II. B. Opt-Out Provisions:

1. Respondent’s Opt-Out

The underlying presumption of the CASE Act is that participation in any proceeding brought under it must be voluntary. This is emphasized in the Senate Report accompanying final passage which states on Pg. 3, first paragraph.

“The process set forth in S. 1273 is intended to be completely voluntary. for both claimants and respondents. Neither party should be coerced into participating. Consequently, no party may, by contract or agreement, relinquish or abridge their right to pursue or not to pursue a claim, counterclaim, or defense before the Copyright Claims Board or their right to opt out of a proceeding before The Copyright Claims Board.”

AMI strongly urges the Office to follow the lead of the Senate Report in emphasizing this in implementing regulations. Such regulations should make it clear that under no circumstances will any contract bind an author in advance to bring an infringement case for adjudication by the CCB in lieu of adjudication in a United States District Court. Nor will the CCB entertain actions brought pursuant to such an alleged contractual obligation. To do so would constitute a preemptive opt-out limited only to libraries and archives under Section 1505 (aa).

2. Library and Archives Opt-Outs

As stated above, Section 1505 (aa) requires the Register to establish regulations for libraries and archives “preemptively opting out of proceedings before the Copyright Claims Board.” Further, the statute defines such libraries and archives as only those that qualify for “limitations on
exclusive rights under section 108.” Such limitations apply only where the “reproduction or distribution is made without any purpose of direct or indirect commercial advantage. (Italics supplied.) Further, the collections of the library or archive must be open to the general public. This is clearly meant to restrict the opt-out to noncommercial entities. The implementing regulations should make it clear that the pre-emptive opt-out is not available to companies that are not eligible for Internal Revenue Code of 501 C3 treatment, such as Google, which offer access to electronic archives with infringing content under safe-harbor, nor quasi-libraries such as Internet Archives. Under section 108, it is irrelevant that access to the archive is without charge because it is impossible for there not to be an “indirect” commercial advantage to the entity making it available.

The NOI also seeks input on whether a library or archive “should be required to prove or certify its qualification” for the section 108 limitation. AMI strongly believes that such proof and certification should be a requirement in implementing regulations. Library / Archive opt-outs should be open to public comment and granted for 2-year terms then must reapply (using the 1201 exemption to prohibition on of circumvention process as a potential model).

Regarding transparency of institutions or entities containing multiple archives, AMI strongly believes that a blanket, institutional opt-out should not be permitted. Otherwise, a complainant could have wasted money and time on bringing an action only to have it thrown out because of ignorance of institutional affiliation of the infringer.

Finally, regarding employees of archives, AMI strongly urges that the regulations do not permit employment in an institution that has filed a pre-emptive opt out to shield the employee from liability for actions taken in the course of employment, but not authorized or otherwise sanctioned by the employer.