if that were eliminated –

JANICE PILCH: Would they try?

LOLLY GASAWAY: -- from the statute.

JANICE PILCH: Um, I imagine. I think that one of main reasons why libraries don't keep copies is that it's not allowed.

LOLLY GASAWAY: Okay.

JANICE PILCH: There are other considerations as well, but everyone is well aware that it's not allowed.

LOLLY GASAWAY: Right.

JANICE PILCH: There could in the future be reasons to keep copies. Right now I don't see one, but one doesn't know. In the future who knows what technology might provide. It might become efficient to do that, but I – you know. If the law were amended people might view it differently.

DICK RUDICK: Okay.

KEITH ANN STIVERSON: And when you mention preservation, it's simply an entirely different subject.

LOLLY GASAWAY: It is, yeah.

DICK RUDICK: Yeah. All right, rights holders. Mark Seeley – Mark with a "K".

MARK SEELEY: Yes, thanks. Mark Seeley, STM Association. One of the reasons I was interested in participating here is to bring in to this discussion a little bit about the international dimensions.

MALE AUDIENCE: Can you speak up Mark?

MARK SEELEY: Yeah, I'm sorry. One of the reasons why I wanted to be here is to bring in the international dimensions that the publishing community is facing. I found it interesting the discussion that we don't have to worry very much because if digital interlibrary loan is permitted, the volume will stay the same. In fact one of the key issues that we have been working on for a couple of years is a consortium of German

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

university libraries. Who engaged in a sort of conflated interlibrary loan document delivery service called Subito, which went from essentially zero copies being delivered primarily in Europe, but also international – outside of Europe – to about 2 million in the space of two years. Now ultimately we have negotiated with the Subito agreement – the consortium. We have reached an agreement with respect to sort of maintaining the distinction in our minds between interlibrary loan and document delivery. And our colleagues at the German Publishers Association have just reached agreement with German Library Association about a change in law, which would also recognize that kind of distinction that we think is important. So I just want to say that in fact we've seen significant evidence that if there is a change in practice and possibly a change in law, there could be a very significant impact.

DICK RUDICK: Uh – Mimi?

MIMI CALTER: Mimi Calter. Just to respond to that. I don't disagree that a change in practice would change volumes of requests for interlibrary loans, I just don't think it's the format issue that would be driving that. You know, certainly if you did a greater promotion of interlibrary services, you could increase volume, but it's not issue of whether are getting paper copies or electronic copies that I think is driving it.

MARK SEELEY: But – and yet everyone around this table talked about the fact that there was a lot of digital demand from users, so what does that imply?

DICK RUDICK: Okay, yes. Denise.

DENISE TROLL COVEY: To answer his question I think that what it implies is that their preference is digital.

MARK SEELEY: Yes.

DENISE TROLL COVEY: It doesn't mean that they don't want it, if it's not digital. But their preference is to get it digitally if it's allowed.

DICK RUDICK: Paul Aiken.

PAUL AIKEN: I'm Paul Aiken. Um, sure but one of the reasons the preference may be digital is the immediacy. Is that you can get it in an instant and that could very well substitute for a closer in library purchasing a copy of whatever the – whatever the document is. And I think it's the immediacy that's really driving the demand, not the particular format.

DICK RUDICK: Roy – you had your hand up?

ROY KAUFMAN: Yeah, I'm struggling to try not to talk about a Topic A, Group 3, but it is sort of hard in this context because we're talking digital delivery. And

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

we've spoken about how library practices have changed since '76. We haven't discussed about how publishing practices have changed. We moved from paper based (**inaudible**) and from a subscription model to an article model and we'll get to that more in Group 3. But when we start talking about digital delivery and I'm not per se opposed to digital delivery, we need to address the fact that these documents are all available digitally from the publishers in real time. As long as it takes to set up your credit card account once and then instantly, whether you are a user from anywhere in the world or a library that might actually get it faster and cheaper because you've already licensed the right to it. And once you start talking about digital delivery, you're getting closer and closer to our primary rights and closer and closer to the Berne three-step test. We're going to get there anyway even in non-digital delivery when we get to that topic. But you're moving, moving closer to what we do for a living. And let's face it, I've heard this over and over again. It's not (e), it's (d). It's articles. It might not just be STM and academic journal articles, but it is primarily them. They are online or available by license, by the (**inaudible**), through publishers through their licenses. You're just getting too close to that.

DICK RUDICK: Dwayne and –

DWAYNE BUTTLER: I guess one –

DICK RUDICK: -- then Kenny.

DWAYNE BUTTLER: -- of the things explicit in that statement was the credit card. I know lots of people that don't have credit cards. And I know lots people that rely on libraries that don't have the financial means to buy into the pay for view model. So I think that's important too. To recognize that not always are we going to be able to buy those materials because all of us don't have those resources.

ROY KAUFMAN: So why does it come from us? Why does the fact that you can't afford to buy it mean that the publishers have to give it away for free? I'm sorry, I'm just --.

DWAYNE BUTTLER: It does mean you have to give them away for free, but it doesn't come from you. It comes from the academic world often. And it doesn't mean that you have to give it away, but I think that one of the things that is implicit in federal information policy is we need some freedom or we need some space to deal with those kinds of inequitable situations in the sharing of information.

DICK RUDICK: I'd like to let this go on, but I think Kenny had his hand up next.

KENNETH CREWS: I'm – reflecting on Roy's comments. Right, I just might test your sense of humor this morning. Um --.

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

DICK RUDICK: I had a lot of --.

ROY KAUFMAN: I expect nothing less, Kenny.

DICK RUDICK: I've had a lot of experience with that.

KENNETH CREWS: Thank you. Thank you. You know really instead of you saying, gosh it sounds more like libraries are becoming publishers, I – what you describe it sounds like the publishing industry is becoming more like a library. And, and how should we react to that? I don't know. But in general, it's one of those **(inaudible)** right kind of moments because we've got aspects of delivery where there will always be issues of affordability, accessibility, etc., etc., etc. that we have to make sure is adequately covered. And another part of me says to you Roy and to you colleagues, and that is if you can coordinate on your own or with Amazon or any other intermediary and provide at some reasonable price, whatever that means, deal with that in another conversation, download copies of individual articles, more power to you. I think that's just great, you know, and this has been a subject for a lot of years. And I'd love to see you do that. And I would love to refer people to that source. But it can't eliminate the need to provide ILL services for other needs, other purposes, etc. It's a movement of the line. Not all the way over one way or the other, but a movement of the line perhaps to some other place in the middle.

DICK RUDICK: I want to refocus the discussion just a little bit because I think as we get later into the day, we'll get back to some of this. We're really trying to understand here something very specific, very narrow, maybe boring. I don't know, probably not. Just some – whether it's going on now or not. If we recognize it, if we make it explicit, are there unintended consequences? What would change? And that's really what this set of questions is designed to get at. Not at the broader, more philosophical and broad economic issues that we've just been discussing. We want to know if we just say okay, you don't, regardless of what people actually do if we just say you don't have to – you can actually send the copy to Italy under whatever conditions apply. Clarify the law. Will anything change? And if so, how will it change?

STEVEN METALITZ: Steve Metalitz representing the Entertainment Software Association. I wanted to pursue that question of what might change and ask this question. I've heard several observations about whether the volume of material that was digitally delivered wouldn't change or whether it would, but I'm asking about the character of the material particularly under subsection (e). I understand or I perceive there is disagreement about how much digital copying can be allowed in this context under current law. But taking my lead from our co-chair in the introduction, on the assumption that there certainly are difficulties or uncertainties about what digital copying can be made now under (d), I'm asking about works that exist only digitally, and particularly computer programs. To what extent, if there were explicit authorization for digital copying to take place in the context of (e), is that likely to change the mix of what is delivered, even if it doesn't change the volume? Would you have more materials that

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

exist only digitally – and an example would be computer programs, but there are other examples that fall within the category of works that are now covered by (d) and (e). And we're not getting into this afternoon's topic yet. Would there be more delivery through interlibrary loan of computer programs or do people think that that is not? I am interested in the reaction of librarians to that is whether they think that really is not something that would be a likely subject of digital delivery or of interlibrary loan under (e)?

DICK RUDICK: Steve's comment really makes me suggest that – we talked a lot about journals, maybe – I'll bet we'll keep on talking about it too. But at least for the moment we need to remind ourselves that while people in the journal publishing business have been thinking about 108 for a long time, authors, other kinds of publishers, non-text material, we are all waking up to the fact that – and librarians too, we are all waking up to the fact that 108 applies – may have been designed for journal publishers, but it can apply and probably should apply to other things. So let's – I would like to take Steve's comment as an invitation to really talk about things other than journals in this context. And yes – Allan?

ALLAN ADLER: Allan Adler. Actually I'm not a rights holder. I just play one in –

DICK RUDICK: You hang around a lot.

ALLAN ADLER: -- the association business. Yeah, I mean this is going to have to come up sometime during this discussion, so it may as well as come up now I guess at the beginning. But many of you are familiar with the controversy surrounding the Google library project which involves the wholesale reproduction of works that are currently in analog form into digital versions for participating libraries who have partnered with Google. And although at the moment the question of exactly what those libraries can do with the digital collection that would be created for them as a side by side with their existing analog collection by Google and the contractual arrangements that exist. One has to ask, what would happen to that material if indeed 108 were to be revised and expanded in some of the ways that are being contemplated under this? Most of what you've heard so far, as Dick has pointed out has talked about subsection (d) with respect to the question of dealing with articles from collections or small discreet portions of works. But if you consider what section (e) allows with respect to the copying of entire works, one would have to ask why libraries would contract with an entity or pursue any means of having their collections digitized in their entirety, if they didn't ultimately intend to serve the patrons for whom those collections exist with respect to the fullest measure of being able to utilize that material?

One issue that we haven't discussed here, which is a significant issue because it simply didn't exist in 1976 as a capability when Congress acted, is the fact when material is in digital format, it is possible to provide access to it through a display rather than providing people with copies that become their property. I wasn't in this role in 1976, but I suspect that my predecessors, whoever they were, probably were in some

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

way responsible for this – what appears to have been a grand compromise. Saying that the copies become the property of the user in order that there is no mistake that they don't become part of the collection of the library. Well that's a hell of a (**inaudible**) to compromise from the perspective of rights holders if you translate that into the digital environment today. And I think that's the reason why when we hear reassurances sometimes from the library community – I was struck by a statement in one of the library submissions that simply said the shift to a digital environment has not changed our mission. I think we all have encountered in our lives, professional or otherwise, situations where the way you go about a task or fulfilling a mission actually can transform the task or the mission itself. And I would suggest to you here that when we talk about fulfilling patrons needs, expectations and requests through the fullest possible use of digital technology, we are in fact transforming the mission of libraries. And Kenny, I would punt it back the other way and say no, I think that Roy was more correct that, in fact, under this type of discussion the greater concern is that libraries are becoming more like publishers than publishers becoming more like libraries.

KENNETH CREWS: I'm glad you brought up Google. They're going to put us out of business anyway.

