

UNITED STATES OF AMERICA

LIBRARY OF CONGRESS
COPYRIGHT OFFICEORPHAN WORKS
ROUNDTABLEWEDNESDAY
JULY 27, 2005

The Roundtable met in Room 2237, Rayburn House Office Building, Washington, D.C., at 9:00 a.m., Marybeth Peters, Register of Copyrights, presiding.

PRESENT

MARYBETH PETERS	Register of Copyrights
JULE L. SIGALL	Associate Register for Policy & International Affairs
ALLAN ADLER	Association of American Publishers
FRITZ E. ATTAWAY	Motion Picture Association of America
JONATHAN BAND	The Library Copyright Alliance
MICHAEL CAPOBIANCO	The Science Fiction and Fantasy Writers of America
DAVID CARSON	Copyright Office, Library of Congress
ANNE CHAITOVITZ	AFTRA
JEFF CLARK	Consortium of College and University Media Centers
JEFFREY P. CUNARD	College Art Association
DONNA DAUGHERTY	Christian Recording Studio
DONNA FERULLO	Purdue University
MIKE GODWIN	Public Knowledge
BRAD HOLLAND	The Illustrators Partnership
ROBERT KASUNIC	Copyright Office, Library of Congress
LEE KIM	Cohn and Grigsby
KEITH KUPFERSCHMID	Software and Information Industry Association
DENISE LEARY	National Public Radio
ALEXANDER MacGILIVRAY	Google
STEVE METALITZ	Recording Industry Association of America
OLIVER METZGER	Copyright Office, Library of Congress

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PHILIP MOILANEN	Photo Marketing Association
KAY MURRAY	Authors' Guild
BRIAN NEWMAN	National Video Resources
ROBERT OAKLEY	The Library Copyright Alliance
VICTOR PERLMAN	American Society of Media Photographers
GARY M. PETERSON	Society of American Archivists
JAY ROSENTHAL	Recording Artist Coalition
ROBERT ROZEN	Director's Guild of America
LISA SHAFTEL	Graphic Artists Guild
MATTHEW SKELTON	Copyright Office, Library of Congress
PAUL SLEVEN	Health Spring Publishers
CHRISTOPHER SPRIGMAN	Creative Commons and Save the Music
MICHAEL TAFT	Archive of Folk Culture, American Folk Life Center Library of Congress
DAVID TRUST	Professional Photographers of America
JENNIFER URBAN	Association of Independent Video and Film Makers
NANCY E. WOLFF	Picture Archive Council of America

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C-O-N-T-E-N-T-S

<u>AGENDA ITEM</u>	<u>PAGE</u>
Topic 3: Reclaiming Orphan Works	4
Topic 4: International Issues	109

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P-R-O-C-E-E-D-I-N-G-S

(9:07 a.m)

MR. SIGALL: Welcome back to the Orphan Works Roundtables Project.

This is Topic 3 in the morning. This is the topic of "Reclaiming Orphan Works," or what is done when a copyright owner resurfaces and seeks to enforce their rights in their copyright against an orphan work user.

Let's go around and introduce everyone on the panel again. We have some new faces, I think. And so everyone knows who's participating in this panel.

I'm Jule Sigall, associated registrar for policy and international affairs at the Copyright Office.

MS. PETERS: Maybeth Peters. Registrar of copyrights.

MR. KASUNIC: Rob Kausunic, principal legal adviser to the Copyright Office.

MR. TAFT: Michael Taft, archivist of folk culture, American Folklife Center, Library of Congress.

MR. SPRIGMAN: Chris Sprigman, University of Virginia School of Law, on behalf of Creative

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1 Commons.

2 MR. ADLER: Allan Adler, on behalf of the
3 Association of American Publishers.

4 MR. ROSENTHAL: Jay Rosenthal with the
5 Recording Artists Coalition.

6 MR. SLEVEN: Paul Sleven, Health Spring
7 Publishers.

8 MS. MURRAY: Kay Murray, the Authors
9 Guild.

10 MR. METALITZ: Steve Metalitz, Smith &
11 Metalitz, for the Recording Industry Association of
12 America.

13 MS. URBAN: Jennifer Urban from USC Law
14 School. I'm here on behalf of the Association of
15 Independent Video and Filmmakers today.

16 MR. HOLLAND: I am Brad Holland. I'm an
17 artist, and I'm here on behalf of five different
18 artists' groups.

19 MR. KUPFERSCHMID: Keith Kupferschmid with
20 the Software and Information Industry Association.

21 MR. OAKLEY: Bob Oakley, I'm the head of
22 the law library at Georgetown, and I'm here on behalf
23 of five major library associations.

24 MR. CUNARD: Jeffrey Cunard, representing
25 the College Art Association.

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1 MS. SHAFTER: Lisa Shaftel from the
2 Graphic Artists Guild.

3 MR. ATTAWAY: Fritz Attaway representing
4 the Motion Picture Association of America.

5 MR. SKELTON: Matt Skelton, attorney
6 adviser at the Copyright Office.

7 MR. METZGER: Oliver Metzger, Copyright
8 Office.

9 MR. SIGALL: Okay, Matt is going to get us
10 started with an introduction to this topic and the
11 opening question.

12 MR. SKELTON: As Jule said, this is Topic
13 3: Reclaiming Orphan Works.

14 As we've done with the prior topics, we
15 would also like you to limit your discussion and your
16 comments here just to the topic of reclaiming orphan
17 works.

18 However there may be particularly with
19 this topic a great deal of overlap with the prior
20 discussions. You may need to refer to the
21 consequences of an orphan work designation in talking
22 about the tradeoffs that should result for the
23 copyright owner should they resurface.

24 So if you do need to refer to a prior
25 topic of discussion, just please remind us what

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1 assumptions you're working from, or what your
2 organization's position was if you advocated a
3 limitation on remedies approach. Just remind us if
4 you were favoring a cap on damages, or reasonable
5 royalty and so forth.

6 I think at least informally here in the
7 office as we've been trying to approach the topic of
8 reclaiming orphan works by resurfacing copyright owner
9 we've tried to think very practically about the
10 circumstances in which it would happen.

11 And I think it bears repeating that if
12 we've done our work properly with the prior two topics
13 of identifying orphan works, a resurfacing copyright
14 owner would be an extremely rare circumstance. But at
15 the same time, it still might happen, and we should be
16 prepared to think about the consequences.

17 Thinking practically about how that might
18 happen, we identified several subtopics that we'd like
19 to address. And we listed those in the notice of
20 roundtables, but I'll just repeat them briefly here.

21 First the consequences of owner
22 reappearance during various stages of preparation and
23 exploitation of an orphan work.

24 The burdens of proof in litigation, such
25 as whether, as stated in some proposals, the copyright

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1 owner would bear the burden of proving that a search
2 was unreasonable, versus other proposals that suggest
3 the burden of proof might be better borne by the user.

4 The availability or unavailability of
5 statutory damages and attorneys' fees.

6 And lastly, rights in derivative works, or
7 transformative uses, based on an orphan work.

8 I'd like to start off with a question
9 related to topic A, the consequences of owner
10 reappearance, and specifically addressing the extent
11 to which preexisting uses, or works that are completed
12 and being exploited should be allowed to continue,
13 should an owner reappear.

14 There appears to be some consensus in the
15 written comments that a work based on an orphan work
16 should be allowed to continue. And I would just like
17 to ask if anyone would like to contradict that.

18 Is that a circumstance in which an
19 injunctive remedy against ongoing use of an orphaned
20 work should be available?

21 MS. MURRAY: Yes, the Authors Guild's
22 position is that in most cases an injunction should be
23 allowed if a diligent search was undertaken and then
24 a rights holder reappears.

25 But there are certain circumstances, and

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1 I think the representative from Google yesterday, who
2 is not here today, alluded to that.

3 We are concerned about the situation in
4 which a digital archive copy of a book or other
5 product is made and released to the public, or made
6 available to the public.

7 And if an owner emerges after that is
8 done, we think then, that's a situation where
9 basically there will be no further market for the
10 work.

11 Paul can probably back me up, but if a
12 book is completely available online, a publisher is
13 probably not going to do another - is not going to
14 publish it again.

15 So we think in those circumstances, where
16 there is no meaningful compensation either.

17 And by the way, we favor a reasonable
18 license fee and not a cap.

19 But in that situation, there is no money
20 coming from that now. There is no market for it. So
21 in those kinds of situations, to prevent an injustice,
22 we think that there should be the opportunity to ask
23 for - or to get an injunction to stop the use.

24 MS. SHAFTEL: In the case of visual
25 images, whether it's photographs or an illustration,

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1 those are often used, incorporated in other works such
2 as a website or other publication as literally to
3 illustrate a point or an event.

4 And it is certainly not unlikely that a
5 user might take an orphan work, an orphan illustration
6 or photograph, to use in another work that would be
7 something either of a political nature, or social or
8 religious nature, that the creator might not agree
9 with or would find objectionable for any number of
10 reasons.

11 And in that sense, certainly the creator
12 of a visual work should be allowed injunctive relief
13 to prevent their image from being used in association
14 with someone else's work that they personally would
15 not support or find objectionable.

16 MR. ATTAWAY: I basically have the same
17 thought that Lisa just expressed.

18 Let me ask you a question: Are we talking
19 here only about injunctive relief to enforce rights
20 under the copyright law which I think we would agree
21 with.

22 But speaking on behalf of our friends at
23 the guilds, I certainly believe that artists should
24 have the right to injunctive relief for violations of
25 the Lanham Act or any state statutes providing moral-

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1 type rights.

2 MR. SIGALL: Well, to answer your
3 question, we've only consider this in the context of
4 the copyright law and changes to the copyright law.

5 So I believe that, at least for today's
6 purposes, that's the purpose of this discussion.

7 MR. ROSENTHAL: To amplify those remarks,
8 and I do agree with them, I think that while the
9 circumstances may be limited, there are certainly
10 times when artists are put in a position where their
11 use of certain works are offensive.

12 And this is why in contractual
13 negotiations, if there are any rights that are
14 retained by artists, it's to approve uses in areas
15 that might be offensive, whether it's pornographic
16 works, whether it's endorsing certain products, which
17 really kind of brings in the Lanham Act, whether
18 you're endorsing something or not.

19 But it's hard to separate the two. If you
20 have a SAM (phonetic) recording by an artist used in
21 a commercial without their authority, it may trigger
22 the Lanham Act, but we're still dealing with an orphan
23 work scenario.

24 So there certainly are situations where an
25 artist may not want their works to be used in a

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1 certain way, and in those situations, I think,
2 injunctive relief should be available to them.

3 MR. SLEVEN: As a book publisher, let me
4 speak out in favor of objectionable works.

5 I feel strongly that as a matter of
6 copyright, copyright is not addressing the Lanham Act
7 issues, the various other issues that might cause
8 people to object to the use of their works in another
9 work and might or might not give them a cause of
10 action, arising from them, a lot of quote
11 objectionable uses are going to be socially beneficial
12 ones.

13 If for example you have two sides of a
14 heated debate - I think abortion comes to mind as the
15 most heated - and somebody wants to do a book taking
16 a right to life position and feature materials
17 promulgated by the other side as part of their
18 exploration of where the other side is coming from -
19 and you could reverse the sides and make the same
20 argument - that's something that copyright law should
21 not stand in the way of.

22 If it's borderline fair use, it may or may
23 not be depending on the four factors, but it's I think
24 the least candidate for special negative treatment
25 under an orphan works provision.

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1 MR. SPRIGMAN: I would echo that. We have
2 the Lanham Act, and Passing Off Law. We have state
3 defamation law which will address some uses.

4 I would see any way of giving artists a
5 veto, a kind of ideological veto, over use of their
6 works. That could be cabined to instances where a
7 veto would be acceptable.

8 I wouldn't even know what that category
9 would be. So I think we have law to take care of
10 that, and developing that law is a separate
11 discussion.

12 MR. METALITZ: I would agree with a lot of
13 what Kay - the general approach that Kay had outlined,
14 but I just wanted to actually picking up on what Matt
15 said at the outset, I just want to emphasize how
16 difficult it is to segregate this issue and look at it
17 in isolation from some of the issues we discussed
18 yesterday.

19 For example, defining what due diligence
20 is. Due diligence, if you were able to identify and
21 locate the copyright owner, but you simply get no
22 answer when you ask for a license, and if the only
23 remedy that you have is a nominal sum and a cap such
24 as in the proposals we talked about yesterday, then
25 you can easily see a situation with a copyright owner

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1 for failing to answer two or three letters perhaps, is
2 left with no remedy at law, no damage remedy, and if
3 they also have no injunctive remedy, it's hard to -
4 and of course if the use that's made of the orphan
5 work may be an extremely valuable commercial use, it's
6 hard to see any equity in that situation, the
7 copyright owner, they are basically penalized for not
8 answering their mail, and in a totally confiscatory
9 way.

10 So in that sense I'm not sure you should
11 rule out injunctive relief in some circumstances.

12 On the other hand, if you have a more
13 realistic due diligence standard, and if you actually
14 provide this reasonable license or fee remedy, then I
15 think the balance of equity goes much more in the
16 direction of being extremely reluctant to issues
17 injunctions against ongoing uses such as this.

18 And again, at least the copyright owner
19 has some remedy and some recompense for this
20 unauthorized use. And again, it might be a very
21 commercially valuable use that's being made of the
22 work.

23 MS. URBAN: I am going to second what Paul
24 said on behalf of for example the documentary
25 filmmaker who may be telling a story that not everyone

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1 wants to hear, but is a very important story.

2 And having that documentary filmmaker have
3 to pull the film off the shelves and out of public
4 debate because someone surfaces and is offended
5 strikes me as the kind of policy we wouldn't want to
6 promulgate here today.

7 However, I would like to point out, as
8 everyone else says, we are prefacing this on a robust
9 definition of an orphan work, and having identified
10 orphan works in a meaningful way to begin with.

11 In addition, Kay's comments were directed
12 towards archival use and other kinds of uses where it
13 may not be as damaging to remove the work from the
14 database or whatever it might be. So it could be that
15 this is a solution that will be different for
16 different kinds of works.

17 But for transformative works, such as
18 films and books, we feel strongly that allowing for
19 injunctive relief is something that should be thought
20 through very carefully if at all.

21 MR. ADLER: We so far I think have been
22 fairly willing to stand clear of any kind of
23 categorical rules in this, which I think is a wise
24 approach to take.

25 But one of the things that we've talked

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1 about within the publishing industry which is
2 particularly relevant to us, and I think is relevant
3 to this issue, is, at least as a consideration in any
4 case, is whether we're talking about an orphan work
5 that has been embedded as part of another work where
6 it may in fact be a relatively minor or even
7 incidental part of the work as a whole, as compared to
8 when we're talking about the orphaned work itself
9 being used in a significant economic way in its
10 entirety.

11 When you talk about republishing a work
12 for example in its entirety, it's a very different
13 situation. There may be different equities in terms
14 of other kinds of remedies that one would consider as
15 appropriate.

16 Clearly in the situation where you're
17 talking about the orphaned work being embedded,
18 particularly where it's a relatively minor part of the
19 new work, we would argue that the equities weigh
20 against, in most cases, injunctive, relief, and that
21 another form of relief would probably be more suited.

22
23 MS. MURRAY: I think that if you don't do
24 something to limit the availability of injunctive
25 relief, then requiring whether it's a reasonable

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1 license fee, or a statutory cap, would really be
2 rendered meaningless, obviously, because somebody
3 could stop the use and hold up the user for whatever
4 amount of money that they wanted.

5 As well, I think that if you allow for an
6 exception to be made for an artist or a copyright
7 owner who is offended by the use being made, you're
8 really going to swallow the rule.

9 MR. HOLLAND: If copyright gives artists
10 the exclusive right to how their work is used, then
11 it's hard to see how they don't have an ideological
12 veto over how someone else uses their work.

13 Particularly if their work is being used
14 because they can't be found, or because somebody
15 hasn't found them. Which may not be exactly the same
16 things.

17 And second, insofar as remedies in court,
18 Vic Perlman pointed out yesterday what most artists
19 know, that while you may have any number of remedies
20 in court, you also need the resources to stay in
21 court, often against entities with infinitely more
22 resources and more time at their disposal than any
23 artist or group of artists will have.

24 And so giving them any kind - making the
25 - making the situation turn on one's ability to sue in

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1 court is just not realistic for most artists.

2 MR. KUPFERSCHMID: Let me touch upon a few
3 of the issues that have been talked about so far.
4 One, first off, I guess with regard to offensive uses,
5 I consider that to be sort of a nonissue here, because
6 it is actionable under other provisions of the
7 trademark law and fair competition, Lanham Act, things
8 like that.

