the AAP serves as an active member of the Commission on Preservation and Access and many members of our industry have participated in the Conference on Fair Use, called for by the Administration's Working Group on Intellectual Property, to explore the needs for and ways of preservation. Publishers appreciate both the need to preserve our heritage and the significant contribution made by librarians to the effort.

In addition, publishers recognize that the current practice of librarians is to make three facsimile copies, rather than one, for purposes of preservation and replacement. We understand that one of those is literally stored in "iron mountain" as a "doomsday" copy, that one is placed in the archive of the library collection as a master copy and used as needed and that only one copy is circulated. Although this practice does technically violate Section 108 of the law, the publishing community has accepted *de facto* the practice since its benefits to society clearly outweigh the potential harm so long as only one copy is allowed in circulation. Hence, we have no objection to the concept of three copies rather than one, provided only one is in use.

The concern arises with inclusion, for the first time, of the right to create *digital* copies for purposes of replacement and preservation. Recognizing the importance of and need for preservation and cognizant of the wonders of the new technology, publishers do not want to interfere with the best way to ensure preservation. We are prepared to support amending Section 108 to allow creation by libraries of digital versions of works for preservation, provided it does not allow the libraries to treat such digital version as part of its collection for the whole range of library activities. It is imperative that any digital copy so created, by definition without authority of the copyright proprietor and hence without the copyright protection scheme the proprietor might well employ, not be used for circulation. Once a work is launched into the NII without such protection, its further reproduction and transmission potentially is without limit. Distribution is and must remain the exclusive right of the proprietor.

In addition to ensuring that the digital version created by the library does not become part of the collection for the purposes of circulation, the legislation should be amended to achieve the following three other clarifications:

First: digital reproduction should be limited to two digital copies -- one "doomsday" copy and one archive copy. From that archive copy, the library can create an analog copy for use in the library and to meet circulation needs. If and when that analog copy is no longer usable, the library can create a replacement analog copy from its digital archive.

Second: the digital version allowed must be defined as a bitmap image of the page. This will achieve preservation better than any other technology since it is an exact picture of the page. And it will avoid potential misuse that can occur with a fully digital file which can be incorporated into a data base, form the foundation of a derivative work, or be manipulated in ways in which its authenticity is put into question.

Third: the library's right to create digital versions must apply only to works where no digital version has been made available by the proprietor. Because publishers and other proprietors are now creating their own digital versions of works previously available only in analog form -- whether old movies going onto laser discs and DVDs or sections of or whole books being added to data bases -- the preservation exemptions of the law should not extend to the creation of new digital versions of works that are already available in digital form.

As the capability of the hardware and software improves and/or the market shifts to new operating systems, computer languages or other variables, proprietors must continue to have the exclusive right to choose whether and when to provide their materials in the new versions. For years we have seen software developers serve different requirements and users by creating different versions of the same programs for DOS and MAC and now Windows95 machines. Likewise, the publisher of an electronic encyclopedia on CD-ROM updates, upgrades and adapts to new technology on a regular basis. A library should not be allowed to create a new digital version from an older generation of digital work in order to use it on the newest equipment, all in the guise of preservation. If a library is concerned about the ability to access an old version of a product that cannot be used on the newest machinery, the solution is simple; keep the old machinery or get permission from the copyright proprietor to create the derivative work. This is not a question of preservation.

The foregoing proposals for revision to the bill will achieve the intended goals of preservation without effectively stripping the proprietor of the exclusive rights to create derivative works and to reproduce and distribute the work.

Indeed, publishers have serious concerns about the distribution of analog copies among libraries, as allowed by the interlibrary loan provisions of Section 108(g)(2). Although our Association concurred with what are now the statutory exemptions, our members have discovered that the law has problems, even before electronic issues are considered. Section 108(g)(2) attempts to accommodate interlibrary loan without allowing the practice to undermine publishers' revenues. Yet because the statute speaks to the extent of copied material received by a borrowing library, rather than the amount of copying done by the supplying library, it is fatally flawed. The statute, arguably, could allow only one library to buy the work and provide a copy of it to every other library in the country.