DICK RUDICK: Well, I'm not sure we'd want to do that.

STEVEN METALITZ: I don't think publishers – I don't think publishers could handle your hours.

DICK RUDICK: Ah, Janice and then I think – I have a sense we could usefully move on. Maybe allow some time – more time for some of the other topics. But let's take two – then Janice and then Keith.

JANICE PILCH: On the matter of the way we do things and also getting back to the matter of the immediacy and the instant nature of digital delivery and the possible skyrocketing demand if materials become available through digital delivery, I think it is important for people to understand that libraries that may even now send digital copies, do so in a very slow way. Material is digitized. It is scanned manually. It is sent in some form digitally. But someone has to go through the pages and scan the document. Then that copy is destroyed at the library. The user gets the copy. It becomes the property of the user. There is nothing quick or instantaneous about that. I get the feeling that some people think it's at the press of a button that these digital copies are being sent. They are very slowly scanned and very slowly taken care of at the library.

Secondly in terms of skyrocketing demand, I think it's important to understand that libraries don't have unlimited staff people to fulfill a kind of demand that would skyrocket from – I don't know – 10,000 to a million or what the figures we're giving. If demand increases to that extent, libraries won't be able to provide interlibrary loan in the way that they are now. They simply can't and won't be able to. It's never going to be that fast and there are never going to be enough staff members to supply that kind of

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

demand from patrons. And thirdly we mustn't forget, getting back to articles, the CONTU Guidelines. We're not competing with free because at five we stop sending the interlibrary loan copies without getting – paying royalties. There are roadblocks.

DICK RUDICK: Okay, I'm going to impose a minute rule. Keith, one minute and then Roy, one minute.

KEITH KUPFERSCHMID: Keith Kupferschmid with SIIA. We've talked a little bit or a lot about how the library practices have changed or may change in the future. And certainly how publishing practices have changed or may change in the future. But one thing we haven't talked about and I'll throw the fly in the ointment here, is how the law has changed during that period time as well. And I have to bring up state sovereign immunity here and the fact that during that period of time now, state entities cannot be held liable for their actions. The best that a copyright owner could get would be an injunction. And it's an extremely unfair situation that exists today. We've tried to rectify that situation with no success, really. And that is a discussion I think that needs to take place in the context of deciding whether and how 108 will be amended. Because it's just frankly not fair to include state entities within that mix given the large exception from the law they have right now.

DICK RUDICK: Okay.

KEITH KUPFERSCHMID: With regard to – just quickly on this property of the user issue. I don't know why this was put in the way it was back 30 years ago and they didn't just use the words "the library shall not retain a copy" but it certainly sounds to me that the libraries understand that that's what the requirement is. And we would certainly endorse a change from the "property of the user" requirement to one that is more clear and makes clear that the library not retain a copy. And that also gives greater – might give greater control with the users to prevent them from misusing the copies. Especially if we're talking about digital copies, which are very easily transmitted to other people and very easily copied. And I know we'll talk about the technological solutions later.

DICK RUDICK: Okay, thank you. Roy?

ROY KAUFMAN: I'll make it quick. I want to respond to one thing Janice has said and one thing that Keith said. With respect to skyrocketing demands and staffing, certainly and probably most libraries engaging in ILL do it in the correct, sporadic way. But there are libraries, ARL libraries, who have set up in violation of CONTU, because CONTU says this doesn't apply to them, centralized document delivery platforms, which they call ILL. And they charge \$15.00 to send the copy. And it is set up like a business. These exist now. And they can certainly increase the staffing as the demand increases because they're making money on it. And competing unfairly with those who are charging copyright fees, so it's a lot cheaper.

Something Keith said, sovereign immunity just – I of course agree with him. Sovereign immunity always seems like this big issue and too big for this. But 108 is an

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

affirmative defense. If you assert the affirmative defense, it would be very easy to write into law then an assertion of 108 to take an affirmative defense constitutes a waiver – a limited waiver of sovereign immunity for those issues, which are raised in that defense. In that way if you want to rely on 108, you've got to give something up. If you don't want to rely on 108, that's sovereign immunity.

DICK RUDICK: We're out of time so – but this doesn't apply to Mary. Well, Mary left actually. Do either of you have any clarifying questions or should we move on? Okay.

LOLLY GASAWAY: Okay now we're moving on to the second group of questions this morning. And we will be taking a break at 10:30, so kind of in the middle of this. The questions that we are to address now continue along the same lines. But our first question is: Should we replace the de facto single copy limit for users with language that would allow libraries or archives to make a limited number of copies as is reasonable to provide the user with a single copy? This is talking about those intermediate copies. Should we write into the statute something that would talk about a limited number of copies as are reasonably necessary to provide the user with a single copy? And then, would that apply to both interlibrary loan and to direct copies for users that the library makes?

The second question, and again we can mix these if it works out, is: If digital copying and distribution is allowed in copies for users, what kind, if any, restrictions – new restrictions – should be placed on this? For example, user agreements, access controls, copy controls, persistent identifiers, would any of that make sense from both the library standpoint and the publisher/producer standpoint?

The next question we'll talk about, and maybe this one really is separate. Maybe those two go together and then these next two go together. If digital copying and distribution is allowed for copies for users, should users be restricted to the library or archives' defined user community? How should we talk about what is a defined user community?

And then the last question again: If digital copying and distribution is allowed for copies for users, should we amend section 108 to clarify that interlibrary loan transactions are library to library transactions? As opposed to delivering electronic copies from a lending library directly to an end user, or does it make any difference as long as that transaction is counted in the CONTU suggestion of five by a borrowing library? Does it make any difference that that roadblock exists?

So – so okay, do you want to start with the first question then? I wanted you to see what all was coming.

DICK RUDICK: I think Tracey is first.

LOLLY GASAWAY: And then Tracey is first and then Marc. Well wait, Tracey was first, sorry. Tracey --.

TRACEY ARMSTRONG: Well --.

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

LOLLY GASAWAY: Introduce yourself remember.

TRACEY ARMSTRONG: Yes, I'm Tracey Armstrong from Copyright Clearance Center. And I'm not a library and I'm not a rights holder. So I'm an intermediary. And I don't know exactly when the right time to talk is, so I thought that maybe I'd shoot for now.

DICK RUDICK: That's fine, whatever you feel like.

TRACEY ARMSTRONG: So Lolly, if it's okay, I have some comments that maybe apply to this group of questions. So is that all right to just make this general comment?

LOLLY GASAWAY: Yes.

TRACEY ARMSTRONG: Some of the things – Copyright Clearance Center is a licensing agent, for anyone who doesn't know. We're a not-for-profit that was opened in '78. And we license when libraries contact us and need to clear a royalty fee for an interlibrary loan, particular interlibrary loan transaction, which many libraries do. We clear those transactions. We also license academic – what we call academic fee-based activity – which you could I guess call document delivery from a library. And that may be controversial, I don't know. We call it academic fee-based activity. We also license commercial document delivery, among a myriad of other things. This isn't a commercial for us. I'm just trying to level-set on what we do. And so that's the foundation for a few of my comments.

One thing hearing earlier – some of the earlier comments on scale. The potential for there to be an increase in activity if digital delivery is allowed. I'm not so sure we're very good at predicting increases in the market. And one of the things I would point out is that in an ARL study – and I'm not an ARL expert, so I defer to ARL experts. Between 1996 and 2002 when ARL studied some activity in what they call ILL/document delivery, and they have a very specific definition for that, that's the period where in particular journal articles were in massive quantities being put online and accessed digitally through site licenses and other things. There was an increase in interlibrary loan activity. Now I don't think necessarily that you can say that's a one to one relationship because those materials were made available digitally that there was an increase.

There are other significant factors that were taking place in parallel with that. And one of those really significant factors I think is unmediated interlibrary loan or patron initiated interlibrary loan. There are a lot of different terms for it. Where somebody can go into a library and maybe go to a kiosk, or from a remote location place a request for a borrow. And the other thing that happened during that time is that there was a lot of technological advancement. Things like link resolvers and other types of technologies. I think link resolvers are kind of yesterday's news, but there are a lot of new wonderful discovery tools, which are helping library patrons discover more of what they might want to get access to. And librarians I think have, again not speaking as a librarian, but I

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

think anyone could say easily a librarian's job and mission is to get as much fulfillment as they possibly can for their patron. At the same time deal with budget cuts and, you know, no credit cards or whatever. And so they're trying to work with a limited amount of resources. And unmediated interlibrary loan has helped in lowering the unit cost of borrowing and increasing the fulfillment rate for patrons. I think generally, people would agree with those facts.

At CCC we have seen interlibrary loan royalty fee clearance also increasing throughout that time. And particularly I brought data from the last three years where there is a big spike in activity in interlibrary loan. So that's one thing I want to point out. I think predicting trends are pretty difficult to do. So I wanted to point that out.

Another thing I wanted to point out is interlibrary loan the – there is a lot of – there are a lot of educated people in this room. There are not a lot of educated people at the interpretation end of the law. And there is a lot of confusion. And Copyright Clearance Center is in this kind of usual role of sending people out and trying to increase education about copyright and whatever. We're not lawyers. We're not out there advising people. We can't. Some people call us all the time: Is this fair use? Well, we're not you. We're not in the moment. You need to make the determination. Here are all of the pieces of data that could go into helping you make that determination. So I want to be clear about that. But what we do here in the field is – is a concern. And a couple of things that I want to put out for this group and I'm sure people can speak up in much more precise ways on these topics. A couple things – one, it is a fact that unmediated interlibrary loan is increasing. It is a fact that – it is our experience that there are many librarians out there that do not delineate or understand how to delineate between fee-based services and interlibrary loan. I've had people come right up to me and say, "I don't make a profit so --. I run this service for no profit so I can use 108 and CONTU and everything for my delivery activities." One of the things I want to point out is, in addition to academics --.

DICK RUDICK: It's running –

TRACEY ARMSTRONG: Okay.

DICK RUDICK: -- running a little long.

TRACEY ARMSTRONG: We license –

DICK RUDICK: Very – wind up quickly.

TRACEY ARMSTRONG: I'll wrap up right now.

LOLLY GASAWAY: Okay.

TRACEY ARMSTRONG: Yep. We license to corporations and what we're finding is there is a meshing between corporate – a decline in commercial document delivery and a strange, gray and increasingly more gray area between where

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

corporates are seeking their document fulfillment and academic libraries. And I think that's something to be considered here. That this – whatever is decided here doesn't just need to be clear for academic libraries. It needs to be really clear for corporate libraries as well that put academic libraries sometimes in uncomfortable positions saying things like, "We're doing this activity for government research, so the Fair Use Act" – as they say. As they say it. The Fair Use Act applies. And this is stamped on these document requests that go to academic libraries. For many of you, you would know how to handle that. For many other people, they don't. And we get these questions all the time. That's just some of the data I wanted to bring to the conversation.

DICK RUDICK: We've got a queue.

LOLLY GASAWAY: We have a queue.