9 And I think it needs to be made clear that
10 whatever we do here, obviously, under copyright law,
11 doesn't affect those other laws.

12 To a large extent, whether there can be an
13 injunction or not, I think to decide that you'd have
14 to take a look at I guess what the results of the
15 first two sessions were, the most important of course
16 being whether there is a cap, or whether this is a
17 reasonable royalty type approach.

18 Having said that, I just want to mimic
19 Allan's comments about, I think there could very well
20 be a different type of standard where you've got a
21 work that is embedded in another work, an orphan work
22 which is embedded in another work, in which case I
23 can't see a situation where there should be an
24 injunction that's allowable, where you've got a work
25 that is wholly encompassed, it's an orphan work that

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1 you're distributing, in that case maybe there might be
2 a situation, for instance the situation that Kay had
3 mentioned, where you're usurping the market, you're
4 not giving the copyright owner any chance to recoup
5 any funds, because you're using up that entire market,
6 well then maybe in that type of situation an
7 injunction ought to be considered.

8 But then we have to look at the backdrop,
9 look at all the other - sort of the foundation of the
10 rest of the limitation that will be decided on the
11 other issues that we discussed on the previous days.

12 MR. CUNARD: I find it hard to imagine the
13 circumstances in which allowing for injunctive relief
14 would further the purposes of what we're trying to
15 accomplish here.

16 As several people have suggested, the way
17 in which the orphan works statute might play out is
18 that people in fact do a reasonable due diligence
19 search; they would go to the gatekeeper, they would
20 explain to the gatekeeping I fall within this
21 statutory provision. I've done everything I can. I
22 cannot identify, cannot find, the copyright owner.

23 And the gatekeeper says, well, what
24 happens if the copyright owner does emerge? Well,
25 they'd get injunctive relief.

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1 Well, then how are we any better off
2 except with respect to a limitation on monetary
3 remedies than we are today?

4 Inevitably what will happen is, the
5 gatekeeper will have to say, well, is my use actually
6 a fair use? And then that takes us to the
7 uncertainties which the Copyright Office had so
8 eloquently described in the notice.

9 So I'm not actually sure we would
10 accomplish very much by providing for injunctive
11 relief.

12 I'm also intrigued by the idea that there
13 is a difference between the use of a work that is
14 embedded in another work, or the use of the work in
15 some other fashion. I mean certainly with respect to
16 visual images and photographs, the entirety of a work
17 is often use, and the entirety of the work may be used
18 apart from a book about the work.

19 But even with respect to nonvisual images,
20 I can imagine finding essentially an anonymous
21 manuscript in someone's attic, doing everything I can
22 to track down the author of the manuscript, I decide
23 to republish the manuscript, or I decide to turn it
24 into a play.

25 And why there should be a difference

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1 between that kind of a use, and the use of a visual
2 image, in an art historical book doesn't strike me
3 immediately.

4 MR. SLEVEN: A couple of points about the
5 interplay on injunction and damages. AAP and I
6 personally favor elimination of the right to an
7 injunction, and a full market licensing fee is the
8 owner comes forward.

9 And I think I would agree with Steve that
10 those two are a pair. It's hard to tell an owner that
11 they get a \$100 licensing fee and no right to an
12 injunction.

13 But I think the idea of an orphan work
14 statute is to make the works useable. And for us, and
15 a lot of others, I think the right of an injunction
16 would make orphan works not useable as a practical
17 matter.

18 And to respond to what Kay said at the
19 outset about usurping the market, I would think that
20 a market-licensing fee would measure the degree of
21 usurpation. It's not going to be 100 or zero. It's
22 going to be 90 or 80 or 70.

23 Most authors give their publishers
24 electronic rights. Occasionally an author will
25 reserve the right to put the book on the web him or

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1 herself, and that may affect the deal. But there are
2 cases where publishers don't refuse to publish under
3 those circumstances.

4 Let me throw out an idea about dealing
5 with this injunction issue. When the rights owner
6 comes forward that would be entitled to a full market
7 licensing fee for the use, the user might then be
8 given a choice. Take it down, accept an injunction,
9 and pay a market licensing fee only for the use to
10 date, or decline to accept an injunction but be
11 responsible to pay a market licensing fee for the
12 ongoing, for the continuation of the orphan use.

13 And that choice might better divide the
14 issue that statutory language can between uses that
15 are separate and apart and easily pulled down, as
16 Google's attorney said theirs were, and uses that are
17 embedded and not ceaseable without harming a
18 subsequent work.

19 MR. ADLER: I just wanted to add in
20 response to Jeff's comments that injunctive relief of
21 course is an equitable doctrine, where when a court
22 considering a request for an injunction is going to
23 see where not only the merits lie in terms of one's
24 legal position but also in particular is going to make
25 an assessment of where the hardships would lie with

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1 respect to whether an injunction issues or it doesn't.

2 The point about the material being
3 embedded, versus material that is used on a stand-
4 alone basis is that I would think in almost any case
5 where the material is embedded as a larger work, the
6 hardship calculation is going to work against the
7 issuance of an injunction.

8 And the point is, in considering this as
9 a general framework, whether you really want to leave
10 that in each instance up to the court to have to
11 decide, or whether the rules that we're talking about
12 should make a general statement about that
13 consideration.

14 The other thing I wanted to just mention
15 in response to this question about offensive material,
16 and whether or not injunction should be available on
17 that basis, I had mentioned again yesterday that when
18 we defined in our comments what we thought an orphan
19 work was, in addition to talking about the situation
20 of the inability to locate or identify the copyright
21 owner, we also talked about the fact that in that
22 instance the user wants to make use of the work that
23 would not be the subject of a limitation provided by
24 copyright law with respect to the rights of the
25 copyright owner, whether it's fair use or some other

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1 exemption under the law.

2 One of the questions, the reason we
3 mentioned that was because if in fact somebody is
4 making use of the work under fair use doctrine, or
5 under one of those limitations, we don't believe that
6 it should be considered within the orphan works
7 rubric, because at that point it really isn't a
8 question of whether or not you could identify the
9 copyright owner and locate them to ask for prior
10 permission, because you wouldn't ask for prior
11 permission under any circumstances.

12 When you're talking here about the
13 situation where the copyright owner emerges, I guess
14 the difficulty is in sort of framing the issue in
15 terms of whether the first time the fair use issue
16 would arise is in response to the emergence of the
17 copyright owner, or whether it's reasonable to say
18 whether or not a person's use of the orphaned work
19 following an unsuccessful but reasonable search for
20 the copyright owner would ordinarily involve a
21 declaration of some sort, or not a declaration since
22 we were not in favor of statements of intent to use,
23 but an understanding on the part of the user that if
24 their purpose is to use it, and they believe that
25 would be within fair use, whether in fact the

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1 subsequent emergence of the copyright owner is subject
2 to the same kinds of limitations that we would apply
3 to remedies when we're not dealing with the situation
4 of a use that is subject to limitations of the rights
5 of the copyright owner under the law.

6 MS. MURRAY: Just quickly in response to
7 something that Paul said. I just wanted to clarify
8 that our view on this allowing for remaining ability
9 to get injunctive relief is only in those situations
10 where there is no reasonable license fee. It would be
11 a nominal fee or no fee at all.

12 And the Google or any digital archive is
13 an example of that.

14 MR. OAKLEY: Thanks. One of the reasons
15 why we're engaged in this discussion is, we have some
16 goal of trying to make these works more available than
17 they have been in the past; to be able to make use of
18 these works which have seemingly been abandoned.

19 So we have a user, and they take advantage
20 of whatever scheme we put into place here, and they do
21 everything they can - this is the due diligence that
22 Steve was talking about.

23 So they've done everything they can to
24 assure themselves that the copyright owner can't be
25 found.

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1 After that - and I'm surprised this hasn't
2 come up here - the user is going to be making some
3 kind of fairly significant investment in whatever it
4 is they want to do.

5 If it's a library they are likely to be
6 preserving it in some fashion. If it's a book
7 publisher, they're likely to be incorporating it into
8 a new book, or republishing the book, or some such
9 thing.

10 If it's a movie maker, they may be
11 investing big bucks in turning it into a movie.

12 And in case there is reliance on the
13 scheme we put into place, and investment going
14 forward, to either allow injunctive relief or at least
15 in the case of libraries, the market approach, is to
16 make that kind of meaningless and sort of defeat the
17 whole purpose of what we're about here.

18 So that's why we come down in favor of no
19 injunction, and the cap on the remedies.

20 MR. CUNARD: Just for 30 seconds.

21 I agree with what Bob has said, but Allan
22 has, as always, made me think harder about this
23 position on injunction.

24 I had been assuming that you were
25 referring to injunctive relief as we currently

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1 contemplate it under the copyright law, which
2 basically presumes that someone is entitled to an
3 injunction if the work is infringing.

4 Here, since this isn't going to be fair
5 use, for the reasons I think we agreed, basically the
6 copyright owner would come forward and say, the work
7 is infringing. There is no fair use defense. If
8 there is a fair-use defense, the work isn't
9 infringing, so this whole issue doesn't really emerge.

10 In which case, I think it is more likely
11 than not in those circumstances that the judge would
12 under current copyright law issue an injunction.

13 MR. SIGALL: Just to clarify, not limiting
14 it to the common law of injunctions, or copyright.
15 There are examples in the copyright act, in the ISP
16 liability provisions for example, where the statute
17 has sort of readjusted or provided additional factors
18 for a court to consider in whether or not to impose an
19 injunction or not.

20 So I think we can think broadly here if we
21 need to to determine whether the scope of the
22 injunction, or what factors the court has to consider
23 in doing it.

24 But so it's that we should try to thin if
25 there are ways to adjust whatever the common law is on

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1 that to address the circumstance.

2 MR. HOLLAND: I'd like to make the
3 observation that some of the same people who yesterday
4 were determining that orphaned works were worthless,
5 and that artists would be happy to see them used in
6 some way, and should be gratified to see them used,
7 are now making the argument that if the artist is not
8 happy to see them used, they should have nothing to
9 say about it and no remedies in court.

10 And while I know we're supposed to take a
11 studied approach to all this, I want to make it
12 personal for a minute. Because I don't think anyone
13 here understands - well maybe some do - what a
14 situation an individual artist is up against in a
15 society in which almost all the values are speed,
16 popularity, ratings, economy, where you're isolated in
17 a society with no real safety net, trying to create
18 something in a society in which people often don't
19 care, and in which a bunch of lawyers can sit in a
20 room and talk about how their work is probably
21 worthless except in some sort of spiritual sense, that
22 they are supposed to be gratified if they see their
23 work used.

24 The reality is that it takes a great deal
25 of commitment to produce something that is personal;

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1 that's creative; that's imaginative; that begins
2 originally not with something that you download off
3 the Internet, but which you start with this and with
4 this, with a blank piece of paper and a pencil, or
5 something, an implement of some sort, and something
6 that comes out of your head, that comes out of your
7 experience, that comes out of your psychology, vision
8 even, in some cases.

9 And then put it out into a world in which,
10 often to produce a work, you are forced to sign your
11 work away under work for hire agreements. This goes
12 back before the 1978 law, and it extends now into the
13 future, with corporations like Conde Nast which
14 require that if you want to do a spot illustration for
15 a magazine, you have to sign all of your rights away
16 forever and in perpetuity for all media now known or
17 yet to be invented throughout the universe,
18 prospectively and retroactively, for any publication
19 that they may buy.

20 What do you do? Somebody just out of art
21 school who knows nothing about this, who knows nothing
22 about the copyright act, who knows nothing about the
23 TRIPS agreement, who knows nothing about WIPO or any
24 of the rest of this stuff, will sign his rights away
25 for the rest of his life for any publication that

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1 Conde Nast may ever buy.

2 And it doesn't do any good to be told in
3 a room someplace with a lot of attorneys and
4 administrators that they may have injunctive relief,
5 or that they may have recourse in the courts.

6 Cynthia Turner who has been here with me
7 has been with a number of defendants in a medical
8 illustration infringement case, they've been in court
9 for seven years. They've been through several
10 lawyers, one of whom has died, several of whom have
11 just given up on the case I guess. And they can stay
12 in court forever, and they will end up probably losing
13 their rights.

14 The only agreement they've got so far is
15 the publisher will let them work again if they will
16 agree to give up all the rest of their rights for any
17 publications that they do for them in the future.

18 So for someone to say that, yes, if you
19 give me more minute, I apologize, if you give me one
20 more minute.

21 Yesterday, Jeffrey, you made the comment
22 that we had all come down here to talk about orphaned
23 works. And here were all these rights holders, these
24 professional artists sitting at the table. And where
25 were the batik makers, and where were the Yiddish folk

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1 singers, and so on?

2 But I would have to venture the guess that
3 the batik makers have more in common with a commercial
4 illustrator who has to do a job for Time magazine on
5 a 24-hour deadline than either the batik maker or the
6 illustrator has in common with all those people who
7 would like to use their work for little or no money,
8 or who would even go so far as to say that the work is
9 worthless, or that perhaps like opera, it should be
10 subsidized, which is the same argument one could have
11 made 150 years ago about Stephen Foster who had to
12 sell all of his rights to his work.

13 One could make the argument that if the
14 author of "Beautiful Dreamer" couldn't make a living,
15 then the work was worthless. Yet of course if ASCAP
16 had been around, Stephen Foster would probably have
17 survived to produce more songs.

18 The idea that whatever scheme we - I don't
19 know about we, because I won't be part of this - but
20 whatever scheme the Copyright Office puts in place
21 will satisfy any number of parties. But it still
22 won't solve the basic problem that artists have in
23 this society.

24 So to just say that they have injunctive
25 relief somewhere down the line, that they should have

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1 no say in how their work is used, does a disservice to
2 artists who are already having a hard enough time to
3 find their way in an extremely commercial society.

4 I'm sorry, I just wanted to make that
5 personal for a minute, if you'll forgive me.

6 MR. SIGALL: Lisa.

7 MS. SHAFTEL: To touch on something that
8 Vic Perlman mentioned yesterday, there is a premise in
9 this room that all copyrighted works should be
10 permitted to be used; all orphaned works should
11 automatically be permitted to be used, because there
12 possibly is no locatable copyright holder who would
13 deny usage, and we've already discussed yesterday a
14 number of reasons why the creator might not want them
15 to be used.

16 There is also a loss of distinction, as I
17 brought up yesterday, between a one-time noncommercial
18 use, for example a library, an archive or
19 preservationist, and a commercial use.

20 As it is, today, certainly in the United
21 States and around the world, copyright infringement is
22 rampant, of visual images, of recorded music, of
23 motion pictures. Known copyrighted work is being
24 infringed at a rapid pace by dubbing, digital media,
25 through the Internet.

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1 And despite a number of very public
2 lawsuits, the public still believes that anything
3 posted on the Internet is public domain; that any book
4 that's in a library is public domain; that if they buy
5 a book or if they buy a CD or DVD, or they buy a
6 poster, that somehow that because they own that
7 physical copy of that copyrighted work that they also
8 own the copyright, and that they can reproduce it at
9 will.

10 So as we are right now, and we're talking
11 about whether or not the creator should have the
12 right, an injunctive right to stop duplication or
13 usage of their work, the American public, and most of
14 the people in the world, are rampantly infringing on
15 known copyrighted work as it is.

16 To give an example of what is copyright
17 infringement but what can happen to an orphan work, in
18 a parallel situation of a work that is protected,
19 there was an illustrator in Canada who created an
20 illustration of Saddam Hussein a number of years ago
21 for an editorial article. And there basically is no
22 copyright law in Iraq, or if there is, he didn't care.

23 And someone in his crew pointed out to him
24 over the Internet this illustrator's portrait of
25 himself on the illustrator's portfolio website, and

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1 Saddam Hussein liked it so much that he ordered this
2 printed on the cover of his biography.

3 And the illustrator obviously would not
4 have approved his illustration being used for this
5 purpose, regardless of how much Saddam Hussein would
6 have been willing to pay him. He would not have
7 wanted this used.

8 And this was an illustrator who is known
9 and easily locatable.

10 Well, and we are also operating under the
11 presumption that none of the authors or copyright
12 holders or an orphaned work would ever come forward.

13 Most visual works do not have the name of
14 the creator on them, whether it's an illustration or
15 a photograph, either because the creator doesn't want
16 to put their name on it, or in most cases, the clients
17 request that their names not be on it. This is very
18 typical for most illustration, that the clients
19 request their name not be on it.

20 There are gazillions of visual images out
21 there that have been created very recently where the
22 photographer or the artist is alive and well, and
23 their name is not on their work.