The publishers fully endorse broad access to their materials; they want the public to read them. But, they cannot sanction a situation where they create the work, sell a copy and see the library become the publisher to the rest of the world.

With the advent of digital technology and networks, it would be a catastrophic mistake to permit the existing formulation to extend, even inadvertently, to digital versions created by a library. This is an issue being studied in many circles, including the Conference on Fair Use, and we believe it is premature to stick any toe into these waters until an assessment of the real-life impact of any changes is made.

In short, with some thoughtful redrafting, we believe that the goals of the changes to Section 108 -- to preserve the decaying books of our heritage -- can be achieved, and enhanced using new technology, without opening the floodgates of the NII/GII to the wholesale unauthorized dissemination of complete works, thereby vitiating the whole basis of copyright.

5. NEW SECTION 108A -- EXEMPTIONS FOR THE VISUALLY IMPAIRED

The AAP supports the goal of improving the access of the visually impaired to the materials that we publish. AAP members work actively to provide educational materials, texts and the like to the blind population simultaneously with their availability to the sighted population. We were early advocates of amending the copyright statute to achieve the admirable goals of the new Section 108A. Hence, we and organizations representing the blind, with whom we have a long and productive working tradition, were somewhat puzzled when the Administration's Working Group proposed the legislation as introduced. The bill could create an infrastructure that would directly compete with and impair important growth businesses of publishers for (1) large-type books and (2) books on tape or CD. At the same time, the bill would make the blind wait a full year from first publication before any special statutory exemptions would begin.

The AAP has continued to meet with groups representing the blind to craft an amendment which will achieve the goals and avoid the problems of 108A as introduced. Our joint goals have been to (1) tighten the definitions to help the right beneficiaries and avoid impairing large-type and audio publishing and (2) ensure that access is immediate, rather than delayed. It is with pleasure that we can report we have achieved a consensus proposal which is attached for your consideration. This substitute has the endorsement of the Copyright Office of the Library of Congress and the National Federation for the Blind; we are assured that the entire blindness field is supporting this language.

OTHER CRITICAL ISSUES

FAIR USE

Contrary to some press reports and commentary that has circulated, nothing in the legislative proposals before you changes the fair use provisions of Section 107 of the Copyright Act, and/or the decades of common law decisions from which it was developed. Moreover, our members want to be sure that the Association convey in our testimony the importance that we attach, both as publishers and on behalf of our authors, to the fair use defense contained in the copyright law. Indeed, publishers have previously

come to Congress to ensure that fair use would apply to all works, including unpublished works. It is not our intention, nor our desire, to see the diminution of fair use principles in the digital world. The law, common and statutory, has accommodated changes in technology and in businesses and has worked reasonably well for all concerned. The publishing community believes there is no reason that we, our authors, our readers and others cannot continue to rely on the factual analysis process required by Section 107 for all types of works, including digital ones.

This does not mean that the application of fair use in the digital world is static or even capable of rigid definition. There is a digital difference and its impact is yet to be fully understood. Accordingly, the Working Group convened a Conference on Fair Use to study whether guidelines, comparable to those existing for educational and classroom use of traditional print and other analog materials, could be achieved for digital materials and activities. AAP not only attends, but actively participates in and serves on the Steering Committee of the Fair Use Conference. Topics discussed have included: creation by students and teachers of their own multimedia works, use of technology by reserve rooms in universities, permissible interlibrary loan, increasing uses of distance learning and life-long learning, and the unclear meanings of vocabulary when applied to the new world. We have learned that comfortable words like "browsing" and "resource sharing" no longer mean the same thing to all who use them. In short, we have learned that in many of these areas, it is premature to write new rules. Many of the goals the "users" want to achieve may be available without the adverse impacts feared by the "proprietors" if we give the technology more time to develop and we learn from experience.