TRACEY ARMSTRONG: I rile people up, I'm sorry.

LOLLY GASAWAY: It's Mark, Keith Ann and then Nicholas. Anyone else in the queue right now? I can't read your nametag.

JOHN OCHS: Yeah, John Ochs from the American Chemical Society.

LOLLY GASAWAY: Could you fix it so we can see it? Thank you.

DICK RUDICK: We're going to give people hats.

LOLLY GASAWAY: Janice, if you could put that stack of papers down. That would help us. We can't see over it. Thank you – or at least the we, who are short here, can't.

KEITH ANN STIVERSON: I just wanted to make one statement and that is what Tracey's describing is not really unmediated interlibrary loan. It's – its people going directly to CCC and not using their libraries. Interlibrary loan is mediated and I'm not sure – I'm not criticizing what you say. But I think that by calling unmediated interlibrary loan, you're really dealing directly with users as opposed to libraries. I mean interlibrary loan is mediated and people come to us to ask if they can borrow something under the library's auspices. That's what interlibrary loan is. It is from library to library. It's not to individuals as a rule.

DICK RUDICK: Tracey do you want to respond to that?

TRACEY ARMSTRONG: It's not my turn. It's – I'm reading the study from ARL and it's talking about the increase in unmediated – and that's one of the bases for my comments.

KEITH ANN STIVERSON: Okay.

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

TRACEY ARMSTRONG: And also just fieldwork that we're doing. And work that we're doing with some of the library groups.

KEITH ANN STIVERSON: Okay, because in law libraries in any event, quite often our users don't realize we already own something and so we also mediate the transaction because quite often they don't even know we have something. And they're asking for something from another library that we own.

TRACEY ARMSTRONG: I'm sure that's true.

LOLLY GASAWAY: Okay, now Mark.

MARK SEELEY: Okay back to single copy. One of the things that I think we've heard a lot this morning is the prevalence of licenses and that is very true for the STM journal community in which most content is now available online. I raise that because most licenses that I'm aware of actually permit an enable some form of digitally enhanced interlibrary loan. So that the interesting – often this is – for example, by permitting or encouraging the use of digital technology to facilitate the exchange of the document between the fulfilling library and the requesting library. I've got that wrong. Now in a way the discussion about whether or not to make that a part of the law is an interesting one. Most of those same licenses also have certain requirements in terms of transparency, in terms of reporting, in terms of a defined user community to clarify for example that it is faculty, students. You know, if you have the universities for example and restrictions in terms of geography. Often I know – there are some that I am aware of who do say that this activity should at least be restricted to the country in which the library was – it doesn't deal with the international aspect. And it does seem to me in the area of sort of looking for compromises or perspectives where we would consider to go forward on some of these issues that – those issues I think are strongly linked. That greater transparency – great reporting, some clear definitions of user communities, I think would give greater encouragement to the rights holder community that permitting some type of intermediated system for this greater digital delivery as between libraries. Provided that there are restrictions we think are quite important and what the actual end user walks away with. This is something that features in a lot of the negotiations that we've had in Germany. I mean frankly, we are a bit concerned about the digital copy use being added to the broader community. I think we're not as concerned about the question of digital copies going back and forth between libraries. So – that's my.

LOLLY GASAWAY: Nicholas.

NICHOLAS SINCAGLIA: Yeah, my name is Nicholas Sincaglia. I'm also an independent. And several of Tracey's comments I agree with. Trends are very difficult to predict. I think libraries will be – their role will change significantly due to technology. Being a technologist I can see the things that are going on right now. The Google book

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

project was mentioned, which is extraordinarily powerful in its ability to get people access to information.

One thing that I'm seeing as an independent, since I don't – I'm not on either side here, the discussion really is set up sort of like the copyright owners versus the libraries. And I just don't – I don't really see the argument as that. What we have here is we have two objectives. The public supports copyright owners. And continues to support them, providing them the monopoly rights to their works for distribution and so forth. At the same time the public supports its library systems. And funds them and it's quite – you know it can be very costly. So where these two public objectives now have a – you know, an area of conflict. And how that conflict is resolved is going – there's going to be compromise made – it needs to be made. And so where is that – where does that compromise – how do we make that compromise?

The discussion I've heard so far, I've heard a couple of numbers. I want to – you know, I'm trying to quantify well what are we talking about here. I hear 6% of the library activity is through loans and copies. I hear that this is a – these copies are one time. No copy is made more than once. So I guess what I'm trying to figure out here is, you know, where – where is the --. Can we quantify the amount of harm, I guess, to the copyright owners? And over time it is definitely going to change the role of the library and the technology is going to change how information is accessed. Is there a way to track that over time to – maybe it's very low today – but in the future, is there a way to track that, to finally get to a point where this is a serious problem? We need to do something to protect the copyright owners. So I'm in the middle. I just want to be able to understand and quantify the issue here.

LOLLY GASAWAY: John.

JOHN OCHS: Jack Ochs for the American Chemical Society. I think for us as I think it is today for most publishers, there is separation. It might be useful to clarify the electronic delivery into two separate issues. One is the transmission of documents from point to point or place to place. And the other is the actual delivery of the digital document to the end user. I know for us, we really don't have an issue with the electronic transmission. The creation of electronic copy and the use of that of that electronic, transmitting it from library to library for the purpose of electronic loan. And it's been in our licensing agreements for the last seven or eight years. Where we start to have an issue and I think where most other publishers start to have an issue, is when a digital document is delivered to the end user. Because then we all start to get into the "what then" scenario that I think everyone in the room is fairly relatively familiar with. One of the issues of trying to deal with that in law – if anything over the last 10 years, I think we have all witnessed that technology is moving faster than law. And here's – here's – we're a case a point. I mean this study group is talking about, one of the issues is should electronic transmissions – should documents be able to be transmitted electronically. And here I think most of – several librarians are saying, well we're already doing it and we have licenses that already allow it that have been out there for seven or eight years. And over the foreseeable future, technology is going to continue to move very rapidly. And one of our concerns is that the market is probably a more nimble

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

solution to try and reconcile compromises as opposed to trying to legislate the law, which sounds good today and then 18 months and new technology evolves. And all the protections and reasonable measures we think we've arrived at today, now don't mean anything anymore.

So we are very much in favor of libraries continuing to mediate interlibrary loan. We think that's a good thing. We support that. We have a lot of confidence in the libraries' ability to do that. And I would second the statement that Mark made that issues such as transparency reporting, defining user community, those things are helpful. They serve to clarify what may and may not be done. And they give us, and I suspect publishers, a greater sense of confidence and security that interlibrary loan will be used as it was intended to be used.

LOLLY GASAWAY: Paul.

PAUL AIKEN: Are we on just question 1 of Group 2 at this point.

LOLLY GASAWAY: You can do that. It sort of mixed together –

PAUL AIKEN: Oh, okay.

LOLLY GASAWAY: -- between one and two for this group of questions.

DICK RUDICK: It's the Wild West.

LOLLY GASAWAY: It's the Wild West.

PAUL AIKEN: All right, okay.

LOLLY GASAWAY: We try to keep them separated.

DICK RUDICK: The wild Midwest.

PAUL AIKEN: Okay first, well with respect to the first question, I see "a limited number of copies" in quotes. And there is no further qualification there, such as temporary and incidental. Such language that would give, I think, the rights holders a great deal of comfort in how interlibrary loan was actually taking place. If it's temporary, incidental, and a physical copy winds up in the hands of the user, obviously we have a lot more comfort with that. In all this we have to be careful of unintended consequences.

And also, I learned this morning, we have interpretations of 108 that might say that digital delivery is already allowed. Certainly it is our position that 108 does not allow digital delivery, a final digital copy winding up in the hands of the user. Let's say that's a high-risk proposition to a rights holder. The right to convert to digital form has to be in control of the author. The security risks are too great. There doesn't seem to be anything as true digital security. It is not anyone's choice to make except for the rights holder. What sorts of security will be put on that document that's going to be delivered

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

digitally? There is nothing we can put in this statute today that would make any sense five years from now about digital security. We're not there yet. We shouldn't be there yet. When we talk about immediacy, are we using how things happen today and trying to anticipate how things might happen in the future? We have to look at how the law might change. Proposals here include allowing library to retain a digital copy. We hear that there might be an interlibrary loan without the mediation of a librarian. These sorts of things can make it very immediate. You look to tools on the Internet. You find out which library has your document. It's unmediated and it's already stored by the library. It could be a very quick transaction. It could easily displace markets that are rightfully the rights holders.

LOLLY GASAWAY: Keith.

KEITH KUPFERSCHMID: Keith Kupferschmid from SIIA. Let me address the first two questions in particular. The limited copy – the limited number and the restrictions questions.

Believe it or not, we may not be so concerned about the number of copies that are made. Especially if we're talking about incidental transient copies made in the process of creating that permanent, more permanent copy. And so, believe it or not, we may not be so concerned about it.

But we are concerned about two other very important issues. And if these issues aren't satisfied, then you better believe we'll be concerned about the number that are made as well as a whole bunch of other issues. And the first of these issues is, you know, the conditions that must be met to create the copy in the first place. And we can look at 108 as it exists today, but we should also look at what additional requirements or change in the existing requirements might need to take place.

And then the second issue, which is – might be the more important of the two – is actually the technical, legal and other restrictions that are applied to that copy. You know, we're all in favor of being in step with technology and that's why we take the position we do on the transient and incidental copies. But for those same reasons, we also believe that technical protection measures must be used to make sure that these copies are not abused by the people – by the patrons and the people that you're giving these copies to. It is extremely disturbing to read comments, in particular the comments I saw from ALA and ARL that I think were published in November of last year that would object to any amendment in 108 that would require the use of technological protection measures, especially those in particular – similar to the TEACH Act. To me what that smells like is that these groups don't – they want to benefit from the new technologies but they are not willing to take on the responsibilities that go along with it. And that is – that is exceedingly disturbing and quite frankly, if that is the endgame, if that is the position taken by the libraries, I know my association and I am sure others will take a much stronger stand opposing other amendments that might take place to 108.

The last thing I will mention is the non-technical steps that could be made. There is a standard in 108 right now, the no notice standard that, you know, that sort of encourages a policy of don't ask, don't tell. And that standard really does need to be improved. It needs – its needs to go quite a bit further to ensure that the users, the

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

patrons will accept responsibility when they misuse a work and they use it beyond a scholarship or distribute it further than they should be.

LOLLY GASAWAY: Ah, Kenny, Mary and then Allan.

KENNETH CREWS: I want to speak in some general terms but really, Keith, reflect specifically on a couple of your points. We can imagine a host of different conditions that the law could say you can do this – *if*. Mix and match any scenario. And I'm not going to speak to any specific one. But I want to encourage you to see the people that are in trenches, the librarians, in a very different way. We come – those of us in this room have come to this room very much immersed in the law for a variety of reasons. And so we're thinking about the whole issue very much in legal terms. The librarians that are in the trenches are thinking in legal terms, but only secondarily. They're trying to do their job. They're trying to fulfill the library's mission. And Tracey, when you said that they're not well-educated, I think what you really meant was they're very well educated in general, but maybe –

TRACEY ARMSTRONG: Just confusion.