24 How could a user possibly identify that
25 image and find the creator? It's very possible that

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1 the creator could see their image used in another
2 purpose. Maybe, in most cases they wouldn't object to
3 a noncommercial use such as a library or an archive,
4 but they would object to a commercial use.

5 It's not just about that they would say,
6 automatically say okay if they would get paid for it.
7 Maybe they would object to it, and they are alive and
8 well, and they don't know that somebody is using it
9 until they actually see it out there.

10 MR. SPRIGMAN: So I can imagine two kinds
11 of injunctions, and I wonder if it might focus the
12 discussion a little bit to distinguish between them.

13 You have an injunction that I could
14 imagine against users once a work that was once
15 orphaned is removed from orphan status by the author
16 identifying him or herself.

17 So we didn't discuss this at any length in
18 our proposal, but I can imagine, under a registry
19 approach, or a reasonable efforts approach, steps an
20 author could take to make sure that the author was
21 known to the public, either formal steps or informal
22 steps, but a work that was once orphaned could be
23 reclaimed in a sense.

24 If a reclamation takes place, and again,
25 I think registration would be a very clear way of

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1 reclaiming, under a reasonable efforts approach. We
2 could talk about what the criteria would be.

3 But if a reclamation did take place, and
4 I could imagine injunctive relief against use that
5 occurs after the orphan status ends.

6 So that's one kind of injunction. And I
7 don't think I have any fundamental objection to that
8 if the conditions for that applying are properly
9 defined.

10 The other kind of injunction, which is the
11 one I think we were talking about, is the injunction
12 that would occur against use that commenced while the
13 work was orphaned under whatever standard is decided
14 for orphan works.

15 I don't - I think if we are looking for
16 certainty, an injunction, as Jeff said and I agree,
17 basically destroys certainty. It would prevent any
18 significant investment from taking place in the use of
19 orphaned works, either in their distribution or their
20 use in second-stage creation, which would basically
21 take away any benefit from the orphan works regime.

22 The other point that I think is worth
23 making at this point is, we have in copyright law,
24 built into copyright law, a mechanism through which
25 people now, in current copyright law, through which

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1 people can prevent in most cases their works from
2 falling into a category of orphaned works, and that is
3 the voluntary registry that we have in the Codbury
4 (phonetic) law.

5 You know artists certainly have rights
6 under the Codbury law. Maybe it also makes some sense
7 to talk about responsibilities. And if you want to
8 have the full panoply of remedies that the copyright
9 law already allows including statutory damages,
10 registration is a good way to do it.

11 So to the extent that we incent
12 registration in the voluntary system, through an
13 orphan works regime, that is also a very good result.

14 MR. CARSON: Let me try to get some
15 reaction to something that, forgive me if it's been
16 said before I walked in, but strikes me as an approach
17 that might do the proper kind of balancing here, and
18 I think balancing is what we want, and that's sort of
19 a hint of where I'm going, because the law has some
20 built-in tools that I think could already be used to
21 reconcile all the interests that arise in this
22 situation.

23 Most of us are lawyers. Most of us know
24 that in your typical copyright case if at the end of
25 the case the plaintiff wins, a permanent injunction is

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1 virtually automatic.

2 Most of us know that at a preliminary
3 injunction stage in a copyright suit, the court will
4 conclude, make a preliminary conclusion as to
5 likelihood of success on the merits. And if a court
6 concludes that the plaintiff is likely to succeed on
7 the merits, the court almost always is going to
8 presume irreparable harm and issue a preliminary
9 injunction.

10 Maybe the answer in the situation where
11 someone has already commenced use of an orphaned work
12 and then the copyright owner arises is that those
13 rules are suspended, and at both the preliminary
14 injunction stage and the permanent injunction stage,
15 the court borrows tools that are the general tools
16 courts use when they're issuing preliminary
17 injunctions anyway, which is, balance the harms. Look
18 at the harm to the plaintiff, look at the harm to the
19 defendant. Do not presume irreparable harm to the
20 plaintiff in this situation.

21 You can take into account the concerns
22 that Lisa brought forward. You can take into account
23 the concerns that Brad brought forward. You can take
24 into account the concerns that users have brought
25 forward about the fact that they relied on orphan

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1 status, and the court can then make a judgment on the
2 particular facts on this case. I am or I am not going
3 to enjoin, based on all the facts that are in front of
4 me, looking at the hardship to the plaintiff by
5 letting the use go forward, and looking at the harm to
6 the defendant if I enjoin the defendant from
7 continuing to do what the defendant has already
8 commenced doing.

9 Doesn't that really solve the problem?

10 MR. SPRIGMAN: That just replicates the
11 uncertainty. It makes it a little bit more favorable
12 to the defendant, but it doesn't make more predictable
13 either immediately or over time what is actually going
14 to happen.

15 And in terms of planning for risk, that's
16 not a rule; it's just a balancing test. It puts too
17 much weight on the courts.

18 MR. ROSENTHAL: As an academic matter, I
19 think you're right. It does put a little bit more
20 equitability, let's say, between the two.

21 I want to step back here for a second and
22 look at this - we're all looking at this to see
23 whether this is a good idea or not. You presume in
24 that that we're in court, that somebody has actually
25 gotten to court, and we're dealing with, is this a

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1 permanent injunction, do we step over certain steps
2 like a preliminary to get to others. Do we take out
3 certain steps so it makes it easier, or it makes it
4 this and that.

5 I'm thinking in terms of the unintended
6 consequences of all this. And while there are
7 wonderful uses, and wonderful reasons why everyone is
8 talking about this is a good idea to use orphan works,
9 I think in terms of the abuse, and what happens to an
10 artist in the position of having to deal with that
11 abuse.

12 And to give you a real-life example, what
13 if you're dealing with the estate of an old jazz
14 artist who actually does have the rights to the sound
15 recordings. It has been somehow reverted to them
16 either by the company, who was originally released
17 them, or maybe they had the rights anyway. The jazz
18 artist died. The wife who has the rights to this is
19 living out in Maryland somewhere. And we're dealing
20 with a rock producer who is looking to make a cheap
21 record.

22 And they think, well, the best way to make
23 a cheap record is to do digital samples of things for
24 nothing. And they find this new system that's here,
25 called orphaned works. And because it is self serving

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1 for them to go forward and to make a declaration that
2 they have, yes, used everything at their - let's just
3 say reasonableness. Let's say they have engaged in a
4 reasonable search for everything, and they have made
5 some kind of affidavit, and we have an orphaned works
6 designation.

7 And then all of a sudden they put this
8 sound recording, a little bit of it, in a rap record
9 that deals with violence against women, that deals
10 with killing cops, that deals with who knows what.

11 And you have somebody, the heir, sitting
12 out in Maryland, not being able to be found, not
13 because it wasn't registered, because you register - -
14 that sound recording could be registered in the first
15 instance. And yet you still can't find them because
16 people move. This is real world.

17 Do you have to go back to the copyright
18 office now as an heir, everytime you move, you give
19 them your new address? Let's just say you can't find
20 this person because they've moved a couple of times,
21 and we're looking at a scenario of, okay, there is
22 some injunctive relief. That is not realistic.

23 The person, the heir, has to accept the
24 reality that somebody has used a work without their
25 authority in a way that harms the integrity - and

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1 maybe we're talking a little bit about moral rates
2 here, not like we have any, but at least the concept
3 - that there is the integrity of the artist being
4 damaged, and there's nothing to do, because they don't
5 have the resources to fight it in court, and they
6 don't have the ability to really hire an attorney
7 except if you go to the lawyers for the arts who will
8 do it for free, and all that.

9 It just seems to me that - and I just want
10 to amplify what Brad said - in a world where artists'
11 rights are being eviscerated right across the board,
12 the unintended consequences here is just another
13 example of that. You're setting up a scenario where,
14 while it's fantastic when we're dealing with museums
15 or we're dealing with archives, and I agree with that
16 intent and concept, but you're also dealing with the
17 companies that put out compilation records without
18 authority, and they make a little bit of a search, and
19 then they just put it out, the rap producer, even the
20 movie producer who makes somewhat of a half-hearted
21 self-serving search, and then puts some music into a
22 movie that may be objectionable, or whatnot, that is
23 just the unfortunate reality that we live in today.

24 I always think of the Internet in this
25 way. Everybody talked about the Internet being such

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1 a great thing for culture and all of this. And yet we
2 all know at the end of the day, who makes the most
3 money on the Internet? Pornographers and gambling
4 companies.

5 It's unfortunate, but it's real. I look
6 at this in terms of what's there for abuse, and I
7 think this area, which by the way, somebody mentioned
8 about there are other remedies, when you're dealing
9 with offensive materials, certainly the Lanham Act is
10 other remedies. But it goes beyond that.

11 We're talking about here again the
12 integrity of the artist, and there may not be a remedy
13 for the Lanham Act in the scenario that I just gave,
14 which is a matter of personal integrity. There is no
15 such law yet.

16 Maybe if you can pass this with moral
17 rights legislation I'd feel better. But that's not
18 going to happen. So I just wanted to point out the
19 downside to all this.

20 There is an ugly underbelly that could
21 occur without some kind of incentive for the potential
22 user to not use a work in a certain way. And I think
23 having injunctive relief somewhere in the system has
24 to be there to keep everything equal where somebody is
25 not going to abuse and harm someone's integrity.

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1 MS. MURRAY: I think that the solution you
2 proposed, David, probably wouldn't do the trick. I
3 agree with Jay that an individual rights holder who by
4 definition probably will be the emerging rights holder
5 couldn't afford to hire a lawyer to prove irreparable
6 harm on those terms. So I don't think it would do the
7 trick.

8 I also want to just comment about
9 something Christopher said, talking about
10 registration. I don't think we want to make whether
11 or not a work was originally registered, the copyright
12 was originally registered, a factor in determining
13 whether a work is orphaned.

14 There are plenty of things that have been
15 registered with the office where the owner can't be
16 found now.

17 MR. ATTAWAY: You know whether you call it
18 equity or fairness or as David did balance, I've noted
19 in trying to think through these issues from the time
20 we were drafting our comments, that quite frequently
21 we find those values juxtaposed against efforts of
22 achieving certainty.

23 And constantly throughout these issues, I
24 find that there seems to be the need to have a
25 tradeoff between how much certainty you can build into

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1 the process, and whether or not the process ultimately
2 is going to treat the primary stakeholders fairly.

3 And so that is why I had suggested before
4 you came into the room that while we do advocate in
5 our comments and have advocated a reasonable licensing
6 fee solution that generally would preclude injunctive
7 relief, I think injunctive relief viewed as an
8 exceptional remedy in this instance might be
9 appropriate, but only in those cases where there
10 really is a hardship issue.

11 And the hardship issue, the one that I
12 illustrated, the very common one for publishers, where
13 the difference is that typically we will be using an
14 orphaned work more than likely as part of a larger
15 work; it will be embedded within that work.

16 So if injunctive relief goes against the
17 user there, it's almost extortionate, because the loss
18 in terms of the overall work is going to be so much
19 more that the person is almost going to have to cave
20 in.

21 But my point was in saying that rather
22 than turn the issue over in the classical sense to
23 have the court decide hardship questions in the first
24 instance, I just wondered whether it would be
25 possible, maybe even in the sectoral roundtables that

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1 Steve has talked about, for there to be a discussion
2 about whether an analysis and criteria with respect to
3 considering hardships can just be built into the rule;
4 not simply left to the question of what a court will
5 do, but actually in these circumstances something that
6 would be built into the rule.

7 MR. SIGALL: Just so I can clarify, you
8 mean the rule to determining what an orphan work is?
9 What do you mean by the rule, just so I understand?

10 MR. ADLER: Well, this rule as I
11 understand it is going to provide - if in fact you
12 were to adopt, say, the basic approach that we have
13 espoused which is one of limitation of remedies, it's
14 not going to be bound by existing traditional remedies
15 under copyright law for infringement. It's going to
16 look to provide a remedy scheme that takes into
17 account the overall purpose of an orphan works
18 process.

19 And I would say the same thing with
20 respect to looking at injunctive relief as the
21 exceptional remedy, but looking at it strictly
22 basically in terms of hardship criteria that we might
23 be able to build into the rule beforehand. Similar
24 in the way that in the ISP liability provisions of the
25 DMCA, that was the discussion that occurred prior to

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1 codifying those considerations.

2 MR. ATTAWAY: Just quickly to add to what
3 Allan just said. I don't think our objective here is
4 certainty. If our objective was certainty, we have
5 certainty now. You can't use a creative work without
6 permission of the author, period.

7 We are trying to achieve equity, and
8 David, I think what you have proposed goes in that
9 direction. Is it enough? I don't know. But I think
10 that it is in the right direction for the same reason
11 that we think that there should be some equitable
12 remuneration if the copyright owner shows up after his
13 work has been used.

14 It's the right thing to do.

15 MR. METALITZ: Three comments. First, I
16 know we'll be getting into this later this morning,
17 but it is important to draw a distinction between the
18 ongoing uses that began while the work was in orphan
19 status, and the new uses that begin after the rights
20 holder steps forward.

21 I think once the work - especially if the
22 use is one that is very public, that may increase the
23 chances greatly that the right holder will step
24 forward. We don't know what percentage that will be,
25 but at least it's out there. Somebody could say, hey,

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1 that's my illustration; that's my work.

2 And in that case, of course, the right
3 holder has some steps that they could take. They may
4 wish to register at that point, and then for any
5 infringement that commences after registration, they
6 may have enhanced remedies.

7 And certainly you don't want to treat
8 those two situations the same. So I think when we're
9 talking about restrictions on injunctive relief, I
10 hope we're just talking about it in the context of the
11 ongoing uses.

12 I recognize there are difficulties in
13 drawing the boundaries between ongoing uses and new
14 uses. And Paul raised some of those yesterday. But
15 I think it's an important marker to put down.

16 Second, I think Jay made a very important
17 point, although I don't agree with a lot of what he
18 said. I think one of his - I think his approach is
19 right in this sense, that we have to take into account
20 I won't say the possibility, I'd say the certainty,
21 that this system won't be abused, and that people will
22 cut corners and make the use, come up with some type
23 of affidavit - yeah, maybe they'll get caught later,
24 but probably they won't. And we obviously can't -
25 there can't be any system that is bullet proof.

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1 But I think we all could come up with a
2 great system hypothesize how people will use it.

3 But I think experience teaches us, we
4 should plan for abuse and have some safety valves and
5 mechanisms that respond to that.

6 And finally, I think Brad and Lisa very
7 eloquently outlined some of the problems and
8 difficulties from the perspective of the individual
9 creator. And I take Brad's point about all the talk
10 about court and who has the burden of proof and what
11 are the remedies is somewhat hypothetical in many
12 real-life situations.

13 And so I would again - and this came up
14 very briefly yesterday - but I think we should
15 consider whether there are at least some disputes that
16 are arising out of orphan work that we should have
17 some very simple arbitration system set up.

18 Now this is not going to cover everything,
19 and in a typical case, when the right holder comes
20 forward and wants to assert his or her rights, there
21 often will be a fair use claim. And I don't see how
22 you could take that away from the courts. The courts
23 have to decide whether it's infringement or not.

24 But there also would be a number of cases
25 in which it's not really disputed that it's an

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1 infringement, and the question I think in our model
2 anyway would be, what is the reasonable licensing fee
3 that ought to be paid.

4 And I think RIAA, from the perspective of
5 a user of orphan works, as we've outlined in our
6 submission, we would support the idea of a very quick
7 simple procedure without all the difficulties of going
8 to federal court, that would allow - would arise at a
9 decision of the reasonable licensing fee is X that we
10 need to pay.

11 And I think that would certainly be
12 beneficial to individual rights holders.

13 Again, there are a lot of cases where this
14 wouldn't apply. And if there is a viable fair use
15 claim, and so forth. But I think there is a - it may
16 be something to consider as an option in some of these
17 cases.

18 MR. SPRIGMAN: I just want to try to
19 summarize how baroque this system may get.

20 So we take a reasonable efforts standard
21 as the first question. What is my reasonable search?
22 I don't know. Maybe courts will add some clarity over
23 time; maybe they won't. Maybe I'm going to have to
24 post my search to some kind of website to tell the
25 world what I did. Posting what I did makes me kind of

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1 uncomfortable, but I'm going to do it I guess, because
2 the standard requires me to do it.

3 Then I make uses of the work, and later,
4 a rights holder comes forward and sues me for a
5 reasonable royalty, so I have to have some judge, I
6 have to rely on some judge or maybe some arbitration
7 panel to make market decisions where a market doesn't
8 exist, which is what the Soviet Union used to do.
9 It's kind of hard to do; that's why they didn't do
10 very well.