ONLINE SERVICE PROVIDER LIABILITY

Another area where we believe Congress has been wise to defer any amendment to the Copyright Act is rules for assessing liability for those who provide online services and/or Internet access. The AAP is keenly aware of and sensitive to the requests and arguments of those in these businesses. We appreciate concerns about the risk of imposing strict liability for infringement of materials of which the provider was not and arguably could not have been aware. Indeed, many members of our Association have expressed concern about their own potential liability when they invite members of the public to chat with their authors, with other readers, and to

share ideas and information online. It is not an easy subject to resolve. Publishers have met among themselves to try to fashion a cohesive position on this issue and they have participated in the series of meetings organized by the Creative Incentive Coalition and the Interactive Services Association.

While there is no unanimous view among members of our Association, the consensus reached by most is that the law in this area should not currently be modified. First, clearly the businesses are varied, with different levels of potential knowledge and control and with different practices and procedures available to them. Second, the technology is improving and may well enhance the ability to control illegal use of the networks. And, third, the small but growing body of case law is demonstrating that the current statutory provisions are not without flexibility for judicial discretion. Hence, with so much in flux, the AAP believes it is advisable to defer legislation in this area for the time being. It can be re-examined should the dire results that some have predicted, but which have not in fact occurred, actually materialize.

Rather than diminish the statutory responsibility of those who are at the nerve center of the NII, copyright proprietors need them to have a stake in the process. At this juncture in the still early life of the NII and GII, copyright proprietors need help in raising the copyright consciousness of the online community. We believe that the online service providers can and must play an effective role in that process.

MANUFACTURER RESPONSIBILITY FOR ANALOG WORKS

AAP members have published, still do publish and probably always will publish on paper -- in notebooks, textbooks, trade books and journals. While silicon chips may be as ground breaking as the Gutenberg printing press, we do not believe they will lead to the end of the printed page to supply education, entertainment, enlightenment and information through words, charts, graphs, photographs and other illustrations. Uncontrolled photocopying and scanning might.

In efforts to control the rapid spread of massive illegal photocopying, AAP members have successfully litigated against unlicensed copy shops. The Association and its members work with universities and bookstores, librarians and professors to spread knowledge of the law and good

copyright practice to college campuses and corporate libraries. Our members have been active in the creation, development and growth of the Copyright Clearance Center to facilitate lawful photocopying.

Society has seen the disappearance of the sheet music business because of illegal photocopying. And while the book, journal and other publishers have survived the world of traditional photocopying, it is not altogether clear how well they will survive unregulated deployment of the new copying equipment. Although not wanting to be melodramatic, publishers do fear for their future, and the well-being of their authors, when looking at a world with low-cost, easy-to-use ubiquitous scanners, copiers, and binders.

Yesterday's slow one-copy-at-a-time process, where you had to stand by and feed in page-by-page, and which produced continually inferior copies is, indeed, yesterday's machine. In contrast, today's equipment allows the user to drop a thick pile of printed pages into a hopper whence they can be scanned, stored and digitized for future retrieval and searching and editing; they can be transmitted, downloaded, printed and bound, all without a human being standing by, without any diminution in quality, with unlimited quantities distributed via networks to any and every place on the globe, all without any authorization by, or even knowledge of, or compensation to the proprietor. Publishers believe that before it is too late and before this admittedly exciting technology swallows copyright protection altogether, the manufacturers of this equipment must be asked to work on solving the problems that their increasingly advanced machines are causing.

Heretofore manufacturers have, inappropriately we believe, relied on the Sony/Betamax case. While holding that the use of VCRs to make time-shifting copies of broadcast TV programs for individual home viewing was a fair use, the Supreme Court plurality also noted that the VCR could be used for a range of lawful purposes, thereby suggesting its manufacturer should not be liable even for an infringing use. We do not believe manufacturers should hide behind this dictum. Simply because a machine can be used without infringing copyright should not lead policy makers to close their eyes to the purpose, design and broad anticipated uses of such devices to reproduce copyrighted works, or to the responsibility of the manufacturers of these devices to participate in the search for solutions to control copyright infringement.