KENNETH CREWS: -- the knowledge about the law is uneven.

TRACEY ARMSTRONG: Better way to say it.

KENNETH CREWS: And I think everyone of us would agree with uneven. And so – but they're, in general, eager to learn. Some of us give workshops and a lot of people show up. They're really eager to learn. They're eager to be law-abiding citizens. They're eager for us, for Congress, to give them rules that they can really understand, as Dwayne put it. And that make sense when they are trying to do their job. It might be condition X; it might be condition Y. We don't know yet. But in the end, whatever those conditions and whatever is allowed really needs to make sense. And in part, a real good example of the tension on some of these issues oddly enough, Keith, goes to your point about sovereign immunity. We in this room, we know about sovereign immunity. We're thinking legal perspective and so on. But the folks in the trenches, it's really irrelevant to them. It's just irrelevant. If we were really worried about lawsuits, we'd look at the record and say, nobody's sued anybody under this statute in 30 years, meeting adjourned. You know, it looks like we've got a pretty good statute. Just adjourn right now. But we're not. We're trying to think about revising the statute because we got a bunch of law abiding citizens who sovereign immunity or not, want to be able to say they're following the rules. And that's who these people are who are in the trenches. And so I hope that we can give them some rules that they can honor, that they can respect and that they really can implement. And say, I can't do everything, but I can at least in a reasonable manner march forward performing good innovative library services. I hope we can give them that. Thank you.

LOLLY GASAWAY: Mary.

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

MARY CASE: Mary Case. We would definitely support language, if 108 were to be reopened, we would support language that would allow the incidental copies and reasonable number of incidental copies for that. I wanted to ask a little bit more about the concern about that digital product that's the end delivery, in terms of an article at the end. That transmission doesn't seem to be the issue necessarily, but the actual end. And the difference between the millions of articles we currently make available electronically to our users on our own campuses and then the much lower potential of sending that either directly to a user or to another library, which would end up in another user. I guess what I'm not really understanding is what the real difference is and where – you know, I can speculate, but I'd like to hear it from some of the rights holders as to really, what the concern of that single article to that user out there getting vastly out of control versus the millions of articles we currently license from you and make available to our communities. And are those getting out of control? Maybe you have data to talk about this a little bit.

LOLLY GASAWAY: Allan.

ALLAN ADLER: Allan Adler with AAP. Well, in part response to that and also to Ken's point, one of the things that I think is important to understand is that the publishing industry is really not a group of fungible businesses. The business models are very different. Among the AAP membership we have commercial trade publishers. We have professional scholar publishers. Higher education and school publishers whose – even though they both could be under the rubric of education publishers, their businesses are about as different as any set of businesses can be. We also represent not-for-profit scholarly society publishers and university presses, which also have very different dimensions. And one of the things that I am concerned about is the more we talk about the use of digital formats with respect to these works, the more the conversation turns toward the issue of licenses. But, you know, a reminder there should be that at least in our lifetimes, I think it is probably high unlikely that we're going to see the end of print materials. Certainly I think that, you know, with respect to the market as it has slowly, painfully, been slowly developing for e-books. That is a good example of the idea that for many people, the notion of print trade books, best selling works of fiction and nonfiction is going to be around for quite some time. Now I assume that the librarians in discussing these issues, do not want to see their acquisition of print copies of these works come with licenses attached to them. But the result is, is that if you talk about being able to digitize them and especially – because again I would point out, we're not just talking about parts of a compilation or small parts of a single work, we're talking about subsection (e) here, which includes reproduction of a work in its entirety – ultimately you have to be careful about the notion, both from the sides of rights holders and from libraries, with the argument that, well, these issues can be addressed through licenses, therefore we shouldn't have to worry about this as a matter under the law.

There are going to continue to be, and I think you want there to continue to be, a lot of materials that you can acquire for your collections and continue to lend to your patrons that are not subject to licenses. And I think that you have to be aware of the fact

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

that the way in which section 108 was written in 1976 was pretty bluntly, in terms of the fact that it did not make any attempt to distinguish between types of works in terms of format. Because frankly, once it had excluded audiovisual works and music and it was mostly focused on text, there really was only one format that they were talking about. They were talking about the equivalent of analog text, because there was no digital works that we were talking about. But the more we talk about this world, the more we have to remember you're going to continue for a long time to be dealing in hard copy print material in terms of what your average patron is going to be seeking. Whether it's for a public library or an academic library at an educational institution, they may very well be seeking predominantly to use those hard copy print versions. And once again, I assume that neither side wants to see this issue of the revision of 108 evolve in a way that is going to require those works too, to come with a long license agreement that lays out additional terms specific to how those works can be used.

LOLLY GASAWAY: We have four minutes before break and I'm going – I'm going let two more people comment who have not commented. And then Paul will be the first one after the break. Eric is on the list and then Tom. And then we'll take a break for 15 minutes and then we'll start back.

ERIC HARBESON: Very quickly, I wanted to respond to something that Keith said. I'm Eric Harbeson from the Music Library Association. I've been largely quiet because sections (d) and (e) rely, for us, largely on the outcome of section (i). But the Music Library Association and music librarians in general would support, under certain circumstances anyway, the use of technological measures to protect the material. We feel that that's actually important if we're going to achieve the digital transmission of recordings we wouldn't be wanting to make physical copies for our users in many cases, so much as we would want to stream them for example. So I wanted to be on record as saying that the – not all librarians are completely opposed to any kind of digital protection. I hasten to add too that many of – in discussions of the education – we find that many of our members are, in fact, advocates for the rights holders as much as they are advocates for our patrons. Many of our members are in fact rights holders themselves. The music library community is very – is – . Music librarians are also music library suppliers, I suppose. So it's – I want to indicate that as far as the [TPMs], we don't feel that we're in conflict so much with the rights holders, but we do feel an obligation to support our patrons.

LOLLY GASAWAY: Okay, Tom you've got to be quick.

TOMAS LIPINSKI: Okay, Tom Lipinski. Just one major point to follow up on what Keith and Eric and Kenny were saying. I think the goal is to come up with a set of reasonable new obligations that might offset the additional uses that we're talking about possibly granting. But I guess I'd also remind the study group that the sorts of obligations that came in with TEACH Act, under section 110(2), its revision, might not be as workable here because the environments are quite different. Those obligations, which are quite extensive, apply in an educational environment and an instructional

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

environment where you naturally have a role of the teacher or a teacher's institution in one of sort of looking over and guiding along. That's really not the environment that many of the libraries exist in. There are many representatives here today from libraries that are associated with educational institutions, but many libraries, archives and now we're talking about museums that would be affected by this revision, really – they see themselves as educational in a very generic sense. But they don't have that close instructional content. So that the sorts of obligations that the TEACH Act brought in, I don't know would be as workable here. It would place the librarian in a role that I'm not sure that they're quite used to entertaining. And it would change some of the dynamic between the librarian and their patron in terms of the issues of confidentiality and seeing the role certainly as an educator, but also as a facilitator of information, not necessarily as an evaluator of your performance in a classroom. And I think that needs to be kept in mind when you look for what is the reasonable place to set the mark of obligations. Whether it be technical measures, whether it be things such as notice, whether it be instructional, outreach or whatever else it might be that's coming say from 512(e) or 110(2) that you sort of want to shift over. And I would consider maybe looking more carefully at just sort of a wholesale movement of those kinds of obligations into a new 108.

LOLLY GASAWAY: Thanks Tom. I want to introduce Nancy Kopans. Nancy is another member of the study group who came in during this time. Nancy is with JSTOR. And so we're going to take a 15-minute break. People back at the table by a quarter 'til, for 15 minutes only.

[BREAK]

LOLLY GASAWAY: Okay, could we – could we get back to where we were as we took our break? And on the list I have Paul Aiken and then Roy Kaufman. If others of you want to be on the list, please let me know. Okay, take it away Paul.

PAUL AIKEN: Okay, partly I'm going to echo what Allan Adler said about 108(e). We're not talking just about scientific articles. We're talking potentially about books. And we have to keep that in mind. And that if a book is out of print, out of stock, not available at that moment, or if the author is trying to get a new contract with another publisher that could be a window in which a copy could be made. And under some proposals a digital copy could be made and delivered to someone else without the rights holder's permission or compensation. These sorts of things become easier and easier. There's new technology available. There's page-turning scanners. There are scanners that are built to be used in library stacks relatively inexpensively. And we've got to bear in mind that this technology is going to continue to change. That authors and publishers are responding to new technologies by bringing back into print books that haven't been in print in years with print on demand technology. And those markets again are markets for the author or the publisher to exploit and use.

LOLLY GASAWAY: Thanks Paul. Roy.

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

ROY KAUFMAN: Yeah, hi. I actually wanted to respond to Mary's question about why we don't want the digital copies going to the end users because I think it's an important one. And I'm going to give one anecdote, which is anonymous protecting both the people involved in this but they're both Mary's members, both librarians at large institutions. I'll call one Librarian One, and one Librarian Two, and Librarian One is a really great customer of Wiley. Librarian Two is a customer of Wiley. And I was discussing with Librarian One what he thought about Librarian Two. And he answer was, "I'm tired of Librarian Two saying he doesn't need to buy X, Y and Z because he can get it from me at – through ILL." Okay, therefore why am I particularly concerned about the digital copy going to the end user, when Librarian Two chooses not to buy material from us? And I believe Librarian Two is a big enough to get a great price on an article by article basis. If Librarian Two all of a sudden feels not only can he get it for free through an ILL service, but he can give the electronic copy to the end user, it really begins to be a market substitution even worse than it is in the beginning. So that's why I'm concerned. I'm actually concerned about that.

LOLLY GASAWAY: Mark.

MARK SEELEY: I was just going to say that, the searching and navigation features, which I think Paul mentioned, are certainly of concern to publishers. But I think I wanted to make the point really more fundamentally that some of the key concerns that we have about the systems that kind verge between ILL and document delivery, is first of all a delivery to corporate commercial customers from a library community, which does happen. And we've heard a bit about that. Maybe it's a bit on the margin at this point, but our concern is that, that might be growing. These are important markets for publishers. And we certainly don't want to be sort of foreclosed from those markets.

And I think that the other thing is that while much is made sometimes of the anti-circumvention technology, I think that for most publishers in the STM field, the kind of technology that we are talking about with respect to DRM, is fairly primitive. It's kind of more in the nature of "its just good enough" protection. By that I mean it discourages further distribution. It discourages further copying. But frankly, in no license negotiation that I'm aware of have we ever required the latest and greatest absolute lock box kind of DRM systems. It's more on the philosophy of lumps are for honest people. You kind of want to encourage people to behave properly, but you can't, I think, in the technology sense, completely prevent determined, technology sophisticated folks from doing things.