11 And then at the end of the day, maybe if
12 the conditions are right, this judge or arbitration
13 panel gives them an injunction thereby destroying the
14 value of investments that might have made in a use.

15 So that's how baroque the system can get.

16 Of you could go completely the other way,
17 and make it - you could take the Occam's Razor
18 approach and make the system formalistic. Either
19 you're in or you're out. Either you indicated as the
20 user that you want all the remedies, or you didn't.

21 That system is very simple. So someone
22 said here, we're after equity. Well, I mean in some
23 great sense we're always after equity.

24 But one rubric for how we think about
25 equity is, we think about efficiency. We think about

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1 what creates social welfare, and then we adjust here
2 and there to try to take account of equity.

3 Most of these orphan works, and I'll
4 repeat this, they are not actively managed properties,
5 because they do not earn money for the owner. That is
6 why they are not actively managed properties.

7 For most of these orphan works, uses that
8 are made of them are not depriving any current owner
9 of any rents. They may in fact create social welfare
10 through a use that for some reason or another finds a
11 market.

12 If that's the social welfare we're looking
13 to create, we should be thinking about cheap ways to
14 create it. And if the system gets too baroque, and
15 like I said before, we are not opposed to a reasonable
16 efforts system that is properly constructed, but a
17 reasonable efforts system that also includes
18 injunctions, and does not include a cap on damages but
19 a market rate is not in our view properly constructed.

20 MR. SLEVEN: In talking about injunction,
21 I understand where we're situated, I'm assuming - I
22 think I said yesterday - I prefer the phrase, orphan
23 use. I assume we are talking about orphan uses. I
24 assume that new uses that begin after the rights
25 holder has emerged are outside the discussion.

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1 Again, there are line drawing problems,
2 but let's leave those aside for the moment.

3 So it goes without saying that after the
4 rights holder has emerged, any new use is outside the
5 orphaned works rubric, and the full panoply of
6 remedies apply.

7 I take David's comment to be an approach
8 within the orphan works rubric. I'm agnostic to it in
9 the circumstances where the orphan use is not embedded
10 in another work of intellectual property.

11 I suggested one approach earlier, allowing
12 an injunction. I don't have a problem with that.
13 Once something is embedded, if you have the risk of an
14 injunction, you are going to make the system much
15 less frequently used by those whose uses would be
16 embedding an orphan work in something else, because
17 you put your entire new work at risk based on a
18 potential equitable decision.

19 I also want to explore what the factors
20 would be. On the irreparable harm side, right now we
21 all assume irreparable in a normal copyright
22 injunction situation. You take that away, either
23 there is no harm at all, because by hypothesis the
24 owner is going to get paid in full by the reasonable
25 life market licensing fee. However, it's imperfect,

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1 but assuming that is the approach adopted, that is
2 fair compensation.

3 Or there is irreparable harm for the same
4 reason there is always irreparable harm assumed in
5 copyright - payment isn't enough. The owner has the
6 right to control his work. I don't know what - how a
7 court is going to think about that side of the
8 equation outside of those two - in between those two
9 certainties.

10 On the user's side, you often - when we're
11 talking about embedded uses - often have the reliance
12 interest in current jurisprudence. Tough on the user.
13 Your reliance interest gets you nowhere if you relied
14 on an infringement.

15 If we take that away, I mean I guess I can
16 imagine a court trying to say, well, your book was out
17 two years. You had a good chance at the market.
18 We'll enjoin you now. It's not a lot of harm to the
19 user.

20 I'm troubled by how a court is going to
21 weigh that, although there are variables depending on
22 how much chance to get recompense that the user has
23 had. So I'm not sure it's workable in the embedded
24 system, in the situation where an orphan work is
25 embedded in another work.

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1 I also want to comment just separate from
2 this, a few people have talked about gaming the
3 system, or the possibility that people will take
4 advantage. It must be remembered: anybody who does
5 not make a reasonable search, however defined, is
6 subject to suit for copyright infringement with the
7 full panoply of copyright remedies.

8 You always have that risk of a court
9 finding you didn't do enough. So I think any user who
10 is worried about an infringement suit - there's
11 nothing you can do about the users who aren't worried
12 about the infringement suits because they've got a
13 website in Kazakhstan. The users who are worried
14 about an infringement suit are going to have to go
15 overboard in being reasonable to try to find the owner
16 to find the injunction, to avoid the statutory
17 damages, maybe attorney's fees, because maybe the work
18 is registered; but to avoid certainly the injunction,
19 which is what I worry about as a publisher, and
20 potentially statutory damages and attorney's fees in
21 additional to full actual damages.

22 MR. CUNARD: Just building on something
23 Paul had said, a lot of people talk about the system.
24 There's actually really isn't a system. What we're
25 really focused on is what happens if somebody actually

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1 sues you in court? Are you able to interpose some set
2 of facts that might limit remedies, and whether the
3 remedies would be cap or reasonable royalty, or would
4 be an injunction or not an injunction. So it's not as
5 if we're talking about getting a license by filing a
6 notice of intent to use or something else at the
7 Copyright Office.

8 So I would say to Brad and Lisa, if you're
9 not planning on - if you're not able to go to court
10 today, where there is a known illustrator, and a known
11 user who is making a blatantly infringing work, this
12 system in quotes won't help you one way or another.
13 You're just not going to be able to go into court.
14 And whether you can get an injunction, can't get an
15 injunction, get a reasonable royalty or get a full set
16 of damages, if the fundamental problem is not being
17 able to go to court, this whole issue of orphaned
18 works is completely irrelevant fundamentally to your
19 concerns.

20 You have lots of completely legitimate
21 concerns, maybe some of which are addressed by Steve's
22 idea that there is some other scheme that might be
23 available to vindicate rights outside of federal
24 courts with respect to the use of orphaned works. But
25 it's kind of irrelevant to people who are not going to

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1 court.

2 And I think the second point is, related
3 to this, which has to do with the relationships that
4 Allan has identified between risk and certainty, if
5 you don't - the whole point of this exercise in some
6 part is to give you more certainty, particularly if
7 you're a noncommercial user, that you have on your
8 fair use.

9 If you don't actually, are not going to
10 benefit from getting more certainty and potentially a
11 more limited set of remedies, then no one is going to
12 essentially rely on orphan work status in picking a
13 work. They will simply say, well, I won't pick that
14 work. I will only pick works for which I either can
15 certainly rely on fair use, or that are in the public
16 domain, or from which I can get clearance.

17 And in those cases, again, I think
18 legitimate rights holders aren't very likely to pursue
19 someone in court.

20 So I think, although it's important to
21 understand the relationship between risk and
22 certainty, if we're trying to create a regime that is
23 more certain today, then we should come down on the
24 side of certainty rather than letting people assess
25 the risks as they do today.

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1 MR. SIGALL: I think now would be a good
2 time for a break. We've gone about an hour and 15
3 minutes. Why don't we take a break until 10:30, and
4 then come back and pick up the discussion, finish this
5 discussion off, and then we can go on to some other
6 topic areas on this issue.

7 Thanks.

8 (Whereupon at 10:17 a.m. the above-
9 mentioned proceeding went off the record, to return on
10 the record at 10:33 a.m.)

11 MR. SIGALL: Okay, I want to give anyone
12 a chance who before the break wanted to say something
13 about what we were discussing and didn't get a chance
14 before the break.

15 Brad.

16 MR. HOLLAND: I just wanted to follow up
17 on something Vic Perlman said yesterday when he said
18 that everybody in this room is talking about something
19 else.

20 I think the subject of orphan works, we
21 probably ought to be specific about what we're talking
22 about. If we're talking about archival works, in
23 legitimate archival situations, I don't think any
24 artist would want to interfere with legitimate
25 archival functions.

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1 If we're talking about direct exploitation
2 of the kind that Jeff was talking about a little while
3 ago, then certainly there should be remedies
4 available, whether it avails the artist to pursue
5 those remedies or not.

6 And there's the third case in which orphan
7 works are used in derivative works. And someone has
8 expressed a concern that the system might not be used
9 to its fullest. And I'm not really sure why that
10 should be a problem.

11 If people don't have sufficient access to
12 orphaned works to use in their own derivative works,
13 then we'd simply see more original work, would we not?
14 I mean wouldn't there be some incentive to force
15 people to take a blank piece of paper and a pencil and
16 create something?

17 MR. SIGALL: The next issue that we'd like
18 to talk about is the question of burden, burden of
19 proof on - in the case where the owner comes up.

20 One of the proposals I think from the
21 Copyright Clearance Initiative at American University
22 was that the orphan work user would only have to show
23 the fact that they made a search and demonstrate and
24 produce their efforts for making a search.

25 But at that point the burden would shift

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1 to the copyright owner to prove whether that search
2 was reasonable or not.

3 And the question is, what are folks
4 reaction to that approach? And what would their
5 suggestions be if they disagree with it? But also a
6 broader thought as to whether adjusting the burdens in
7 these type - these situations could be used as a means
8 to help ameliorate some of the concerns and issues
9 that people raised before the break this morning.

10 So let's spend a little bit of time on the
11 burdens of proof issue, and what people think about
12 that issue.

13 MR. TAFT: This goes back to yesterday's
14 discussion. But if we had good guidelines to begin
15 with as to what a diligent search was, then I think
16 that perhaps the user supplying evidence of using
17 those criteria, using those guidelines, would be a big
18 help toward establishing, yes, this is a diligent
19 search.

20 MR. ADLER: We have responded in our reply
21 comments to the CCI proposal, which we viewed as
22 splitting the burden in terms of initially placing the
23 factual burden on the user to demonstrate what steps
24 were taken. But then their proposal shifted back to
25 the copyright owner the burden of arguing whether or

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1 not those steps met the reasonableness standard under
2 the law.

3 And the concern that we had about that, we
4 think basically that both burdens should be on the
5 user. Otherwise what you has is a situation where the
6 factual account of what was done is almost going to
7 establish a legal presumption that the search is
8 reasonable, because the burden then is on the emergent
9 copyright owner to argue that those steps were not.

10 And under the circumstances - and again,
11 this does assume that there is adequate guidance, that
12 we have really done a good job in getting this
13 threshold step in this entire orphan works process
14 right, which I think is the most important step
15 involved - we took the position that the burdens
16 really shouldn't be separated; that they're really
17 related in an important way; that the user should have
18 to come forward in making the argument.

19 MR. CUNARD: I think to think that this is
20 more of an academic issue than one that would really
21 pose an issue in real litigation. What would really
22 happen is that the user would say, you're suing me for
23 infringement, and your remedies are limited, because
24 here is what I've done.

25 And of course I have to invoke this orphan

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1 works provision that says the remedies are limited
2 where what I've done is reasonable.

3 Inevitably, the plaintiff is going to have
4 to come back and say, what you've done is
5 unreasonable, I think, and then the - in the reply
6 brief, defendant would say, no, not true. And there
7 would be a factual dispute, and the motion for summary
8 judgment wouldn't be granted. And so you'd be at
9 trial and people would be producing evidence as to
10 whether or not what the defendant had done was or
11 wasn't reasonable. And a judge would ultimately make
12 a determination as to whether what was done was
13 reasonable.

14 I mean I think it's important perhaps to
15 get it perfectly clear in the statute, although we
16 tend not to focus on sort of allocating burdens of
17 proof in the statutory language as such. But I think
18 in the real world both sides will have some burden of
19 proving either reasonableness or unreasonableness as
20 the case may be.

21 MS. URBAN: We agreed with Jeff in that
22 proposal, and our proposal on this, after thinking
23 about it.

24 And again it came down to our attempt to
25 front load the certainty issue a little bit, put some

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1 serious burdens on the user to really do a robust
2 search, and do everything they can, and possibly have
3 that buttressed by some guidelines to help them make
4 a robust search.

5 And we talked about all of these
6 registries, and boot strapping possibilities for
7 giving owners every opportunity to be found, and users
8 every opportunity to find them.

9 And then trying to offset that by letting
10 the user know that going into court they would have
11 some kind of a presumption.

12 I agree with Jeff that practically
13 speaking they are going to have to argue for
14 reasonableness, and the copyright holder is going to
15 have to argue for unreasonableness, if they think so.
16 But I actually think that the risk here for a
17 situation such as Dave brought up before the break
18 isn't probably practically as great as some might
19 worry, because it seems clear to me that anytime a
20 user has done a sham search, or anytime a user has
21 engaged in bad faith, that a court would find that
22 that would be unreasonable.

23 And perhaps we just can't, in this
24 process, get anything more set than that.

25 MR. METALITZ: Yes, a couple of points,

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1 first just responding to what Jennifer said.

2 One problem that we had with the way this
3 was formulated by the CCI proposal and some of the
4 others was that it seemed to distinguish between
5 reasonable searches and sham or pretextual searches
6 that are carried out in bad faith.

7 And it seems to me, and I think we had a
8 lot of comments yesterday that would support this,
9 there's probably going to be a big area in between,
10 the area honest incompetence, that I think we have to
11 - and I think this will be very common. Because the
12 skills for searching to try to locate unidentified
13 copyright owners may be better developed in some areas
14 than others

15 And we have to figure out what to do when
16 that comes up. If someone is honestly and in good
17 faith just performed an incompetent search, I don't
18 think that that qualifies as an orphaned work.

19 Now this is not - leaving aside the
20 question of who has the burden of showing that, I just
21 think it - the ultimate question is one whether a
22 reasonably diligent effort was made.

23 I agree also with one of the comments
24 earlier that this problem will be minimized, or some
25 pressure will be taken off this problem, let's say

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1 that, if we have some pretty specific sectoral
2 guidelines worked out, kind of a benchmark that the
3 courts can use in trying to resolve these questions.

4 Actually, Jeff raised a point I hadn't
5 really thought about, which is whether reasonableness
6 is an issue of fact or law. I would think that if we
7 have some good guidelines it might more often become
8 a question of law, and you could see if they had done
9 the things that the guidelines call for.

10 But I think a lot of that does turn on
11 having a good discussion, and trying to build a
12 consensus from sector to sector on what would
13 constitute reasonable diligence.

14 MS. URBAN: I just wanted to respond to
15 that quickly to say that I agree with Steve. One of
16 the things that my constituency was really concerned
17 about was their own level of competence. And they
18 would really - because they - we are copyright
19 holders, and we really do want to find people and pay
20 them.

21 And so we did ask for some manner of
22 guidelines. That would be incredibly helpful. I
23 don't know if you could get to the level of making it
24 a question of law; that would be excellent. But
25 guidelines would I think really help ameliorate the

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1 problem down the line of concerns of people of using
2 the system.

3 MR. ROSENTHAL: The idea of using
4 professionals to do this might be thought about, and
5 the issue of is it reasonable or unreasonable to think
6 that somebody who's not in the business of finding
7 somebody is that a - that may be unreasonable, to
8 think that somebody who doesn't do it could do it.

9 Working on Sound Exchange, on the board of
10 Sound Exchange, after years of looking for recording
11 artists, we still are having an unbelievable problem.

12 And I'm thinking about the users who are
13 sitting out there thinking, okay, I'm going to try and
14 find somebody. It may be totally unreasonable to
15 think that a nonprofessional could actually do it in
16 the first place, and maybe that could be something
17 that triggers a nice presumption, that you use a
18 professional to find somebody at the end of the day.

19 I would feel much better, being the jaded
20 cynical one, I would feel much better if you would
21 have a search done by the same kind of people who
22 usually clear digital samples, for instance, involved
23 in it. And I'm not quite sure how you would put this
24 into regulations or even rules, but it's certainly
25 something to think about in terms of whether in fact

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1 the search can be reasonable or not.

2 Let's have somebody who knows what the
3 heck they're doing.

4 MR. SLEVEN: I'd be very concerned about
5 any kind of rule or comment or anything that suggested
6 that hiring a third party to do this work was
7 necessary to constitute a reasonable search.

8 As I said yesterday, our authors are
9 responsible for this. I would like to think that an
10 historian's or biographer's training includes
11 research, and that they would be good at this. But I
12 would be concerned about saying, no, you have to -
13 they're not search specialists. They are many other
14 things above and beyond researchers in this narrow
15 type of sense.

16 And you'd make it again very difficult for
17 our authors to take advantage of an orphaned work
18 provision if they had to go out of pocket to hire Jay
19 and his new business or any of the other professionals
20 to conduct a search or to get the benefit of orphaned
21 work, orphan use status by virtue - for the search.