We are distressed to see print and television advertising by major companies such as Xerox, AT&T, HP, Ricoh, Canon and others inviting, presumably with lack rather than malice of forethought, the indiscriminate digitization, modification and transmission of materials, without regard to whether they are inducing and promoting copyright infringements. We have seen advertisements showing the copying of books by machines with spine saver components and we have seen advertising promoting the scanning and faxing of whole books.

We understand that yet another device is far along in development by manufacturers -- the page-turner copier. Such a machine would do all of the scanning and storing and faxing and duplicating offered by the current devices. The added element of page-turning capability quite simply would allow the equipment to break what is today's most practical barrier against widespread copying of printed materials -- namely, the binding.

Congress has made clear its acceptance of the principle of manufacturer responsibility in enacting the Audio Home Recording Act as Chapter 10 of the Copyright Act, requiring that certain devices be designed in a fashion to implement a particular copy protection system. Indeed, we think that awareness and increasing acceptance of the principle of manufacturer responsibility readily leads to acceptance of a relationship between the traditional principles of "vicarious liability" looking to the ability to control, and the logic and ethic of our belief that if the manufacturers of the new replicating and transmitting technologies have or can develop infringement-controlling technologies, they well ought deploy and pursue them as a matter of responsible business behavior, policy and law.

We noted that, in its White Paper, the Working Group urged the equipment manufacturing and copyright industries to work together on bilateral solutions. At this time the AAP has determined to follow that counsel and encouragement and we have initiated such discussions. We want to explore combinations of better educational and advertising practices, and the possibility of technological devices to control or at least account for scanning, storing, copying and transmitting. We will see where these discussions will lead us.

Hence, we do not seek any legislative solution at this time. But, we urge that your legislative findings highlight the concerns about these new copiers

and their links to the NII and GII. We hope you will join with us to call on the manufacturers to devote substantial and serious efforts to develop and employ technological tools and to engage in educational practices which will facilitate copyright management and compliance.

CONCLUSION

Our industry appreciates your attention to our thoughts on this legislation. We hope that they will be helpful to you in navigating through some uncharted territory, both in assessing the legislation before you and in contemplating some issues for future consideration. So far, the U.S. has taken the global lead in this effort which is only fitting to reflect and ensure our position as the world leader in the creation of intellectual property. We hope that will continue.

U.S. copyright industries are a vibrant sector of American business, culture, education and life and we appreciate the attention shown by Congress to making it possible for the creative process to flourish. We thank you for your understanding that protection of intellectual property is the surest way to nurture yet more creativity and to spread its benefits -- material, as well as intellectual and spiritual -- to all in society. We are eager to assist in the ongoing process in any way that we can and hope you will call on us as the process proceeds.

Thank you.

NFB PROPOSAL
AMENDMENT PROPOSED TO H.R. 2441/S. 1284

(a) On Page 2, line 18, strike "visually impaired" and insert in lieu thereof "blind or other persons with disabilities."

(b) On Page 3, line 13, strike "visually impaired" and insert in lieu thereof "blind or other persons with disabilities."

(c) On Page 3, strike the text beginning on line 15 through line 2 on Page 4, and insert the following:

Section 108A. Limitations on exclusive rights: Reproduction for blind or other persons with disabilities

(A) "Notwithstanding the provisions of sections 106 and 710, it is not an infringement of copyright for an authorized entity as defined in this section to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities as defined in this section.

(B) As used in this section, the term--

(1) "authorized entity" means a nonprofit organization or a governmental agency whose primary mission is to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities;

(2) "specialized formats" means Braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities; and

(3) "blind or other persons with disabilities" means individuals who are eligible or may qualify in accordance with section 135a of Title 2, United States Code, to receive books and other publications produced in specialized formats.

(C) Copies or phonorecords made under this section--

(1) Shall not be reproduced or distributed in a format other than a specialized format exclusively for use by blind or other persons with disabilities, and any copies or phonorecords made under this section shall bear a notice that any further reproduction or distribution in a format other than a specialized format is an infringement; and