LOLLY GASAWAY: Janice – I have Janice, Mary then Marc and Steven.

JANICE PILCH: I want to refer to the argument that Allan started and it was picked up by Paul and then Roy on the types of materials that right holders fear might be being copied under subsection (e). Because the term bestsellers came up, or works that out of print that might come back into print very soon. You need to realize that libraries first all make a careful search to see that works are not available at any other U.S. library before they interlibrary loan. And in most cases they will find a copy available at another

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

library. In general we use subsection (e) when in rare cases, when the lending library owns the only existing copy in the United States. And when that copy itself is in not – not in good enough condition to be loaned physically under section 109. That's when we copy an entire work using 108 and it's very rare. So I don't – I'm not sure we're talking about the same kinds of works that are probably very likely owned by many libraries in the United States and then would be interlibrary loaned under 109 to the borrower.

LOLLY GASAWAY: Dr. Maurer?

MARC MAURER: Yeah, I wanted to say that in this meeting today I've heard that the effort here is to talk, at least in part, about how it is that the books that are printed in print are going to be a major factor. I, for my part, am pressing as hard as possible on getting books digitized. I know that the Google project has been mentioned. The Open Content Alliance that is part of the digitization effort, there are several of them. I have urged that the library at Oxford be digitized and have been working with those people. The reality is that of the many thousands of books that are printed each year, a very, very tiny percentage is ever available to the population I represent. And then it's usually once and sometimes years after they become available to everybody else. So digitization is an opportunity for us and we don't look upon it as a danger, but as a great chance to get at information. All of which is to say, I think that we ought to take recognition of the fact that this is going to happen. And that we ought to build in whatever protections are needed for the people who own the rights, but have a use factor recognition for all of the populations involved and particularly I don't want to forget the one that I've got. The Google people, as frightening as they may be to some, are annoying to us because although they are making these digital books available, they are presenting them in a non-usable format for blind people. I have talked to them about changing their minds about that. And one of the major things they're worried about is whether or not they're going to face copyright challenges. So we have to find a --.

MALE AUDIENCE: They already are.

MARC MAURER: Yes, I know they are.

MALE AUDIENCE: That sounds like a bit of an excuse to me.

MARC MAURER: I've been thinking of intervening in their case because what I want to do is begin to find a way to get at the information, not face yet further frustrations from what we're talking. I know that this isn't a major topic of conversation for this meeting, but I want to raise it because it is going to be a major effort of ours. And it will have an impact on this discussion. I'm sorry I'm here as late as I am. I didn't realize that these meetings were being conducted in the past. But we just don't get at the information that you're talking about that becomes readily available to other people. And it is an opportunity for us.

LOLLY GASAWAY: Thank you. Mary Case?

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

MARY CASE: Mary Case. A number of little things here, I wanted to talk a little bit about there was a concern about wanting to be in the corporate market as one of the key markets. And being able to provide that service. And again I think libraries for the most part who do that kind of service do, in fact, charge a service fee and pay royalties. We have a program of corporate memberships. They pay an annual fee, plus they pay for the service. Plus a royalty is paid to CCC usually for these things. In terms of Librarian One and Librarian Two, I'm --.

DICK RUDICK: Your not either one of them, I take it.

MARY CASE: Thank you very much. Let me just suggest that ARL organizations are quite large and what the university librarian says might not necessarily be what's actually happening in the interlibrary loan office.

ROY KAUFMAN: It was.

MARY CASE: One may think so, but -- . Okay they may not have been paying the royalties when they do it, but perhaps the business for the particular journals didn't warrant it either. And I don't know. You know the facts of the case. Again I think we're back to bad actors and how much do we legislate to control a handful of bad actors. And maybe it's broader than that, but it does, it seems to me, become a question for how we want to maneuver this. Technological protections, I think the real emphasis here is not necessarily to dictate something specific so we're not caught in that notion of the technology changing over time. And I think for us the important thing is that any kind of watermarking protection does not actually inhibit the use of the material for the research purposes for which it was intended. In terms of mediated and unmediated, most of us -- and I don't necessarily want to dispute those because I do think there is some unmediated direct for the nonreturnables, as we call them, the articles -- but for most of us doing that activity it is usually confined to some kind of consortium where we share online systems, and it is the direct back and forth of books. So we may want to try to go back and look at some of the data more carefully. But that's -- .

LOLLY GASAWAY: Mary makes an interesting point about how you don't always know what's going in your library. I'll tell you a little story on myself. Back in the '80s when we were worried about newsletter copying and I was going around the country doing my workshops. One day I did one in my own library and someone said, "well we get this newsletter." I don't know -- it was a Federal Court something. But it was a commercial newsletter. "And Professor So-and-So was so late turning it back that I just made a photocopy and send it to him." What! So you're right. Sometimes you think you've got it under control, but someone doesn't. So I have on the list Steve, then Bill Maher and then Keith Ann.

STEVEN METALITZ: On behalf of the entertainment software industry whose products, insofar as they are computer programs, are subject to 108(e), and whose -- will

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

become I think even potentially more practically subject to 108(e) if there were changes with regard to digital copying. I just wanted to mention in the discussion we've been having about digital rights management and technological protection measures, I mean we've talking about what measures might have to be added as a restriction if an interlibrary loan were to occur. But our industry's products are almost invariably published with technological protection measures. And I think any – that we really should have a clear rule and I agree with Ken that we should try to make these rules as clear as possible and as understandable to users. **(Inaudible)** in your rule that any activity that's allowed by 108 has to be consistent with the technological protection measures with which the product has been placed in the market. And any use that is inconsistent with those, or does allow those, would not be a use that can be covered by 108. So I wanted to add that. I think because – there's a diversity of business models in the entertainment software industry as well, but the use of technological protection measures is quite widespread.

WILLIAM MAHER: I want to come back to – probably because I'm going to get way away from the topic here and in a different direction – I want to start by getting back to the questions that you asked, at least from the perspective of the archival community. In terms of the question of if a digital copy is to be allowed, should there be a provision to make a limited number of copies reasonably necessary to provide the users with a single copy, these intermediate copies? It seems to me that that's a rather absurd question. How can you possibly be making any digital copies unless you do those intermediate copies? If you sandwich with that with the principle that those are only for the purposes of creating the single copy that is provided to the user, whether provided to the user is something you want to do or not, seems to be beside the point. That, that sounds like a reasonable practice and a way to go about a regulation that would indicate that, if the objective is that the library or archives is only to be making a copy for the user, and not enhancing its own collections, then that would be the approach to do it.

The second part of that of the – what restrictions would apply? I think the bottom principle is the current system leaves a significant burden, if you look at the nature of the notice that's mandated by section 108, leaves a significant burden of the compliance on the ultimate user, the recipient of the copy. And I think that that is probably a useful model. From the perspective of the archival community where you have maybe 40 to 50 to 60 percent of the repositories in this country being very small institutions with one full time staff member or less, anything that would require a complex digital rights management system is going to probably preclude them ever being able to take advantage of digital copying.

And then the last comment I want to make before jumping the track – jumping the track, not jumping in front of the train – is that in, keeping in mind the comment I made at the beginning about that archives are the place where information goes to die and be resurrected for a new life. Digital rights management is – controlled documents are a very significant problem for society in the future. Because the provisions we have in Chapter 12 make it a criminal offense to be manipulating digital rights – or copy protection mechanisms – that if one would have to do that for purposes of preservation

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

and access and electronic records, as a whole, presents such a significant problem for the continuity of culture that one does not like to see that added.

Thinking about that whole array of things and listening to this very interesting conversation, I work in a research library. I deal with colleagues on a different level who deal with interlibrary loan. It is not an issue I deal with on an ongoing basis. I had the passing thought of well, maybe the appropriate solution from my perspective from the archival community perspective is to say make section 108 the section on library provisions. And make a new section 108A that would be a section on archival provisions, since many of our concerns are really very alien. And in order to accommodate the interests of journal publishers and librarians needing to interlibrary loan internal stuff, you create all this set of structure and that locks down a whole bunch of additional material that nobody really intended and has no commercial value. I doubt that that's a very good useful suggestion for the study group to have to think about, creating a new subsection of the law. But maybe the tack on it is to recognize maybe within 108, through some new subsections, that the copying of items directly for users is a rather significantly different operation than the copying done on interlibrary loan or document delivery. So I would encourage the Study Group to think about that notion that copying directly for users, which is generally a one-off kind of thing, a one item selected, that's something where the general public has a great deal of interest. But those general public members who have that interest are just individuals. They never can come together in any sort of way to speak for themselves in the copyright discussions. Thanks.

LOLLY GASAWAY: Keith Ann.

KEITH ANN STIVERSON: I just wanted to be sure that the point was made that some of us are still doing a lot of photocopying for our primary clientele. Faculty, let's say, who want a copy. And we've largely passed on printing – printing costs to students and other people. We really do serve a small enough user group. And I think we're going to talk about this more. We don't try to enlarge this group or make sure that we can give things to the world and all of this. We have very set user groups and those are the people we serve. We don't serve everybody. Every library can't do that. We are really under-funded. We really don't have enough staff. And the thought of making a digital copy of something that is in print and giving it to someone else, is kind of – it just kind of shocks me. I mean, we don't have time to do that.

LOLLY GASAWAY: Tracey.

TRACEY ARMSTRONG: I just have two comments on protection and purchasing. On purchasing our data shows that in many cases when CONTU is exceeded, the library will go directly to a document deliverer or to the publisher to purchase an article. Frankly because it's less expensive and they get fulfillment. And I think that's – indirectly that applies to some of the questions that are in this period of discussion. Also from our experience with licensing, we would advocate for – CCC's experience with – . Well, we would advocate really for licensing versus protection or any

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

kind of encryption or lockdown because it's very – . Technology changes. It's very difficult I think to outline any type of protection that wouldn't inhibit the exchange of documents and process over time. And that I think CCC's very existence is a demonstration of how the exchange of licensing has been very productive for 20, almost 30 years now. And that – I think that can be technologically neutral in a very meaningful way. And I think that's important to consider when you're thinking about the change.

LOLLY GASAWAY: Nick and --.

NICHOLAS SINCAGLIA: On that note of technological protections, storing the media in a digital format unprotected at a library and archive, I think makes sense. I know from a commercial standpoint we, in the companies that I've worked for, we've used DRM and have opted to do on the fly kind of DRM. And that would enable the ability to change over time. And we had issues with delivering to like the – a PC market, laptop, and desktop computers, but we're anticipating the change in DRM for mobile products such as cell phones and so forth. So you can do the DRM on the fly on delivery and just store it unprotected.

LOLLY GASAWAY: Janice.

JANICE PILCH: I just wanted to make a final comment on the first question in Group 2 about temporary or incidental copies. And just to say that the language proposed here is not bad. Better language might be without the word "limited," "a number of copies as reasonably necessary." But I'd also like to suggest there is another way of dealing with this question, which is to just declare temporary and incidental copies fair use copies. At least one country does this in the world – Slovenia does it. Slovenia, Article 49A declares temporary and incidental copies as free use copies and that's how they deal with this question.