22 MR. SPRIGMAN: So I've actually done
23 orphan work searches. For example I was searching for
24 the copyright owner of some articles by Leo Alexander,
25 who was a psychiatrist who was the chief psychological

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1 consultant at the Nuremberg war crimes tribunals, and
2 wrote some very interesting psychological profiles of
3 Nazis.

4 And this is a guy whose work I think is
5 deserving of wider attention. A lot of what he says
6 is potentially relevant to understanding al Qaeda a
7 little bit better.

8 So having done this orphan work search, I
9 can report that it is very expensive to search probate
10 records, and sometimes very difficult to search
11 probate records.

12 And it requires a bit of expertise. And
13 often when - especially when you're looking at older
14 works that are orphan works, there has been transfers,
15 and recordation of transfers is al something that is
16 difficult to deal with.

17 So I think on a practical level this is
18 another issue that is going to have to be dealt with
19 if we take a reasonable efforts approach. A
20 reasonable efforts approach might be quite useful if
21 the reasonable effort required is actually reasonable
22 given the economic value of the use that is foreseen.

23 If a reasonable effort is actually the
24 effort you could make if you could throw infinite
25 resources at the effort, then that effort is never

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1 going to be made.

2 So again, we have a choice between making
3 everybody do searches, and if we are going to do that,
4 we had better be careful about what reasonable search
5 is, or we can make authors reveal some information,
6 much cheaper, much more efficient.

7 If we're not going to do that, then we
8 better be very careful about the scope of what is
9 reasonable.

10 MR. HOLLAND: I think once again Vic
11 Perlman's observation that we're talking about
12 different things is relevant.

13 I would agree with Paul. I would think
14 most historians not only understand the necessity of
15 checking sources, and understand the protocols and the
16 techniques of sourcing their material properly, but
17 the remix artists who are coasting along the Internet
18 looking for things to incorporate into their own work
19 don't have the same training as historians.

20 MR. OAKLEY: So one of the things that
21 librarians is good at is conducting searches. But if
22 we're going to have sort of the burden of proof at the
23 outset of showing that the search we conducted was
24 reasonable, then we need a benchmark. We need to know
25 what the threshold is that meets that reasonableness

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1 test. So that does bring us back perhaps to the
2 sectoral discussions of trying to define what those
3 reasonable searches would be.

4 So at the end, the user is going to claim
5 that what they did was reasonable. And the other side
6 will necessarily have to come forward if they're going
7 to continue the lawsuit and say, no, that's not good
8 enough. The standards that you developed weren't
9 sufficient, and they're going to have to show why.

10 So as a practical matter, that's
11 essentially the same as the CCI proposal. A user
12 comes forward and says, I did what was reasonable. I
13 met the sectoral best practices standard. And the
14 other side is going to have to say, no you didn't and
15 explain why.

16 MS. MURRAY: Yes, I just wanted to point
17 out that in our survey we found out that, again, 85
18 percent of the people who have done searches for
19 copyrighted works had little or not problem finding
20 the - or rarely failed to find the owner of the
21 rights.

22 And another question we asked was whether
23 you incurred any expense in trying to reach the rights
24 holder. And interestingly, 87 percent said no, except
25 for nominal costs, and 13 percent said yes.

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1 We also asked them what their methods
2 were, what kinds of searches they did. And again,
3 this is probably very unique to the writing industry,
4 but most of them, 87 percent, started by contacting
5 the works publisher, and then other publishers of that
6 author.

7 Eight percent did a copyright office
8 search, and 30 percent did online research, and used
9 directly assistance, and sort of self-help methods.

10 And again, they were quite successful in
11 reaching the rights holder.

12 MR. CUNARD: Just picking up on something
13 that Lisa said, there is a difference between textual
14 works and visual images. So in the art historical
15 area, or where you have artists who are not actually
16 creating things from their - necessarily just from
17 their brain and putting it on a blank sheet of paper,
18 but perhaps making collages or repurposing other work,
19 or working with ephemera of some sort, it can be in
20 effect very, very difficult to figure out anything
21 about the work.

22 You have a photograph that has no
23 identifying information. You don't know when it was
24 taken, who took it, maybe even what it is, other than
25 maybe some anonymous soldier marching off to war.

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1 So what are you supposed to do? People do
2 what they can, but frankly, there isn't a lot of
3 purchase. There just isn't a lot of ways in which to
4 sort of tackle the problem.

5 And this is not merely academic, although
6 it occurs a lot in academic environments. You have
7 literally hundreds and hundreds of people who are
8 writing Ph.D. dissertations every year who are not
9 only art historians, who are historians of American
10 history, who are in many, many other fields,
11 sociology, economic, who are working with orphan
12 works.

13 They are not experienced searchers. They
14 are not yet fully trained historians. And so telling
15 them in some way, shape or form what is a reasonable
16 search is I think an important thing, because
17 frequently they will be taking that document, they
18 will be going to a publisher, and they'll say, I'd
19 like to see if this can be published.

20 And then of course as Paul has pointed
21 out, the onus is on them to have done the right
22 search. So some measure of guidance as to what's
23 reasonable is important. If the standard is, you have
24 to have thrown an untold amount of money at it, and
25 spent five years on it, these works aren't going to

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1 get published and we'll be back sort of where we are
2 today.

3 MR. SIGALL: Let me ask a related
4 question, and it actually might be restating a
5 question I asked yesterday that I don't think anyone
6 precisely answered.

7 But I'm thinking in the practical realm of
8 how these cases are going to come up in a reasonable
9 efforts system, which is that you will have post hoc,
10 looking backward, litigation.

11 And I think if we talk about people who
12 maybe aren't out to abuse the system, but who others
13 find themselves stuck with an infringement litigation
14 in front of them, they will probably assert in
15 litigation that they did a reasonable search, whether
16 they did or not.

17 And one of the questions related to what
18 I asked yesterday is, when do you determine what a
19 reasonable search is? At what point are you looking
20 at? Before the use? During the use? In the middle
21 of the use? All the way up to the point of
22 litigation?

23 How do you fix that moment in time where
24 the court would be determining reasonableness?

25 And the precise question I asked yesterday

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1 that I don't think was answered is, what happens when
2 at that precise moment a reasonable search was done,
3 but then for whatever reasons, it could be shown that
4 the person receive information about the owner after
5 that fact, after that point in time, does that affect
6 the analysis?

7 And in thinking about this in this topic,
8 it's really a question of, how does the court sort all
9 of this out? Because I think it'll always - it'll in
10 most cases be presented to them all in a lump, that I
11 did a reasonable search, and then it'll be trying to
12 sort out when that occurred, and how that was changed,
13 or not changed, by subsequent information.

14 So I've got Paul and Chris and Jay and
15 Keith.

16 MR. SLEVEN: I think conceptually the
17 point in time as of which you have to have completed
18 a reasonable search is the time when I'll call it
19 significant reliance on the ability to use the work
20 kicks in.

21 With us, I guess it would be around when
22 second pass pages are circulated. Even that is a
23 little late. I'd prefer to have it when the book is
24 submitted to copyediting.

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1 But at some point, and I know you're not
2 going to write a reg that covers the book industry.
3 But that is the concept.

4 At some point in the making of a movie,
5 you're done. As Mike Less (phonetic) used to say,
6 pencils down.

7 There is a pencils down point in the
8 creation or use of any work. And I would think that
9 would have to be the point.

10 Now how do you figure that out? How do
11 you say that? I don't exactly know, because it
12 differs from use to use.

13 I would think after that point, an
14 emerging rights owner should be in the orphan works
15 rubric. Otherwise you're in a situation where we've
16 already printed X number of copies, and they're going
17 to the bookstores next week, or a number of prints of
18 the movie have been made and they're about to go out,
19 and it's an injunction at the worst time.

20 So how do you fix that? Maybe, I mean
21 fortunately, in this litigation situation, you are
22 looking retroactively at when the user began to rely,
23 began to print, began to duplicate whatever it is. So

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1 the user presumably has evidence of the timeframe of
2 their actions. So you can go back and see when they
3 relied.

4 How do you define in legislation what the
5 pencils-down point is I don't have a good answer for
6 you. I apologize.

7 MR. ROSENTHAL: There we go. Maybe we
8 could look at trademark practice. I don't know of any
9 competent IP attorney who wouldn't say, hey before you
10 use the mark, do a Thompson & Thompson search.

11 And maybe you kind of have to work it up
12 where you get to that point, and I think you were
13 alluding to this, you have to do some preproduction
14 work to get to the point where you really even know
15 you want to use the orphan work.

16 Now granted that is probably viable, but
17 certainly before publication. I mean you've got to go
18 down the road of engaging in a search.

19 And again, I think maybe trademark law is
20 something to look at, trademark practice. I can't
21 conceive of anybody using - at least somebody who I
22 would advise, using a trademark without engaging a
23 professional search company. And it's always got to

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1 be before you use it.

2 MR. KUPFERSCHMID: Yes, we've talked a
3 little bit about worrying concerns about abuse of the
4 system. I think the easiest thing that could be done
5 is to make sure that the search occurs before the use.
6 If we want to define some line before that, that's a
7 different story. But if you really want to open this
8 thing up to abuse, and defenses that really shouldn't
9 be made here, then you could open it up to something
10 past use, which we do not want to do. I mean that
11 would create a whole bunch of problems.

12 In addition, forgetting about just sort of
13 abuse, in other words, people are just infringing the
14 works to begin with, think about what we're trying to
15 accomplish here.

16 What we're trying to do is make these
17 works available and disseminated to the public. If
18 somebody is going to go ahead and use a work and not
19 do any searching of it anyway, they've basically
20 rolled the dice and taken the chance that they may or
21 may not be infringing to begin with. So it's not that
22 group of people I think we need to address this with
23 the approach we're suggesting, limitation and

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1 remedies. I don't think it's that group of people
2 that we need to be concerned about here, because
3 they're willing to take a chance and make that work
4 available in some form or another, and not even
5 worrying about looking for who the owner is, because
6 it's purposeful, or was as Steve said, honest
7 incompetence, or whatever.

8 So I think it quite clearly, any search
9 that takes place, it has to go to absolutely be before
10 the use of the work commences. Otherwise you really
11 run the risk of abuse of the system. And also we're
12 addressing a problem that we don't need to address
13 here.

14 MR. SPRIGMAN: I think that current law,
15 unless you changed it specifically, and whatever
16 orphan works arrangement is enacted, would suggest
17 that you would have to make the search before
18 undertaking any activity that treads upon any of the
19 exclusive rights granted to the copyright owner.

20 So I think the reasonable search would
21 have to be done before reproduction or distribution or
22 the creation of a derivative work. That would be,
23 absent some specific direction otherwise, where I

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1 think courts would go, in assessing this.

2 So the second question is really
3 interesting. So what happens if you do a reasonable
4 search, however that is defined. And then later,
5 which I can easily imagine happening, you learning
6 something, because a reasonable search isn't
7 necessarily a perfect search, right? You learn
8 something that later would tell you who is the rights
9 holder.

10 Again, we're running up against the risk
11 of uncertainty that becomes paralyzing, uncertainty
12 that prevents us from realizing the benefits of the
13 uses of works that are otherwise orphaned, otherwise
14 not used.

15 I think we need to do a reasonable search
16 that is going to have to immunize you going forward,
17 and that the reasonable search, once discharged, is
18 enough.

19 Now, again, I'm not saying that a
20 subsequent user doesn't have to do their own search,
21 and if facts change, what constitutes a reasonable
22 search might change, because information about
23 someone's identity might become available such that a

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1 reasonable search would pick it up. So an orphan work
2 for person A may no longer be an orphan work for
3 person B, who makes a use somewhat later.

4 And in addition, you know, we talked about
5 reclamation, and I think this is related to
6 reclamation. We should encourage authors who detect
7 uses of their work to make themselves known, and the
8 voluntary registry the Copyright Office has now is a
9 tool.

10 MR. METALITZ: I have to disagree with
11 Chris' last point. I think we have to draw a
12 distinction between a duty to search, and a duty to
13 act on knowledge that comes to you.

14 I agree that at some point you've done
15 your reasonable search, and you haven't found, located
16 the person, that's fine. It may be an orphan work.

17 But then if information comes to you, not
18 because you searched again but because it comes to you
19 because it identifies and locates the copyright owner
20 - I mean the whole purpose of this, assuming we're not
21 going down the road of formalism, the purpose of this
22 is not to go through the formality of the search or
23 the steps of the search, it's to see, can you locate

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1 or identify the copyright owner.

2 And if you can, even if not as a result of
3 your search, I don't think from that point forward it
4 could be considered as being in orphan work status.

5 I would also say in terms of the other
6 question you raise, Jule, it certainly would help the
7 court in that situation I think if a user had posted
8 a notice of intent to use at a certain date and
9 explain what he or she had done to try to identify and
10 locate the copyright owner as of that date.

11 Then you'd at least have something, a
12 statement from the defendant at a fixed point in time
13 -- you could figure out whether that was before or
14 after pencils down - of what they had done. You could
15 then try and address the reasonableness of what had
16 been done.

17 So even if it were not a mandatory
18 requirement, perhaps there would be ways to encourage
19 users to do this.

20 And finally on the question of
21 professionals which Jay raised, I would agree that you
22 couldn't really have a per se rule that you have to
23 hire a professional to do this, but on the other hand

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1 there certainly are circumstances in which users who
2 are not skilled may not be able to achieve a
3 reasonable search unless they do hire a professional.

4 Again, if we're trying to encourage people
5 to undertake good searches to try to identify and
6 locate copyright owners, and if our goal, or one of
7 our goals, is to try to bring together owners and
8 users in a way so that they can try to work out a deal
9 on the use of this material, I don't think there is
10 anything wrong with encouraging people to use
11 professionals in trying to make people aware of the
12 fact that there are professionals in this area.

13 So I don't think that's a downside of
14 this. Again, I don't think it could possibly be a per
15 se rule. But I think if, as a result of these
16 changes, there were more work for copyright searchers
17 and clearance of permission people, people with those
18 skills, and if more people went into that business, I
19 think that might be a sign of success.

20 MR. STEVEN: I wanted to respond to
21 something Steve said about the notice of intent to
22 use.

23 I had thought it was being conceptualized

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1 yesterday as a step in the search process to try and
2 draw out the owner. I don't think it's sensible to
3 require that, but to instead have a notice after the
4 fact, well, you're done. Are you now requiring a
5 period of time after you've done your search and
6 before you finalize to allow that? That has the delay
7 problem we talked about, talked about yesterday.

8 That's all, thanks.

9 MR. SPRIGMAN: We're not going down the
10 road of formalism, maybe. But the road of formalism
11 is straight, level, and smoothly paved, okay, compared
12 to the idea that we are going to assess
13 reasonableness.

14 And then if I heard Paul right, and Steve
15 as well, at some point we're going to have an
16 assessment of whether somebody who found out something
17 about an author after conducting a reasonable search
18 sufficiently relied, invested sufficient resources in
19 a use such that an injunction which is assessed on its
20 common law rules shouldn't be issued.

21 Now again, if we sat here, I'm sure we're
22 all smart enough to build an incredibly complicated
23 machine like say the copyright law to cover orphan

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1 works. The difference is that the copyright law is
2 supposed to incent the creation of works and then give
3 exclusive rights so that these works can be profited
4 from without the danger of free riding.

5 And that works very well for works with
6 significant value. The copyright law is a big,
7 complicated, expensive machine, but that works very
8 well for works that are very valuable.

9 It doesn't work very well at this point
10 for works that lack significant commercial value. To
11 add a kind of epicycle to the very complicated system
12 - an obscure reference - but to add another
13 complicated system on top, all right, and then say
14 that we're going to impose this complicated costly
15 system to free up orphan works is basically just going
16 to be futile.

17 It has to be a cheap system, again, cheap,
18 simple, formal - that's typically how we do these
19 things. If we don't want to go formal because we have
20 some deep opposition to the idea of authors having to
21 reveal information, then fine, we can do a reasonable
22 efforts proposal, but we have to be very careful to
23 make it quick, certain and cheap.

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1 MS. URBAN: So in our proposal, and I
2 think similarly in Kay's Authors Guild proposal, she
3 can correct me, we had suggested what we discussed
4 yesterday, the idea that you have an affirmation of
5 good faith, and perhaps you fill out a form that in
6 some level of detail describes your efforts.

7 Presumably that would be dated, and then
8 presumably there would be a record of that search. It
9 seems to me that that would be a pretty easy date from
10 which to determine when the reasonable search was
11 done, and when the fees commence.