LOLLY GASAWAY: Paul and then Dwayne.

PAUL AIKEN: I won't try to address Slovenian law, but I did want to comment on something Janice said earlier about the practice today with respect to interlibrary loan of entire books and that's that copying is basically a last resort. And that's good that you've checked all the libraries and tried to deliver the existing copy rather than photocopying an entire book, which has all sorts of downsides. But we have to assume that practices are going to change as technology changes. And technology is changing rapidly. It is not written into the law that copying without permission is a last resort. If it were written into the law, we might be a lot more comfortable with it. If it were written into the law that you check everywhere, it might – it might make authors and other rights holders more comfortable. But right now, it's not there.

LOLLY GASAWAY: Dwayne.

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

DWAYNE BUTTLER: I guess one of the things I wanted to say a little bit about is, and I think it's related to your question, is the idea that a lot of folks have said that licensing might be a way to look at this question, or, you know, we could use licenses as a model for some of the statutory language. And my concern about that is that my understanding of the federal – the U.S. copyright law in 1976 was that we wanted to create some federal uniformity and predictability to the law. And as we move to a system where we license individually, then we really create a problem with that. So that really it becomes a state contract law kind of question and we've lost all that uniformity. And the other issue in respect to that is I don't know if all us have had the grand pleasure of reading licenses, but they're not particularly pleasant. And they're not easy to read. So, I'm not Librarian One or Two, but I've talked to Roy on the phone about the Wiley license and it's kind of long. And you have to know this material to understand that license. And for me to communicate to my folks in the trenches what those terms are is always up in the air. You know I do my best because I'm obligated to do that, but the reality is that I almost have to educate the middle role of intellectual property, copyrights, some of the underlining philosophy and say, then think about this license provision and what you can do. So I'm a little concerned that – I guess you've guessed at this point that I'm not big fan of licensing as a role to deal with federal information policy.

LOLLY GASAWAY: Mark.

MARK SEELEY: This is Mark Seeley. I don't know Dwayne, if you were referring to my comments made earlier. My comment made earlier about the single copy issue was just that in the context of licensing a lot of STM publishers have become comfortable with the notion of a somewhat of a hybrid system. But that the reasons for that comfort also had to do with some of the other licensing provisions, which have to do with clarifying usable, identifying the user community, having reporting requirements and the likes. It's a bit of a bundle of issues. Some of which have been raised in the questions here today. I wasn't suggesting – maybe I was. But I wasn't suggesting that licensing is the solution. But I was suggesting that if we are going to look at this issue in terms changing the copyright law that we also deal with some of those other matters, which have greatly contributed to publisher comfort with some of these issues, as part and parcel of a possible revision of the law.

LOLLY GASAWAY: A couple of you have in your comments mentioned the defined user community. I think both Keith Ann and Mary did a little bit in their comments about who we serve. But that was one of the questions, is if that were to be a part of the recommendation that we would come up with, how do we define that user community? Understanding that it's easy for academic institutions to define it, but how is it defined for public libraries? Maybe Mary Minow can answer that. And some other types of institutions, it's much more difficult.

MARY RASENBERGER: Including archives --.

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

LOLLY GASAWAY: Including archives, yeah, how could I do that.

MARY MINOW: Well public libraries have been defining it, needing to define it in terms of license agreements. And in that context, it's generally the cardholders and that would be anybody who is eligible – would actually go ahead and apply to get a card. And that would depend on locality. It could be within a geographic municipal setting, for example where there could be out of area users that pay to get a card. But there is a defined user base because it's cardholders in the license setting and I think that that could apply pretty well to this kind of setting.

LOLLY GASAWAY: Ah, Steven and Roy.

STEVEN METALITZ: Yeah, I think just to pick up on your question, it's not just an issue of defining the user community by some status like cardholder or membership in the academic community. But, at least under the current section 108, it's limited – it's supposed to be limited to private studies, scholarship and research. So how do you determine whether people that you are serving are the private studies, scholarship and research? Just holding a library card or just being a member of an academic community doesn't to me demonstrate very conclusively that the use that is going to be made of the work that you're giving them is private study, scholarship or research. And particularly again if we're talking about in practical terms, we're **(inaudible)** the range of works that are subject to this to include more computer programs, more entertainment software products. I think it becomes a real question of how – what is the scope, legitimate scope of private study, scholarship and research for those types of works. And that would have to be one of the **(inaudible)**.

LOLLY GASAWAY: Roy.

ROY KAUFMAN: On the user community, I mean this is a place where I think from what the librarians at the table seem to be saying – I mean, I think there could be an agreement, you know, a place where we meet. I think that most academic publishers recognize the needs of the library community and their customers. And yes, you know, Mary and Dwayne tell me if I'm wrong, but in one way the community is defined by the license you get from us. But having drafted that license, the first place I went was well what is their community and how do they define it. And when there is a mismatch between user community and the language of the license, I've never in my recollection, not been able to get there with the library.

To me the bigger issue is going beyond that user community. And ILL being used as a justification in the case of some test ordering I had done by a law firm in Boston, you know, a law firm, not an educational institution borrowing copies of articles or actually a chapter of a book that I wrote. Cross-country, no one within a 3-hour flight was supplying this handbook. Everyone he asked was supplying **(inaudible)**. This commercial law firm was not at all a part of any defined user community that I could come up with **(inaudible)**. And that's what I'm worried about. And maybe it is, as Mary said, maybe it's bad actors. But there are – seems to be a fair number of them. And just

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

to defend our licensing language, if the statute comes out as clear as a license, I think it's an improvement.

DICK RUDICK: Standards are pretty low.

LOLLY GASAWAY: Keith and then Bill.

KEITH KUPFERSCHMID: Just to follow up and supplement a little bit what Steve said about authenticating – authenticating whether you, a particular patron or user, are using it for private study, scholarship or research, I'd be very interested in finding out how libraries and archives go ahead and do that. Because I really have no concept and hopefully there is some process in place for doing that.

In addition, I would also be interested in finding out how they verify the identity of a user. Because I know in the software area, we have a particular problem with the sharing of registration numbers and other things on line. And I can certainly envision a world in the future where you can just go to a particular web page and go – oh, here's a particular library identification number for this library, for that library and then you pick and choose. And use that number because that's the library that has your particular copy. So I would be interested to know further also how the libraries go ahead and verify the authenticity of their users.

And then lastly, just to expand upon something that Roy said about what happens when you – whether we should expand beyond the defined user community. That's especially troubling given the no notice standard that's in the statute right now. I mean, in a similar situation or somewhat related situation; according to the DMCA, we use notice and takedown to take down websites that are posting illegal material. And normally what happens is, that website okay maybe gets taken down and just pops up using a different ISP. I can envision a world where you have a very similar situation where a particular patron or user maybe is in that defined user community has abused his or her privileges and then decides, well I'll just go to another library that doesn't have "no notice." So I think under the existing standard of no notice and possible abuse, not by libraries or archives, but by their patrons, that would certainly be a concern.

LOLLY GASAWAY: On the list I have Bill and then Mary Case and Nick.

WILLIAM MAHER: I just want, you know, again throw out something that makes your work more difficult. But I think if you're really doing a serious job of looking at section 108 –.

LOLLY GASAWAY: Please God, tell me we are after two years --.

DICK RUDICK: Don't feel – and don't feel you're alone in making our life more difficult.

LOLLY GASAWAY: Right.

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

WILLIAM MAHER: Well the notion of converting the statute into a series of licenses --. Boy, insomnia could really be cured.

LOLLY GASAWAY: Right.

WILLIAM MAHER: But the notion of a user community, I think for archives in a sense, the user the community is the world. Because it is -- because we are -- archives hold unique and rare materials that exist generally as last copy or only copy ever made, it is a copy of last resort. The community that matters for that is that the person who needs it for a particular time and for an interest. And so that it is really not possible to -- and in broad terms to define a user community. In fact, the only archives I can think of that might really have such a definable user community might not meet the definition of an archive and library as eligible under section 108(a). That is they're not open to the general public. They serve a very internal corporate community. So that gets me back to this fact that it's probably going to be important for you to think about, again in our instances at least, a lot of our needs can be solved by having appropriate provisions for direct user copies. It's not an issue that comes up for us in most instances with our interlibrary loan.

LOLLY GASAWAY: Mary Case.

MARY CASE: I wanted to talk both about the use of materials for scholar and private research use. We usually try to -- or we do put that kind of notification on where patrons would sign up for requesting an article or copy or an interlibrary loan. There is that kind of notice on the request form, along with the copyright notice in terms of what the permissible use as required by law and that's -- that's there. We certainly don't do anything beyond that in terms of actually monitoring individual use. I think that's -- and that's not something that we would ever want to be doing.

In terms of authenticating our users, if you're requesting an interlibrary loan through us that we would pass to another library, in order to get and use that form, you have to enter your university library 16-digit number. Not once, but twice, to get through this system to be validated and have that filled. If you're coming in as what we call the direct user from outside, you would be giving some kind of payment information. I mean, you'd be getting the same information about you're suppose to be getting and using this information and the copyright restrictions. And if it's our community user, you would pay a service fee for the copying or the provision. And if you were from outside, you would then be expected to give your credit card or whatever else can be billed for the service fee or the royalty fee. But that's just one example at least of how we go through that process.

NICHOLAS SINCAGLIA: I guess my comment -- I've been hearing individual stories of some bad apples. I continue to go back though to how significant is this problem? If it's -- and is there a margin there where it's not perfect control, but it's not an enormous amount of market loss. That they're -- they're will always be a certain amount

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

of bad users, possibly bad employees of libraries, but how bad is it? And is there a way we can – we can really get our hands on that number?

The other thing to Mark's point is he represents a community where there is a market failure. And there will always be market failures. And that in many ways is what – where a library can help out when it's not profitable to service certain communities and so forth. And so you have to sort of go into this knowing that there will be market failures and that's --. As the public we fund our libraries to make information accessible to our community. And that you shouldn't let the – have the law prevent that.

LOLLY GASAWAY: Keith Ann.

KEITH ANN STIVERSON: Section 108 as you know talks about the fact that libraries for whom section 108 can be used have to be open to the public and welcome researchers that are outside the community. I mean that's part of 108. I just wanted to say that I think that all of us have walk-ins. And especially in law libraries, we expect citizens to come in ask for the government documents that we collect and ask for copies of the law whether its from a commercial or an official publication that doesn't come under copyright. And this walk-in traffic, you know, it may vary among institutions, but it's also important, we feel, to serve the public. And we don't follow them around and we do give them access to electronic resources if we've also provided for that in the license, and we do ask for this, that walk-ins can be served by that digital material. And so it's taken care of pretty easily in law libraries I think.

LOLLY GASAWAY: Allan.

ALLAN ADLER: Allan Adler, AAP. John, you commented before about looking at this from the perspective of how large is the problem of bad actors and looking at the issue of market failures. That's precisely the point that some of us I think on the rights holder community are trying to raise. Which is, first of all, it's not a question of looking at bad actors because that simply presumes that the current system that was created in 1976 in 108 needs to be extended with respect to digital network capabilities. Which I think is only part of the question. Because part of the question should also, of course, be the extent to which the marketplace that makes informational materials available to the public through other mechanisms, now may in fact mean that it is not necessary or appropriate for it to be a part of every library's missions to make copies of works for their patrons.

Secondly we keep talking about libraries as if we're talking about the same identities. And of course we're not. Public library is quite different than an academic library based in a large research university, which is quite different than a medical library or a law library in terms of whom they serve. And with respect to the constituencies that those entities serve in terms of defining a user community, in many instances you're going to find quite the opposite of market failure. In fact, there is a market that has been specifically designed to meet the needs of those communities. And that is what comes in to conflict with the notions of exemptive privileges for these institutions under section 108. I also wanted to mention that in talking about how you define user community, I

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

think more people probably would agree that that definition in some meaningful way has to be directly linked to what people would call the mission of the particular institution involved. Which, as I say, differs from a public library to a law library to an academic research library.

And I just wanted to mention a phenomenon that has arisen. Actually it has been brought to national attention in my backyard. I live in Fairfax County, Virginia. And recently there has been a lot of press about the fact that the Fairfax County Public Library System is utilizing a software system that allows them to determine with a fair amount of precision how much circulation there has been for every work that is in their collection. And the purpose of this of course, that in grappling with budgetary problems - - and we understand libraries, particularly public libraries, have, in grappling with the very real problems of physical space to make these materials accessible to people onsite. They have concluded that they need some sort of a systematic way of being able to determine what it is that their user community wants to be in that collection and what it's not particularly interested in having in that collection. And the disturbing aspect of this with respect to the discussion we've been having now, is it shouldn't surprise many people that what they've been finding is that the types of works that have significant scores for circulation are precisely the kinds of best-seller types of works that are sold by booksellers. And publishers depend upon being able to introduce these into the market largely free of copyright exemptions with respect to their reproduction and distribution. And one question that comes up again, as I mentioned earlier, about not being so sanguine that we understand either what the mission of each these different kinds of libraries is today, or how that mission might be affected, if they're enabled to proceed with operating in the way that they would like to with some of the proposed revisions and changes under section 108. If in fact it is going to mean that some of these libraries are essentially going to become little more than competition to booksellers in being able to service what their user community defines as what they truly want to have access to. If that turns out to be, as I've said has been suggested by at least the results in the regional library in the Virginia system, the Fairfax County system that I live two blocks from, if that turns out to be best-sellers, then we really have to look at the question of expanding some of these privileges for those types of libraries in a fairly different way.

LOLLY GASAWAY: I have Mark and then Denise.

MARK SEELEY: Mark Seeley. I think that the question of the authorized user community – that definition and the question of the linkage to private scholarship and study that Steve's raised – is a very interesting one and I know personally I've had a number of discussions with people, again relating to the question of requests for documents coming from the commercial environment. I've actually had people say, well, it could well be that somebody at Texaco or other places has a private study scholarship purpose in mind. Now as I've said, none of these discussions have recently happened in the U.S., but typically outside the U.S. that these kinds of issues have come up. I mean, I do share the frustration that sometime in designing statutes, which are very carefully balanced in an attempt to sort of cover a wide variety of sins that we sometimes

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

force people to try to sort of have these very existential debates and discussions. And my reaction to these kinds of discussions typically is, you know, I think it would be pretty safe to say that if a request is coming from somebody at a commercial company, the likelihood is about 99% that it is a commercial request. And it ought to be treated that way. So I'm not sure that to what extent we can design statutes to have certain presumptions one way or the other. But it might actually be helpful as opposed to trying to figure out how we can divine what someone's purpose is.

LOLLY GASAWAY: Denise.

DENISE TROLL COVEY: It's been a while since I raised my hand, but let me try to organize my thoughts. We've had from several different people in the room talk about markets and market forces and new markets and lost markets and all sorts of things. I want talk about market failure briefly from a different angle. I have recently come back from a study of faculty at Carnegie Mellon and we talked to them about – or I talked to them, not to be rhetorical – I talked to them about interlibrary loan and document delivery services. And how we have a sort of maximum, because our library has absorbed the cost of interlibrary loan and document delivery. And we have a maximum that we will pay for an individual transaction for our faculty. And when the transaction exceeds that cost, we ask them to pay the overage. They refuse, which means the transaction falls short because we won't pay the overage either, so there's no transaction. And what we have discovered time and time again with faculty and with graduate students is if they cannot get what they want at a convenient and at an affordable cost, which is basically the minimum that – the maximum that we will pay, because they're going to pay, the response is we will use something else, or do without. And one thing that we've heard around this table only once, and it was in the introductory remarks was that business about the national interest. So my question on the table and about the markets and the market forces and all of that is, if the response from faculty and graduate students, and given the limited library budgets and things, is if they cannot get that copy at a reasonable cost – and they don't think document delivery costs are delivery costs are reasonable – if we can't absorb it, they're not going to pay it. If they are not going to pay and they are going to do without, what is the upshot of that for the national interest?

LOLLY GASAWAY: I have no one else on the list. We have two minutes before we have to move on to the next question anyway, so. So Paul, two minutes.

PAUL AIKEN: Just on market failure and national or public interest, when we talk about this, national interest, it often seems to go that we're talking about the users. And making maximum use is what the national and public interest is all about. But the nation and public has a strong interest in protecting markets as well. Without – without effective markets, publishers and authors find better things to do with their time and money. So when we're talking about public interest, there are two sides to that. There is a user side and a rights holders side and they both have to be properly addressed.

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

LOLLY GASAWAY: Shall we move on?

MARK SEELEY: Question, just very briefly. In terms of the market failure discussion, the surveys that I see with respect to researcher access to content – now I agree that researchers may not be the entire universe of the users, but certainly they are what our publications are aimed at. The private initiatives and licensing that has happened over the past six or seven years have resulted in a huge increase in access and availability. In fact, there is – that's hardly market failure. It's market success.

DICK RUDICK: Okay, there are a couple of things that we're going to try to cover in a short time, so you've got to keep your remarks as brief as possible. The first one is actually two related questions. It relates to something we've been talking about, which is the growth of a market for individual articles and for parts of larger works, like a chapter from a book on travel or an educational work. And the other – we don't want to open that general discussion, but a very specific issue that connects to that phenomenon. And it's a two-part question.

Should libraries and archives be required to search for a copy of an article or the portion of the work at a fair price before they are permitted to make a copy under 108(d)? Remember that's already true in (e). And second, should (e) and if necessary (d) be amended to clarify – here comes license again – whether a copy of a work available for license, but not for purchase, qualifies as one that can be obtained at a reasonable price? Assuming the price for the license is reasonable. Okay, got that? Any questions, comments rather I should say. If there be none, we'll move on to something else.

KEITH ANN STIVERSON: Quite often interlibrary loan requests especially are speculative. And somebody sees something in a footnote and thinks that looks like exactly the right thing for me. So one of the current problems we have is finding out enough about that piece before we pay for it to see if it's going to be of any use. So I think that that kind of situation should be kept in mind.

DICK RUDICK: Roy.

ROY KAUFMAN: I'll do facts first since I'm not always good at that. To begin with just Wiley as a licensing company, which is not all that different from many academic publishers, we have customers who buy no subscriptions. They just buy individual article access. We have customers who buy only subscriptions. And we have everything in the middle. So the article itself is a primary means of **(inaudible)**. Now – so just to start there and quite frankly I can just sort of end it there because what we're talking about here is whether there should be --. Oh, one other thing. Whether there should be a need to try to see [if an article is available] before you take the exception. If it's available for sale well, yes because it is. And I think the law as it's written today you can argue quite frankly, that you should be doing it and it is substituting for a sale when you make a delivery of something that is available by the drink. There should be an effort there. I think there's an old ARL study that says it costs a lending library about \$30

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

to lend a copy of an article. You can buy from Wiley our rack rate and this is the second point I want to make about the reasonable price issue. Our rack rate is \$25. Anyone from the outside can buy an article at that price. In the licensing context, the price gets lower. I do get nervous. I don't have a problem per se with reasonable cost. Although I will say publishers and librarians will never agree on what a reasonable cost is. So there's a little bit of an issue there. And the other thing, what is the reasonable cost from Wiley? What's the cost of our article? Is it the rack rate? Is it the lowest negotiated rate if you're a library buying a lot, if you commit to buying more? So even determining the cost is a little hard. I don't oppose reasonable cost, but I wonder if there couldn't be another formulation that's easier.

DICK RUDICK: Okay, anybody else? Kenny – I was looking to the right. Ken did you have your hand up first?

KENNETH CREWS: I did. That's okay. I'm Kenny Crews. When you pose the question in isolation about a precondition of searching the market for an item at the fair price, it is hard to say absolutely yes or no to a single question in isolation. The whole – the whole – I see that as like a lot of statutory compromises. It's a give and take. If – I'm sympathetic as you've already heard me this morning. If the publishers have reasonable price, reasonable availability, you know, I'm sympathetic, go buy a copy. But on the other hand so where's the give so that we can – because reasonableness is more than just price. It's reasonable access to that item for the particular needs, which sometimes under the circumstances that particular market is not ready to supply. But maybe the need for that item next week the market does reach. Circumstances can change. So I say its part of a give and take. So one way of answering the question which is a little bit hazardous is to say, do I see that as a piece that I'm willing to talk about? You bet, but I think it's a piece of the larger puzzle.

And an interesting point though that just to – a related point if I can respond to Keith Ann's point about you would like to know before you make the purchase, a little bit more about the item. And it occurred to me, wouldn't it be great if there were – in other words, some enterprising organization said "let's deliver snippets of this item" so that we get a little bit of insight about it, so that we could click the next button and buy it. And buy it. Not download for free, but buy it. And that could be an enormously valuable service.

DICK RUDICK: Okay, I've got four in the queue. Mark Seeley, Mary Case, Mary Minow, Roy and I'm going to try to save a little time for the next question. But let's go through at least those four.

MARK SEELEY: Mark Seeley. One thing that came up in the fairly protracted discussions in Germany between the German library association and the German publishers association, which I think will all become public in the next week or so –

LOLLY GASAWAY: Or now --.

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

MARK SEELEY: Well this is kind of public/private actually – is that they have looked – they haven't. They have also language about reasonable price and that kind of thing. So that feature is as well in the German law. But another important aspect that they were looking at is with respect to any kind digital exceptions and limitations. One of the things that would be looked at first is whether that work is available for license. And the notion is that if it is available for online digital license then that essentially kind of removes it from the context of things to which a digital exception or limitation might be applied, at least a special exception. So that might be something to consider as well. I think that in the context of the discussions in Germany, that was felt to be good recognition of sort of development of the market. Encouraging the market to further have an increase in digital availability while at the same time having a bit of a safe harbor. So it seemed to be an interesting suggestion.