12 MR. CUNARD: I think that whatever the
13 merits of that approach might be, I certainly agree
14 with almost everything that has been said with regard
15 to the date - the date has to be a date prior to
16 publication or the date of the infringing use. That
17 seems to me sensible. You can't sort of continue to
18 do the search in what I would regard as a pretextual
19 way in preparation for litigation.

20 I think the more complicated question is
21 the one that you raise, which is, what happens if
22 after the reasonable search is conducted the rightful
23 copyright holder comes forward?

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1 Clearly, if the rightful copyright holder
2 comes forward the day after you sign the form, I don't
3 think formalism should go so far as to say well, you
4 can ignore that.

5 If on the other hand the rightful
6 copyright owner comes forward on the day that your
7 50,000 books are on the shipping dock, where you've
8 made your decision to include this particular image a
9 book, then I think it's more problematic to say, well,
10 we're going to recall all the books and rip out the
11 pages just because we now know who the copyright owner
12 is, and gee, the whole purpose of this was to get
13 copyright owners coming together with users.

14 So I think again it may not be appropriate
15 to be overly formal with respect to this. But
16 certainly if you have actual knowledge,
17 notwithstanding what your search is, prior to the time
18 that you've spent a lot of money, or prior to the time
19 of pencils down, you certainly I think need to respond
20 to that.

21 MR. HOLLAND: There has been a lot of
22 attention, or there is a lot of talk about the
23 certainty that the use would have in making use of an

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1 orphaned work. But what I'm concerned about is the
2 certainty that the rights holder has that his work was
3 protected under copyright law.

4 And I'm not sure why the prejudice should
5 shift in favor of the user, since the copyright holder
6 was under the impression that his work was protected.

7 And as I said yesterday, once this law is
8 changed, a lot of artists will never know that the law
9 has changed. They will think that their work has been
10 protected.

11 I also pointed out yesterday that even if
12 you find the rights holder in the cases especially in
13 a lot of pre-1978 work, and in a lot of work going
14 forward, because under these new work for hire
15 agreements that artists have to sign in order to work
16 for Conde Nast, or to do a Time cover or other
17 situations, you may be able to find that a publishing
18 company has forfeited its rights. You've located that
19 the work has been abandoned, but that hasn't returned
20 the rights to the author.

21 And in that situation, shouldn't there be
22 some provision that where you found that the - that
23 the publishing company has forfeited rights, that the

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1 work has been orphaned, shouldn't there be an
2 opportunity for the author of that work or their
3 estate to reclaim rights? Otherwise you're taking
4 away rights from the author on two occasions, once
5 when he's forced to sign away his rights in return for
6 work, and second, when the work is given to the public
7 because the people who bought his work didn't care
8 enough about it to maintain the copyright.

9 I would argue that if you invited a lot of
10 time and work into the work that you do, and as a
11 condition of being paid for it you sign your rights
12 away, you may have signed those rights away under a
13 form of duress, and that that then becomes a legal
14 justification for the author's losing his rights to
15 the public domain.

16 MR. ROSENTHAL: Let me respond to what you
17 just said, Brad. I think whatever else the harms that
18 may come to artists from inequitable bargaining power
19 with large publishers, if the artist has signed the
20 rights away to a Conde Nast or a Time-Warner, and the
21 work of art was published in those journals, it is
22 much, much less likely to be an orphaned work than if
23 the rights had reverted, because everyone knows where
24 to find Conde Nast and Time.

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1 So I think you have other problems that
2 you have articulated, but orphaned work law isn't
3 exacerbating it in those cases.

4 MR. HOLLAND: Yes, I understand, but we're
5 talking about years in to the future. I have a
6 specific example of some work that I did years ago for
7 Bankers Trust in which they bought all the rights, for
8 a good deal of money, and it was worth it to me at the
9 time to make that transaction.

10 Bankers Trust has been bought by
11 DeutscheBank. And in a couple of cases I know of
12 specific infringements that I informed DeutscheBank
13 about. They didn't have enough concern in protecting
14 that copyright that the work has now gone out.

15 If they didn't want it, I'd have been
16 happy to have taken the rights back, and I would have
17 protected my copyrights. But I have no control now
18 over the work that DeutscheBank has essentially
19 forfeited.

20 MR. ROSENTHAL: Following on a point that
21 Steve just made, I think the issue of certainly
22 publication or prepublication is the moment where you
23 have to determine whether a search was reasonable, I'm

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1 wondering if there shouldn't be an ongoing
2 responsibility as well, and the thought of requiring
3 some kind of a notice that is placed on the work, that
4 there is an orphan work incorporated within this new
5 derivative work might be something to think about,
6 because some people already do that. Publishers do
7 that with certain copyrights that they can't clear.
8 They say, we can't clear this. If anybody knows who
9 owns this, please contact us. I have seen that
10 numerous times in books, and it might be something
11 again to make everybody deal in good faith. Just a
12 thought.

13 MR. SIGALL: We got into some of those
14 issues yesterday afternoon. So if nobody has anything
15 further on this issue, I'd like to turn to another one
16 that Matt mentioned, which was, availability of
17 statutory damages or attorneys' fees.

18 It seems that there is close to a
19 consensus that in most cases those remedies are not
20 Available. Those seem to be the remedies that most
21 people want to limit in the orphan work situation.

22 Those are the ones that give users the
23 most concern about going ahead and using a work in
24 this situation.

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1 A question I have is, is there any room
2 for those kinds of remedies to address in a reasonable
3 efforts search system, to address abuse of the system
4 either by owners or who purport to be owners of
5 orphaned works and show up later and say that was my
6 work when in fact it wasn't; or users who purport to
7 say they've done a reasonable search and it's just a
8 pretext and there's really no evidence of that search
9 at all.

10 And in thinking about that question, think
11 about whether existing law addresses those concerns
12 now without change, or whether we have to change the
13 law with request to statutory damages and attorneys'
14 fees to address those questions.

15 MR. CUNARD: So CCI and a number of other
16 organizations obviously supported the view that there
17 should be a cap and there should be no statutory
18 damages and attorneys' fees.

19 But again, the way you formulated the
20 question is a big puzzling. In the absence of being
21 able to prove that there's been a reasonable search,
22 and the plaintiff not being able to prove that it is
23 unreasonable, the full panoply of remedies is
24 available, including statutory damages if appropriate
25 formalities have been complied with.

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1 So I think we're only talking about a
2 situation here where the search is reasonable, and
3 then - so it was presumably done in good faith, and it
4 was done competently. So then the question is, should
5 there be statutory damages? In mean in some sense the
6 cap that we proposed is a kind of statutory damage
7 that replaces the statutory damage provisions that are
8 in the current copyright act.

9 But if the full availability of statutory
10 damages is available, and you've got attorneys' fees
11 and you can get an injunction, even if you have
12 undergone a reasonable effort to search why are we
13 here? What is the point?

14 It will be a dead letter provision of the
15 statute, as far as I'm concerned.

16 MR. SIGALL: From the user's perspective,
17 the question might be also was it from a false owner
18 claim perspective. And maybe again the answer might
19 be that the current law deals with the situation, but
20 let me hear what you think.

21 MR. METALITZ: Jules, as I understood your
22 question, I think that the - I agree with Jeff that if
23 it's within the orphaned works rubric, we're talking
24 about what the remedy would be. Because ordinarily
25 that would not include statutory damages and

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1 attorneys' fees.

2 But you raised a question of where there
3 has been a bad faith claim of a reasonable search for
4 example. And the problem is, I guess - I mean a lot
5 of these works are not going to have been registered,
6 and therefore, the attorneys' fees and statutory
7 damages are not available, and so the question
8 becomes, would actual damages, and I guess an
9 injunction, be an adequate remedy for those cases?

10 Is that the question?

11 MR. SIGALL: That's part of it. I'm just
12 trying to explore if there is any area where
13 attorneys' fees or statutory damages might be useful
14 in the situation to either guard against abuse on
15 either side of the issue.

16 MR. METALITZ: The RAA position is that
17 there should be some additional remedies in that
18 circumstance. I don't know whether they would take
19 the form of statutory damages or attorneys' fees. I
20 think the analogy we look at is Section 512, where
21 there are penalties for material misrepresentation in
22 the notice of take down process or the put back
23 process for online liability.

24 Similarly here, either someone who with
25 the requisite bad intent falsely claims that they had

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1 made a reasonable search before making the use, or
2 someone who after the use is made, and perhaps if
3 there is a notice on the work or in some other way
4 it's come to their attention, in any case they falsely
5 step forward and say, I'm really the author.

6 I think there probably should be some
7 additional penalties in those circumstances. I'm not
8 sure whether it makes sense for those to take the form
9 at least in the first instance, they could take the
10 form of statutory damages and attorneys' fees. I'm
11 not sure whether that is the right approach. Or maybe
12 partly that's an approach, where there would be some
13 type of penalty that would be imposed.

14 But I do think we need some type of
15 deterrent for misconduct in the system, and one that
16 doesn't impact the user who in good faith did
17 something, but who goes after the people that have
18 abused the situation.

19 MR. SLEVEN: I have been assuming that the
20 structure of the orphaned works statute that we're
21 talking about would be analogous to 412. It would
22 say, under these circumstances, whatever they may be,
23 these remedies are not available to a copyright owner
24 in an infringement suit.

25 If we adhere to that analogy, and do not

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1 make any other changes, then attorneys' fees would be
2 available to a defendant under the same circumstances
3 as they are now, and I don't see any reason to change
4 that one way or the other.

5 MR. ROSENTHAL: Certainly from the abuse
6 standpoint of the owner, an owner stepping up and
7 making a false claim, I agree. I think attorneys'
8 fees should be available for the user, because that's
9 bad faith.

10 I assume that other than the situation
11 where a copyright owner intentionally hides, which is
12 a hard thing to do, I think, or to prove even, other
13 than that I cannot conceive of a copyright owner being
14 - a legitimate copyright owner not being awarded
15 attorneys' fees. You stop the process of legitimate
16 copyright owners, or at least disincentivize the
17 process of them stepping forward.

18 This is part of the license. The user
19 wants to stop out and use something. They can't find
20 the owner. The owner is really out there. And they
21 step forward. This is the cost of the use. At least
22 attorneys' fees should be paid. I'm still out on
23 statutory damages, that concept. But attorneys' fees
24 should certainly be part of that process.

25 MS. MURRAY: Well, attorneys' fees in most

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1 cases would probably vastly exceed the reasonable
2 license, never mind a cap. So we favor the
3 elimination of attorneys' fees unless there is a case
4 of abuse.

5 And just would like to be on the record as
6 supporting the AAP's position that in cases where
7 there is a user who made a reasonably diligent search
8 then refused unfairly or in bad faith to pay a
9 reasonable license fee, then the full panoply, at
10 least attorneys' fees and statutory damages, if
11 otherwise appropriate, because the use of the owner,
12 the original copyright owner at least registered the
13 work timely, should be available.

14 MR. SPRIGMAN: The reason why Fritz'
15 proposal here is kind of on the horn of a dilemma, if
16 you include attorneys' fees as something a plaintiff,
17 an owner who steps forward, can recover in an orphan
18 works category lawsuit, then you destroy the ability
19 of the reasonable efforts proposal to actually
20 facilitate most of the uses of orphan works that
21 anyone would want to make.

22 It's only the major commercial uses that
23 are going to go forward. And really that's only a
24 small part of what we're talking about.

25 If on the other hand you deny attorneys'

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1 fees to plaintiffs, and I think frankly very few
2 lawsuits are every going to be brought, because under
3 any market licensing scheme, it's going to cost more
4 to determine, to have your lawyer make an argument
5 about what the market rate should be than what you're
6 eventually going to get.

7 So you're not going to have lawsuits. So
8 this kind of reasonable effort system either does
9 nothing at all for the use of - or very little for the
10 use of orphaned works, or it does nothing at all for
11 owners who want to get paid.

12 So again, why not instead of this system
13 of lawsuits, have a different system of liability
14 rule? Now however you determine what a orphaned work
15 is, whether you do it formalistically or through some
16 reasonable efforts system, you could have that system
17 for determining orphaned works result in a license, a
18 default license I call it, a kind of statutory payment
19 that is due, and that is claimable.

20 And that is a much cheaper system than
21 having a judge sift through the cost of a market
22 license, certainly. And the attorneys' fees problem
23 I think makes the hope of litigation pretty faint.

24 MR. ATTAWAY: I think I found something
25 that I can agree with Chris on.

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1 I think the best way to prevent abuses on
2 the users side is to require reasonable compensation
3 if the true owner shows up.

4 Without that ability, users are going to
5 be tempted to engage, or to not engage in, due
6 diligent searches, knowing that if the copyright owner
7 does show up, that he's going to have to go to court,
8 go through the expense of trying to prove lack of due
9 diligence, and probably many copyright owners just
10 won't have the resources to do that.

11 But if the user knows that at best it,
12 from his perspective, if the copyright owner shows up,
13 he's going to have to pay reasonable compensation, his
14 incentive to try to scam the system I think is
15 reduced.

16 MR. ADLER: But I think the continuation
17 of that thought is whether you run into the situation
18 where the user decides not to pay, and essentially
19 says, it's up to you now, copyright owner, you either
20 come to court after me or I just don't pay.

21 And in those circumstances, unless you
22 have attorneys' fees, I can't imagine what the
23 incentive would be for the copyright owner to be able
24 to make that exchange, the reasonable search or the
25 reasonable licensing fee when the copyright owner

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1 emerges, actually work.

2 And again, as we keep saying on almost
3 every one of these issues, the premise of this is
4 going to be that there will be very few cases where a
5 copyright owner is expected to emerge, so that this
6 issue shouldn't even arise.

7 MR. SPRIGMAN: The issue that Allan just
8 raised is easy to address. You could probably
9 incentivize users by telling them that, look, you can
10 pay a statutory license fee, a default license. And
11 I would set the fee quite low, because the point I
12 make before I think holds, which is that the market
13 value of these works is measured by their abandonment,
14 in many instances, is low.

15 So you make the payment, or if you don't
16 make the payment, and this person surfaces and has to
17 come after you in court, you are not entitled to
18 shelter within the orphan works system. You are
19 exposed to the full measure of damages.

20 So any but a very reckless person is going
21 to do what they're supposed to do. Now, again, you
22 could incentivize misbehavior on the owner part,
23 fraudulent claims of ownership, by the same kind of
24 penalties you'd have for example for a fraudulent
25 registration. And that's not - I don't think that is

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1 a complicated matter either.

2 So again, if we're looking to simplify
3 this, we should get it out of court.

4 MR. CUNARD: I think Allan and Fritz'
5 point which tied us to the reasonable license fee
6 approach that they support is instructive because if
7 after the fact a copyright owner emerges to say, well,
8 the reasonable license fee is \$30,000 for the use of
9 that photo in your book. And the way I calculate that
10 is because my grandfather sold a comparable painting
11 in 1945 for \$3,000, and we have to take account of
12 inflation and the like, and the user says, what, ho,
13 I'm only planning on making \$2,000 in profit, or
14 \$5,000 in profit from the sale of this entire book.
15 And the author who is supposed to indemnify doesn't
16 have \$30,000 to their name. And so the user and the
17 author says, no, \$30,000 is not a reasonable approach.

18 As I understand the AAP proposal, that
19 exposes the defendant - and remember in this situation
20 we're only talking about the reasonable, good faith,
21 due diligence activity, the rare case, not where
22 somebody is actually - you potentially are exposed to
23 attorneys' fees in that circumstance.

24 Or there is a litigation over the question
25 of whether or not \$30,000 is or isn't a reasonable

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1 number for purposes of determining whether or not
2 attorneys' fees should be paid.

3 And frankly a system so baroque, so filled
4 with epicycles, is realistically not going to be used.

5 MR. ADLER: Can I just respond to that?

6 Again, I think that the operating
7 principle here is that the risk of what Jeff has
8 outlined occurring is mightily discounted by the
9 probability of the situation even arising.

10 MR. CUNARD: This whole conversation is
11 about that, it's not about the 99 percent of
12 situations where it doesn't occur. The whole purpose
13 of this topic is to focus on that one situation. It's
14 irrelevant if no one comes forward, but we're not
15 talking about a future where no one is coming forward.

16 So this topic is focused on what is the
17 remedy when the plaintiff comes to court and sues the
18 user?

19 MR. ADLER: But the problem is that in
20 order to avoid that for example, in Chris' comments,
21 we have to again return to his notion of the rather
22 nominal licensing fee that is the only thing that will
23 be available to the copyright owner.

24 And I think we discussed yesterday at
25 great length why in many instances that is going to be

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1 wholly inequitable.

2 MR. SLEVEN: Let me address Jeff's
3 scenario. I agree with Allan, it's going to be a very
4 rare one, but I agree with Jeff, it's not going to be
5 an unheard of one.