LOLLY GASAWAY: Could I just clarify that a little bit -- available to a library to license or available for individual license.

MARK SEELEY: They weren't that clear, but I don't think it matters.

DICK RUDICK: Okay, a couple minutes each please -- two Marys and a Roy.

MARY CASE: Just briefly I think the associations at least would find that option to have to check before every single article is not really a positive development for us. And in terms of the licensing, I think if we're talking about providing an individual, I don't think license would in fact be reasonable. I think we are talking about a tangible product.

DICK RUDICK: Okay, Mary second.

MARY MINOW: I would go further. It not only would be difficult for public libraries, but it effectively guts the whole 108(d) and (e), which it's not that our users don't have credit cards and they don't. But there is suppose to be a balance for private study, scholarship and research. And it's gone as I read the question, if we have to make a reasonable effort to pay for it.

DICK RUDICK: It's pretty clear. Roy.

ROY KAUFMAN: I'll respond to Kenny, who asked the question, where is the give? And I'll tell you where the give is, and it's not that this document is **(inaudible)** some game. For the past 10-12 years rights holders have spent an enormous of money because we've listened to the library saying we want fast ILL. We want digital. We want linked. We want this. We want that. And I think we've paid some of that give and you've paid us for that give. But you know I'll be the first to admit it. But there is a market that has developed in response to your needs and we've been paid for that as well. But we think we want to keep that market going and sustain that market and we'd

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

like to sustain that and do more inventive things. Knowing that we'll get paid for our efforts. I will acknowledge – the first Mary said and the second Mary seconded it. You know it could be hard in some cases to check, but I also think it's pretty easy to know if you're buying from –. I have to tell you, American Chemical Society, Elsevier, Wiley and we are not the universe and I recognize that. You now any librarian getting that request will know that they're available individually. And that's something that they would know. So there might have to be some checking in margins and things, but largely you – I would think that the big stuff, the high used stuff, you sort of know and developed that. So.

DICK RUDICK: Okay, Steve and then this should be the last one.

STEVEN METALITZ: I was just going to add, Steve Metalitz, and I was just going to add to this last point. One thing that has changed since 1976 is it's probably easier and faster to determine whether something is available. There are a lot of tools now that exist. You know, if you think back 30 years, that could have been an extremely time consuming process involving a lot of correspondence. Now I would think you could usually tell fairly quickly.

DICK RUDICK: There's a question of fact here and when you submit your written responses, if this is a good thing to educate us on, then the question on the table is how easy is it? And remember the word reasonable is in the statute right now. How easy is it? How possible? There are two different points of view. The written responses are a good way to educate us beyond what the time available today will permit us to.

Marybeth joins me in being curious about the next question which is, should the study group recommend that the ILL CONTU guidelines – and if anybody wants to know what those are, I'm going to ask Lolly for help. They're not law, but one of the things we talked about in the group is, you know, we could recommend changes to the law. We could also recommend changes in things that are not in the law. And so that's why I think it's particularly interesting to talk about CONTU. Do you think those should be revised? And a laundry list of possibilities, it's not meant to be exclusive. Does it apply to works older than 5 years? It could require that the borrowing, as well as the lending library or archive to keep parallel records. I know you're going to love that. You could you know, tracking non-ILL copies for users. To make records available to rights holders. I'm not advocating these things, just a list. You know, whatever you want to say. I think we'd like to hear some discussion about how you feel about those guidelines and whether they should be revisited. And here we are. Don't all speak at once -- Denise?

DENISE TROLL COVEY: I'm concerned a bit that the CONTU guidelines are being discussed at this table, which was to be talking about recommendations to changes in the law. And the guidelines are not law. And to the extent that we talk about them in a way that gives them the force of law, I believe it has a chilling effect on fair use, which calls for a case by case application of the four factors. The fact that vendors have written compliance with the CONTU guidelines into their contracts or to the

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

licensing agreements, indeed in that case, gives CONTU the force of law. Whether or not that's to our advantage or not, I'm not sure. My preference for this group would be to say the CONTU guidelines are out of scope for the Section 108 Study Group. And if some other group wants to look at that, fine. Now if we want to talk about these things individually, Carnegie Mellon's position is no, no, no, no, no. And I will explain here or in my written comments why we feel that way, but any discussion that would give CONTU guidelines the force of law is a problematic discussion.

DICK RUDICK: Well we have been seeking clarity. I think I have to say thank you. Roy?

ROY KAUFMAN: Yeah, I mean CONTU is not CONFU, it's related to --.

DICK RUDICK: And that's good.

ROY KAUFMAN: Yeah that one failed. So I'm going to just take the questions quickly. And I'll begin with -- separate and apart from the other issue, which is if it is available digitally it shouldn't fall under CONTU and 108, but beyond that, I think 5 by 5 is a rule that many of us have lived with and grown up with and I don't have a huge problem with it. It needs to be very clear as the sentence before the 5 by 5 rule that many forget is that it doesn't apply to systematic deliveries. That rule needs to be linked to the 5 by 5 rule. I don't think that the 5 by 5 -- you know, could you expand it to older works? Yeah, you know, something reasonable. Not opposed to it. I mean the idea of older works still have value, but you can expand that out. I do think there should be record keeping and clarity there. I think there is sort of a willful ignorance standard in the statute. You have no knowledge that they're doing something wrong with it, but you're not supposed to ask or keep any records to check. So I'd like to see that improved. Tracking interlibrary loan copies, I'm not quite sure what you mean there. Tracking document delivery -- I'm not sure, and records available to rights holders, obviously that's the other point. Yes, there should be records. People should be able to look at them. If there's nothing to hide, then it's fine.

DICK RUDICK: I thought I might see some hands up. And I think I'd like to give -- Mary, I bet you're dying to say something.

MARY CASE: That's okay, I'll wait my turn.

DICK RUDICK: Let me just see if I have you in sequence. Tracey next, then Mary and did anybody else have a hand up? And Mark and who else? Tracey.

TRACEY ARMSTRONG: I have a very quick comment, and that was a couple years ago, I think it was about two years ago, we started -- it may have been more -- we had a little initiative to try to license, broker a licensing arrangement for digital delivery. And we worked in place of the scanning and paper in/paper out type of the system that we have now. We were talking with some rights holders about that and we

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

were talking with some librarians. And part of what we were discussing was one of the points here. That all of the libraries in the transaction would do record keeping. And I just wanted to share with the group that the reaction, absolutely total consensus on the part of the libraries that we worked with – no way. We – it's not – we – they weren't willing to do that – to have all the libraries involved in the transaction to get the digital delivery. It was a very, very strong – we immediately dropped the issue and haven't picked it up since. It was just so strong. I just want to share that with the group. It was about 22 different libraries represented in the group from across the country.

DICK RUDICK: Mary would you talk not only about what the answer is, but why from your perspective?

MARY CASE: Mary Case. I think – well our answer is no, obviously. But – and that didn't go into a lot of detail for me. But I do think in part it's felt that it's working at this point. People know what it means. It was meant to protect the markets for the current publications. We don't necessarily go back in the print environment to buy back files now. You know, we're doing something differently in electronic, but we're buying them locally so we'll have access to those back files. In terms of record keeping, the borrowing institutions are keeping these records. They're keeping them for 3 years – the borrowing. And it's the law that talks about the borrowing institution. And that the borrowing should not substitute for the purchase or the subscription and it's that burden that the record keeping is linked to. And we would have no interest in – and I think some people – a few people have done it on ILL with some publishers in very small –. But this would not ever be something that we would welcome, as a broader community, for the lenders to be keeping these records as well. In terms of actually having access to them, those records are there. Those records contain information that libraries consider sacrosanct in terms of information about our patrons and our users. The only ways that we would be willing, I think, to make those available – they're there and you know what ways you can get access to them. But those are not things that we would willingly give up in terms of that product. We use aggregated data to help us make collection decisions. If there are lots of things being borrowed and we're paying copyright fees that would go to collection development to help them make a decision as to whether we need to actually subscribe or buy something. But they would be very heavy resistance to having access to those records.

DICK RUDICK: All right, I've got two and a secret addition to the queue, one minute or 1 ½ minute rule.

MARYBETH PETERS: Because we've got exactly one minute until we're suppose to break for lunch.

DICK RUDICK: I don't want to – we don't want to shorten your lunch hour. Mark, Kenny and then I'd like to save a little time just in case Mary or anybody from the Copyright Office –

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

LOLLY GASAWAY: How about that two-minute rule?

DICK RUDICK: -- has a question. One minute each and we'll be a little late for lunch.

MARK SEELEY: I'm Mark Seeley. I don't think anyone was advocating that a lot of detailed information be made available under said reporting or transparency requirements. Certainly the notion of aggregated data was I suspect all that would be discussed and all that would be proposed. I – except the CONTU guidelines are not law, but I have to say that I think people understand them a lot better than the actual statute itself. So from my perspective I think there's much to recommend that we take a look at this issue and that we think about possibilities of revising and looking at the CONTU guidelines as a way of being a bit more precise and a bit more helpful.

DICK RUDICK: Okay, I guess Kenny you were next.

KENNETH CREWS: Yeah, I'll try to keep it to a few seconds. In – and on this – just the record keeping thing is fraught with problems. But just this one question of extending it to materials more than five years old, I think it's problematic as well. Mark, I agree with you, these are very pragmatic guidelines. They've – for better for worse they have been accepted. They work pretty well. I'm afraid of tampering with them for that reason. We'll probably end up with something that doesn't work as well. And the other very pragmatic aspect is our experience, and I suspect then experience of others, is most of the stuff that we're dealing with in ILL is from within the most recent five years, the vast majority. And therefore we would likely, if we open this up, burn a tremendous amount of energy and time addressing an issue on the fringes. And I suspect we'd be better off just leaving it alone and dealing with it in another way.

DICK RUDICK: If we were permitted to cover something that isn't connected with the statute, Mary would like to say something about lunch.

MARY RASENBERGER: Yes, it's an administrative detail, but first I do – there is an issue that we didn't get to today, which is the international implications. And we just – if you'd would like to speak on those, please provide written comments on them.

DICK RUDICK: Yeah, we're very –

MARY RASENBERGER: It's one of the topics we were going to try to get if we had time. We didn't, so.

DICK RUDICK: We are actually quite interested in that. We just didn't – we realized we might not get there.

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

Topic A: Amendments to Current Subsections (d), (e), and (g)(2) Regarding Copies for Users, Including Interlibrary Loan

MARY RASENBERGER: And it may actually work better with written comments.

Okay, some details. We are going to break for lunch now. We're going to ask you, if you're not in the next session right after lunch, and this is on 108(i), please take your stuff off the table and move it to the back of the room. And when we come back, only people who are going to be – who are registered to talk in that section Topic B, again 108 (i), will be at the table. And everybody else should be behind. Now we may have a space crunch so we'll work out seats when we get back here. Um, Barbara is going to tell us where you can go for lunch in the neighborhood. Okay? And then we also – we're going to ask the section 108 group members to please stay in the room for a minute.