6 Somebody will come forward to me and say,
7 you included my photo in your book, and a reasonable
8 licensing fee is \$30,000.

9 Now, I have to sit here and say, if, A, if
10 a fees proposal is adopted, if there is attorneys'
11 fees for unreasonable refusal to pay, I have to say,
12 okay, I have to be in the realm of reason. I don't
13 have to agree with 30 grand. I have to be in the
14 realm of reasonable.

15 And we pay between \$5 and \$1,500 per photo
16 for the photos in this book, and that's a normal
17 range, let's assume for the hypothesis, in this type
18 of book.

19 I'm going to offer this person \$2,000 so
20 there is no debate whether I've been reasonable, and
21 something I can afford the extra \$500 because I didn't
22 pay for the other orphaned works because the owner
23 didn't come forward.

24 I think, our attorneys' fees proposal is
25 not intended to award attorneys' fees when the user

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1 has acted - has made whether you call it reasonable or
2 good faith offer of market value, even if the court
3 says, this is the Picasso of photos, it's worth a lot
4 more, if you're acted reasonably, the idea is not for
5 attorneys' fees to be awarded.

6 The scenario in which we proposed
7 attorneys' fees is, the owner comes forward and says,
8 I want money. And we say, you know something, you
9 can't afford to sue us, ha ha ha, we're not going to
10 offer \$2,000. Then the only way to avoid that
11 scenario is to allow attorneys' fees for an owner who
12 has - the owner's effort not by the way attorneys'
13 fees in the fight over whether it was an orphaned use
14 or anything else, attorneys' fees to recover the
15 reasonable license fee once it was established that it
16 was an orphaned use.

17 If it's not an orphaned use, full
18 attorneys' fees are available already by definition.
19 It's outside the orphan works exception. And I think
20 - I see David looking very puzzled - courts do this
21 all the time. They say you can get attorneys' fees on
22 issues one, three and five, not on issues two and
23 four. It's a standard show me your time sheets and
24 let's assess how much time you spent on the issues for
25 which attorneys' fees are awardable.

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1 MR. SIGALL: Let me just get a point of
2 clarification from Paul and maybe Allan.

3 What you just described sounded like a
4 system not of owner makes a reasonable offer that is
5 denied by user, but the key point is that the user
6 makes a reasonable offer to pay.

7 And I guess my next question is, is there
8 any difference in that? And what do others think
9 about looking at it that way, that the burden is on
10 the user to make a reasonable offer.

11 MR. SLEVEN: It proceeds from the
12 hypothesis that a demand and an offer can both be
13 reasonable even if they differ. And in that scenario,
14 there's no attorneys' fees, there is just a
15 negotiation and eventually a payment.

16 MR. HOLLAND: In response to Christopher
17 again, I think we should note that the value of this
18 work is not determined by the fact that it's been
19 abandoned.

20 I have not abandoned my work simply
21 because somebody can't find me. I know a lot of
22 people who came into the illustration business, earned
23 a living at it for five, 10 years, in some cases did
24 incredibly good work, but couldn't make enough of a
25 living at it that when they turned 30 or 35 and they

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1 wanted to have a family, they took a real job and
2 gradually drifted out of the business.

3 They haven't abandoned their copyrights;
4 they've simply stopped being artists. And because
5 they've stopped being artists and moved to another
6 city, they may not be locatable anymore. But their
7 work hasn't been abandoned. It's just - it's their
8 property, and nobody should be allowed to take that
9 property from them anymore than you should take my
10 banjo away from me because I don't play it any longer,
11 and because somebody out there might want a banjo and
12 could put it to better use than I could.

13 MR. SPRIGMAN: I want your banjo.

14 MR. HOLLAND: I am reluctant to wade into
15 the business of attorneys' fees surrounded by
16 attorneys. But I would think first of all that except
17 in cases of false claims of ownership, attorneys' fees
18 should not be available to users who have made
19 insufficient searches, or it would be a disincentive
20 to artists, authors of any kind, to try to reclaim
21 their rights.

22 On the other hand if you made attorneys'
23 fees available to authors, it might be an incentive to
24 users to make a more diligent search.

25 MR. KUPFERSCHMID: I just want to follow

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1 up on what Paul was saying, and Jule, your follow up
2 question to Paul and Allan, and to be clear, and to
3 reiterate what the comments that AAP and SIA and AAUP
4 filed. It talks about attorneys' fees and court costs
5 being incurred as a result of quote unquote bad faith
6 on the part of the user.

7 So that's really what we're talking about
8 here is where a user just says, you know what, you're
9 not going to sue me, I'm not paying you anything. And
10 there has got to be some other leverage in that case
11 if the owner has to say, wait a minute, this guy is
12 just being totally unreasonable, and because the fee
13 is so low, that otherwise the reasonable licensing fee
14 here would be so low that there is really no other
15 alternative.

16 And it's really in cases of bad faith,
17 there has got to be some avenue here, and that's what
18 the comments here are suggesting; not the case where
19 the user says, well, I'll give you X amount, and
20 that's a lot lower than what the owner has suggested,
21 and there is some kind of reasonable negotiation going
22 on.

23 MR. SPRIGMAN: I think we'd all agree that
24 it would be bad if we assigned an orphan works system
25 that did no useful work at the end of the day, right?

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1 And the reason all these comments are
2 important is, they get to this issue of damages and
3 attorneys' fees and presumptions that make litigation
4 either very expensive or relatively inexpensive,
5 right?

6 And the reason you care about how
7 expensive it is to settle these issues of the use of
8 an orphan work is, if the typical use of an orphan
9 work is not going to make someone very much money, if
10 the underlying work is not that valuable, then very
11 few people are going to be willing to spend
12 significant resources to make a use.

13 So the Copyright Office collects data that
14 suggests that in fact we have something to worry about
15 here; that in fact the underlying works are not
16 typically all that valuable.

17 So here's the data. The Copyright Office
18 collects registration data every year, and if you
19 graph that registration data, one thing you notice is
20 that it's been rising from 1910 to 1991, it rose and
21 rose and rose. The economy grew. People created more
22 and more works. The population grew. The expressive
23 output of the country grew. And the Copyright Office
24 gets more and more registrations as a result. That
25 makes a ton of sense.

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1 Okay, then suddenly in 1991 the number of
2 registrations begins to fall, and it keeps falling,
3 and by 2000 registrations have declined about 20
4 percent from their peak in 1991.

5 Now we didn't get less creative after '91.
6 So how do you explain this? The population continued
7 to grow. The economy god knows continued to grow.
8 Why are we registering fewer works?

9 And the reason I think is because the
10 copyright office increased its fee for registration
11 from \$10 to \$20 in 1991, and then increased it again
12 to \$30 in 2000.

13 And this is like a little natural
14 experiment in economic terms, and what this experiment
15 suggests is that users, I'm sorry rights owners, make
16 decisions, authors make decisions whether to register
17 or not.

18 And a work that may be worth registering
19 at \$10 is not worth registering at \$20, because that
20 \$10 delta exceeds the net expected value to put it in
21 terms that relatively few people would use, but that's
22 what they're thinking, of the work.

23 So again if the central point here is that
24 the works we are seeking to free up are works that
25 don't produce much economic value in their current

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1 form, then we had better have a cheap simple system to
2 do it, or the system will exist but it will do
3 nothing.

4 MR. SIGALL: We have run out of our
5 questions and discussion. I'll open it up for one
6 more if anyone has some last thoughts on this issue
7 about what happens when the copyright owner
8 resurfaces, or reactions to what other people said.

9 Otherwise, I think we can wrap up this
10 session now. Okay, let's start back up at 2:00
11 o'clock here for the international issues panel.

12 (Whereupon at 11:39 a.m. the above-
13 mentioned proceeding went off the record, to return on
14 the record at 2:04 p.m.)

15 MR. SIGALL: Okay, I think we'll get
16 started with the last session, Topic 4: International
17 Issues.

18 Just for the record, we should introduce
19 the roundtable participants. I think everyone knows
20 who the Copyright Office is, and we haven't changed.
21 There is at least one new face on the roundtable for
22 this topic.

23 So let's start with Chris, introduce
24 yourself and who you represent.

25 MR. SPRIGMAN: Chris Sprigman from

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1 University of Virginia law school representing
2 Creative Commons and Save the Music.

3 MR. TAFT: Michael Taft, archive of folk
4 culture, American Folk Life Center, Library of
5 Congress.

6 MR. HOLLAND: Brad Holland representing
7 the Illustrators Partnership.

8 MR. FEDER: Ted Feder representing the
9 Artist Rights Society, which in turn represents the
10 interests of most 20th century artists in the states,
11 and every European Union artist rights society here as
12 well. These individuals include Picasso, Matisse,
13 Chagall, Pollack, de Kooning and numerous others.

14 MR. OAKLEY: Bob Oakley. I'm at
15 Georgetown University, head of the law library, and
16 I'm here representing five major library associations.

17 MR. CUNARD: Jeffrey Cunard, representing
18 the College Art Association.

19 MS. SHAFTEL: Lisa Shaftel, Graphic
20 Artists Guild.

21 MR. ATTAWAY: Fritz Attaway, Motion
22 Picture Association.

23 MR. SIGALL: Okay, on this last topic
24 we're going to be dealing with international issues.
25 And I think we've touched on it a little bit in

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1 previous topics, but we haven't looked at it
2 specifically.

3 This is the overarching international
4 framework for copyright, which has direct bearing on
5 the kinds of things you might do to address the orphan
6 works situation; the question of what international
7 copyright rules might limit, how they might limit what
8 we could do as a matter of solving this problem or
9 addressing this problem, and how that interplays with
10 the types of mechanisms we would choose to help
11 resolve this problem.

12 The four subtopics that we've identified
13 are, first two are probably the most important, the
14 question of how the prohibition on formalities in the
15 Bern Convention and incorporated into the TRIPS
16 agreement would affect and how it should shape
17 whatever solution we're proposing and the issues that
18 we've discussed over the past day and a half.

19 The second major issue is how the
20 limitations on exceptions - or the requirements for
21 exceptions and limitations to copyright embodied in
22 one place at least, TRIPS Article 13, would affect the
23 solution that we might come up with and what
24 parameters we were required to operate under or within
25 in coming up with a solution.

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1 The other two subtopics that we've
2 identified are the question of whether, given the
3 analysis of those first two topics, whether excluding
4 foreign works from an orphan works system is
5 appropriate or something that should be considered to
6 help avoid international issues that might come up, or
7 any other ways that we might address international
8 copyright issues that might arise from such a system.

9 And the fourth one is a question as to
10 whether there is any learning that we can benefit from
11 in foreign countries regarding this problem,
12 considering the fact that for almost 100 years now
13 it's been well settled in almost every other country
14 that formalities like registration and other
15 mechanisms were not present.

16 The question is, can we learn anything
17 about whether an orphan works situation has arisen in
18 those countries, or whether we can get information
19 about how this issue or problem was dealt with in
20 those countries, if it had arisen over the past
21 century or so.

22 So those are the four main areas. I will
23 start with a question related to the formalities
24 issue, and the Bern Convention, which is this: If you
25 went with a reasonable search approach, and through

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1 either sectoral roundtables that came up with
2 guidelines or common law developments in the courts it
3 was determined for, let's say a particular sector of
4 copyrighted works, photographs or illustrations or
5 something like that, it was determined essentially
6 that registration in a voluntary registry, an author's
7 failure to do that would almost always result or very
8 likely result in a designation of the orphan work,
9 designation for the purpose of the system.

10 If that were the case, would that de facto
11 raise international formalities issues, in the sense
12 that as a matter of practice someone, an author for
13 example, would essentially have to register in one of
14 these so-called voluntary registries in order to
15 forestall an orphan works designation, and the
16 limitations and remedies that it might entail, if as
17 a result of those discussions or other case law that
18 seemed to be where things were headed.

19 Does that raise the formalities issue in
20 the Bern Convention, and the question of whether there
21 is a violation of the formalities prohibition.

22 I think Chris and Steve and Ted had their
23 hands up.

24 MR. SPRIGMAN: So I think the answer to
25 your question is, in my view it's very unlikely that

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1 it would raise an issue of Bern or TRIPS compliance.

2 And let me back up a little bit to try to
3 explain why. So the formalities provision, Article 5-
4 2 in Bern, as adopted by TRIPS, is not a flat ban on
5 formalities. It's a limited ban on formalities,
6 limited in a couple of different ways.

7 First, it does not apply to a nation - to
8 the works of any Bern signatory's own nations, so
9 you've been over that in your introduction. So all of
10 the works in the U.S., for example, of U.S. nationals,
11 you could condition protection on any formality, and
12 Bern would have nothing to say about it.

13 So we're limited to the works of foreign
14 nationals, and there is another limitation in the
15 provision, in the text of the provision, which is, the
16 provision proscribes formalities that affect the
17 exercise and enjoyment of copyright, okay. And some
18 formalities do affect the exercise and enjoyment of
19 copyright and some don't.

20 We have formalities in the copyright
21 system now, and those formalities don't affect the
22 exercise and enjoyment of copyright in a way that
23 violates Bern.

24 For example if you do not register your
25 work, you are unable to get statutory damages for the

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1 period - for any infringement commencing before
2 registration actually occurs.

3 So there is a limitation on liability that
4 is often a very meaningful limitation on liability
5 that applies across the board, and that is a
6 limitation on remedies but not one that the U.S.
7 feels, as is evident by its existence in the law,
8 affects the exercise or enjoyment of copyright in a
9 way that runs afoul of the Bern Convention, and by
10 virtue of TRIPS adopted of Bern's standards, TRIPS.

11 Okay. The Creative Commons and Save the
12 Music proposal has a voluntary registry that our
13 registry, if you don't register a work in it, the work
14 is deemed categorically to be an orphan. It's a very
15 simple, straightforward approach, and remedies are
16 limited to the compensation that you would get under
17 what we call a default license, which is a license fee
18 that is payable to you if you identify yourself.

19 We don't think that runs afoul of Bern for
20 the following reasons. The exercise and enjoyment of
21 copyright for works that are unregistered,
22 registration sends a signal we believe that a work is
23 valuable. Nonregistration often sends a signal that
24 it's not.

25 And so for those works, you get the notion

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1 that these works are not sufficiently valuable enough
2 to exploit through the expensive mechanism that the
3 copyright law currently provides, which is
4 infringement, damages, lawsuits, customized licensing.
5 These are all very expensive ways of exploiting works.
6 They work very well for commercially valuable works.
7 They work not so well for other works.

8 For those other works which don't find a
9 market for the typical copyright law, what we call the
10 property rule, establishing a liability rule,
11 establishing a rule where you can make a use without
12 the need to find the author and ask permission, you
13 can make the use, but you have to pay something, that
14 helps those works find some kind of market where they
15 might not otherwise.

16 And that, you know, in purely economic
17 terms, is if anything increasing an author's
18 opportunity to enjoy and exercise the benefits of his
19 or her copyright. And of course whether an author's
20 work falls within the liability rule or the property
21 rule is in the first instance the choice of the
22 author.

23 This is not to say that some authors won't
24 make mistakes. Some will. Some will choose to
25 register works that frankly can't be exploited

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1 effectively through an expensive property rule system.

2 Some will choose not to register works
3 that will frankly be best exploited through a property
4 rule system, and they will default to the liability
5 rule. And if you're worried about that, you can
6 design a recapture provision like the ones we talked
7 about in yesterday's and this morning's session, a
8 recapture provision that allows people to cut off
9 prospectively uses of works where those works turn out
10 to be valuable.

11 So that's our position under the Bern
12 Convention, and we think a formality like the one
13 you've proposed, which is a kind of meta-formality in
14 the sense that it's not the kind of formality that
15 we're typically accustomed to. It's a kind of de
16 facto formality, if we think that no other information
17 is available other than registry information.

18 I'm not sure if that's the way the world
19 actually is, but assume for the moment that that is
20 the way the world actually is, still, I think the same
21 arguments apply even more forcefully to that kind of
22 formality.

23 MR. METALITZ: Thank you.

24 In response to your question, Jule, I
25 think that there would be issues under Bern, at least

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1 for non-U.S. works. In the situation you described,
2 which was that your failure to register in a voluntary
3 registry meant that you were almost always deemed an
4 orphan, I suppose it might be different if you could
5 show that almost all works in a particular category
6 were in fact registered there, and I suppose at some
7 point it becomes a de minimum issue if one out of a
8 million isn't.

9 But I think in the real world this is why
10 a voluntary registry approach, which we support for
11 copyright owners, due diligence can't simply mean
12 consulting that one registry. It has to be more than
13 that to come up to the level of good faith, of a
14 reasonably diligent search.

15 I think with regard to Chris'
16 intervention, I agree with the first paragraph. Bern
17 Article 5.2 doesn't affect U.S. works. And there's a
18 lot more freedom for deciding how U.S. works are
19 treated than non-U.S. works under our international
20 obligations.

21 To me that's a good reason for - if we are
22 to move towards statutory change for an orphan works
23 system, that's a good reason to make the first step
24 apply only to U.S. works. That way we avoid the
25 question, which I think are serious questions, about

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1 whether the kind of system we're talking about here,
2 even one that involves a reasonable efforts approach,
3 and one that involves very sharp restrictions on the
4 remedies that are available, I think this does raise
5 questions under our international obligations, not
6 necessarily insoluble questions, but we can avoid
7 those questions.

8 And by the way, the reasonable efforts
9 approach is not mostly formalities questions, it's
10 questions on the three-step test for exemptions and
11 limitations.

12 But we can avoid those questions by
13 saying, at least at first, that this applies only to
14 U.S. works. Obviously we then have to have a way of
15 dealing with works whose national origin aren't known.
16 But I think that we can probably - that's something
17 that could be arranged.

18 But I think that's one of the arguments
19 for saying that this should apply first. It should
20 not apply at the outset to foreign works.

21 MR. FEDER: I think it's regrettable to
22 prejudice American works while seeming to favor
23 foreign works. Although I'm speaking mostly really on
24 behalf of foreign artists, American artists are of
25 concern to me as well.

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1 Bern Article 5 Subsection 2 says, it's
2 very short, quote: "The enjoyment and the exercise of
3 these rights shall not be subject to any formality,"
4 unquote. It doesn't say, good formalities are okay;
5 bad ones are not. It doesn't say convenient ones are
6 okay.

7 Our experience has been that any foreign
8 registration is anathema to our members, whether they
9 are European or American. Indeed, the 1909 copyright
10 law which was formulated I think mostly with writers
11 of books in view, made some sense when you have let us
12 say a prolific writer who might put out as many as one
13 or two books a year. That's a prolific example.

14 But artists very often create 2, 3, 4, 500
15 works in a given year, if you include all the
16 sketches, drawing, preparatory works and so on. And
17 very few American artists - I'm not even speaking
18 about European; this is certainly true of European
19 artists as well - went to the trouble of registering
20 their works as they did them. Most of them didn't
21 even know that this requirement was in place.

22 But it is - they did not - had they known,
23 they did not choose to spend their time filling out
24 forms, sending in fees, and so on, thereby protecting
25 their works.

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1 They may or may not have been cognizant of
2 the Bern Convention approach, which is that works are
3 protected from the instant of creation.

4 Just one other thing I'd like to say. It
5 relates to the three step test for the limitations.
6 But I don't mean to be facetious about this, but there
7 are three steps that are available now to would be
8 users of copyrights, and I don't think we need to add
9 a fourth.

10 And those three are the following if I
11 may. The first is fair use. And this is essentially
12 for noncommercial purposes. So persons can use
13 copyrighted work without authorization under a fair
14 use regime.

15 The second use is a commercial use, where
16 the would be commercial user does a risk analysis, of
17 trying to determine whether or not they should go
18 ahead and reproduce an unlocatable work.

19 And thirdly, and this is something a
20 little bit related to the second, but not entirely,
21 because it applies good faith, and that is where a
22 good faith user makes a disclaimer. And the VRA has
23 published, one is quite common and occurs in many
24 publications, let me read it and then I'll stop.

25 Quote: We have made every effort to

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1 obtain permissions of all copyrighted and protected
2 images. If you have copyright protected work in this
3 publication and you have not given us permission,
4 please contact us.

5 And that happens at times, just as it
6 happens that a commercial user is informed that the
7 copyright holder is locatable.

8 These things are almost always negotiated.
9 We issue thousands of permissions and licenses in a
10 year, and I dare say the number of times we've had to
11 go to court could be counted on one hand.

12 They are subject to negotiation, and I do
13 not know of any extreme case such as the one Jeffrey
14 brought up this morning about the \$30,000 instance.

15 Though I think Jeffrey conceded that that would be
16 a great exception.

17 MR. CUNARD: For the record, I've actually
18 not come up with that example. It was described the
19 day before by somebody else.

20 MR. SIGALL: I apologize to both. I think
21 it was Jonathan Band, and he is currently unlocatable,
22 so you're fine.

23 Can I just ask Ted to give just a little
24 more information about what you just described, this
25 disclaimer, and how it's used, and in what context

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1 it's used?

2 MR. FEDER: I see it most often in books,
3 but it can be used in any format, in a game or any
4 product that somebody chooses to put out. That is
5 where the manufacturer or publisher puts the
6 disclaimer someplace on the product. Very often it
7 occurs either on the facing title page or on the back
8 page, in which the publisher or the
9 producer/manufacturer puts a notice up to the effect
10 that they're tried to locate the copyright holder, but
11 they have been unsuccessful. But if that holder comes
12 across this use and calls it to our attention, we'll
13 be happy to make amends.

14 That seems to be an eminently reasonable
15 way of dealing with this issue.

16 The other way, as I've tried to point out,
17 is the fair use way. And lastly the commercial way,
18 which is a risk analysis.

19 We see this all the time, where people
20 have used works by our members, because they say they
21 couldn't find them. We'll assume that they did it in
22 good faith. We approach them and we have a
23 discussion. And either it's done, it's negotiated
24 out, or some other methodology is found, perhaps a
25 discontinuance of the product, or if it's distributed

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1 abroad, we look to sanctions in Europe.

2 MR. SIGALL: I don't want to get too far
3 down this road because it takes us away from
4 international issues, but if anyone wants to comment?
5 Jeff?

6 MR. CUNARD: I wanted to comment on that.
7 But I don't know if I'm in sequence on the
8 international - maybe it's because the CCI membership
9 has worked so closely with Ted and his group for a
10 long period of time, including with respect to the two
11 publications that we publish, that we're basically
12 sympathetic to this last point we made.

13 And it's in some sense the genesis of the
14 point in the CCI proposal, which is that if a work is
15 an orphan, one way or another, you kind of identify it
16 as such. You say, we haven't been able to find the
17 copyright owner. You wouldn't necessarily say that as
18 a credit for every single photo, but you might have
19 some designation at the end that says this is what
20 this means.

21 We've really looked hard, but we haven't
22 found the person. I think reputable scholars and
23 artists will try to do that.

24 So that was the basis for the proposal
25 that we discussed yesterday. I guess we're going to

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1 come later to the inclusion or exclusion of foreign
2 works, a topic on which I have quite a bit to say.

3 But I would say with respect to the
4 question that you put on the table that it's not clear
5 to me that conditioning the right to pursue particular
6 remedies would run afoul of the exercise and enjoyment
7 languages in 5.2, maybe for the reasons Chris has
8 pointed out.

9 But we sort of crossed that bridge with
10 respect to Section 412. And I'd like just as we're
11 kicking off this discussion, I'd like to read from the
12 preliminary working group report on accession to Bern,
13 which says, the president and the Congress determine
14 whether U.S. copyright law, other statutes, and common
15 law are compatible with Bern, and what changes if any
16 are required to provide compatibility.

17 So we can certainly inform the president
18 and the Congress on that, and of course that's the
19 principal job of the Copyright Office. But at the end
20 of the day it doesn't matter what academics think,
21 what all sorts of other people think, fundamentally
22 the first call on this is what the Congress and the
23 president have said, and at least with respect to the
24 one data point we have in Section 412, they've
25 apparently concluded that some sort of formality and

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1 condition with pursuit of remedies is not inconsistent
2 with 5.2.

3 MR. SPRIGMAN: And here is why they've
4 concluded that, because WIPO itself has made that
5 clear. WIPO has said that limitations on remedies
6 typically are outside the scope of what 5.2 is talking
7 about.

8 And what we heard from Ted was a kind of
9 absolutist view of 5.2, that any formality runs afoul
10 of 5.2

11 Well, we've absolutist views for example
12 about the First Amendment. Hugo Black on the Supreme
13 Court reminded us that the text of the First Amendment
14 is, Congress shall make no law abridging the freedom
15 of speech. Well, wait a minute, we have laws banning
16 criminal solicitation. That's a law bridging free
17 speech. I can't solicit you to join me in committing
18 a crime.

19 Similarly, just like that absolutist
20 reading of the First Amendment kind of ignores
21 reality, the absolutist reading of Article 5.2 of Bern
22 kind of ignores reality. And the copyright law has
23 formalities in it which have extremely meaningful
24 consequences.

25 The failure to register, I'll say again,

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1 not only takes away statutory damages, but takes away
2 the possibility of attorneys' fees. And think again
3 about the realities of litigation that we've been
4 talking a little bit about today.

5 That means that for many, many, many uses
6 there will be no lawsuits for injunctions; there will
7 be no lawsuits for actual damages; there will be no
8 enforcement of the extant copyright.

9 For many copyright owners, for reasons I
10 think Brad Holland has pointed out, that means there
11 is no recourse to law, absent a cease and desist
12 letter that is ignored.

13 So we have that built already into our
14 copyright law, a series of formalities that shifts
15 burdens potentially, that creates a reasonable efforts
16 standard, and that limits liability I think is
17 completely consonant with what we have now.

18 MR. METALITZ: Yes, I actually wanted to
19 ask Ted a question. You obviously have a lot of
20 experience in this area. You've talked about a lot of
21 situations, and the disclaimer prong of what you
22 talked about.

23 I wonder if you have any observations
24 about how the arrangement that is ultimately
25 negotiated relates at all to the license fee that

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1 would have been charged up front if in situations, in
2 a book they may have 50 illustrations, if they can
3 find 40 people and there is a license fee negotiated,
4 how does that compare when the other 10 or some of the
5 other 10 come forward after publication? Can you
6 generalize about that?

7 MR. FEDER: Yes, the way that's normally
8 done is this, you go to the user or publisher, and
9 there are two or three types of fees, I don't know if
10 Steve explained that to you.

11 The basic fee we would charge is a normal
12 fee. In other words, had you come to us at the
13 beginning and the cost of that reproduction was \$75,
14 that's what we would charge, you so pay us. There is
15 a provision among the societies internationally that
16 does prescribe a penalty for those who go ahead and
17 reproduce work without permission. And that generally
18 runs about 50 percent.

19 We sometimes apply the penalty and we
20 sometimes don't. When we apply the penalties it's
21 because our members have asked us to.

22 So you have one - you have either the
23 standard fee or the fee plus penalty. And those are
24 the two basic ways.

25 MR. CUNARD: Okay, then, I guess I would

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1 ask Jeff at this point, if that is the method, then
2 your clients who you are very familiar with and have
3 worked under for so long, I wonder why you have such
4 an objection to a similar system coming into place
5 with regard to orphan work in general under which if
6 the copyright owner comes forward after orphan work
7 status is established, the user would be liable for
8 paying a reasonable licensing fee.

9 MR. FEDER: For the most part my
10 organization does not charge College Art Association
11 for reproductions in its two basic publications. So
12 this issue doesn't come up. And we don't charge as an
13 accommodation.

14 And maybe that is an indirect way of
15 saying that not all the copyright holders are just
16 looking to exploit and get as much use as they can out
17 of every use.

18 Sorry.

19 MR. CUNARD: That's a fair point, and
20 thank you. But I'm really glad you asked the
21 question, because it means we're starting to
22 communicate.

23 I think with respect to - most of Ted's
24 organization's clients are known. I think most of us
25 have heard the names he mentioned. And that would be

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1 also true of VGA. The starting point of any due
2 diligence search is going to ARS and VGA. There is a
3 standard rate card. You've got to be a pretty bad
4 scholar, historian, researcher not to start with the
5 principal collecting societies if what you are
6 interested in is 20th century or now 21st century art.

7 So what we've all been focusing on here in
8 my litany yesterday are people who don't have standard
9 rate cards, who are not generally speaking in the
10 markets to create works, exploit them. They are not
11 in Brad's group, they are not in Lisa's group.

12 And there is a large cadre of works that
13 are created by those sorts of people who don't have
14 any rate card, who don't have any standard rate, where
15 you can't obviously go and even start to find out what
16 a commercial rate would be.

17 MR. HOLLAND: That's why our proposal has
18 been that artists be given time to create the kind of
19 organization that Ted already has established.
20 Because it would give artists not only a chance to
21 gather their copyrights and put them under one
22 umbrella where they could be found and negotiated in
23 a rational fashion, and with the certainty that some
24 people are looking for for the user, but it would
25 going forward give artists of the future a chance to

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1 put their work under one umbrella for protection
2 against future orphaning.

3 MR. FEDER: I just wanted to address one
4 remark to Chris. If I understood correctly, Chris,
5 you regretted the situation where if there were no
6 registration, the copyright holder could not sue with
7 the hope of getting attorneys' fees and statutory
8 damages when a user used their work without
9 permission.

10 I think there is a simple solution to that
11 problem, and that is, abolish the registration
12 requirement. Let the artist or whoever sue with the
13 possibility of getting attorneys' fees and statutory
14 damages without having to register. It is the
15 registration that is anathema to so many, and which is
16 abhorrent I must say to the European mind.

17 And the worst part of it is, if I
18 understand the requirement correctly, the registration
19 would have had to have occurred either prior to the
20 actual illicit use, or maybe within a very short time
21 thereafter, and most people are just not in a position
22 to do that.

23 MR. SPRIGMAN: So a couple of responses.
24 I don't regret the absence of statutory damages and
25 attorneys' fees. I celebrate. I think that - no, I

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1 understand - I think that the reason for statutory
2 damages and attorneys' fees being limited for
3 nonregistration is a lingering and I think eminently
4 sensible desire on the part of the United States
5 policy to incent registration for reasons that are
6 pretty obvious.

7 You want to understand something about
8 ownership, because understanding something about
9 ownership makes bargained for exchanges, licenses,
10 which are kind of the life blood of how these works
11 are exploited, makes licensing easier.

12 So we think that producing information
13 about ownership is good, and we think that about many
14 forms of property, not just copyright.

15 So I'm happy with the setup as far as it
16 goes, which is, we have a registry and there are
17 significant inducements to register.

18 Now, I would note though that for the
19 orphan works that we're talking about today, these
20 inducements are not sufficient. Because again these
21 are not works by and large for which owners foresee a
22 significant possibility of infringement damages, and
23 injunctions or attorneys' fees.

24 And so they do not - the inducements to
25 register that I think work very well for valuable,

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1 commercially valuable works, do not work particularly
2 well for commercially less valuable works, which to
3 pick up on a comment by Jon Band yesterday, might be
4 very valuable in other ways. They might be valuable
5 culturally. They may be valuable historically.

6 They also may be valuable commercially if
7 used in a derivative work, reset, or differently
8 marketed.

9 So there is a lot of value of different
10 kinds waiting here to be unlocked. The question is,
11 how do we unlock that. And the voluntary registration
12 system is good as far as it goes, but it doesn't do
13 that work.

14 MR. FEDER: Complicated proofs of
15 ownership of copyright is a particularly American
16 construct. It's not required in Europe. The
17 assumption was again that the work is protected at
18 creation.

19 Article 15 of Bern, I'll just read part of
20 it: In order that the author of a literary or
21 artistic work be regarded as such, it shall be
22 sufficient for his name to appear on the work. That's
23 it. You don't need any more.

24 And their system has worked for 120-some-
25 odd years since Bern in the 1890s.

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1 MR. SIGALL: Let me just skip to the third
2 subtopic, because I think we're at a point to talk
3 about that.

4 Ted, you just said that it's worked for
5 100-and-some-odd years. And the impression I get,
6 which may be an incorrect one, and if it is if someone
7 could correct me I'd appreciate it, is that the orphan
8 works issue has not arisen in any great degree in
9 European countries, particularly in countries that do
10 not have formal registration systems or other formal
11 systems.

12 One theory - if that is the case - one
13 theory that I think may explain that is the
14 prevalence of collecting societies and rights
15 management organizations in Europe, which are much
16 more prevalent than they are here for lots of
17 different types of uses and works, than are here in
18 the United States.

19 Is that a correct assumption or theory as
20 to help explain why there - to explain the conclusion
21 that the orphan works problem hasn't really arisen in
22 European countries and other foreign countries?

23 And if both those things are the case,
24 then shouldn't we try to devise a system that creates
25 an incentive to - for owners to organize in collective

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1 management organizations in a way that essentially
2 they serve a function of not only collecting and
3 distributing royalties, but essentially they become
4 the searchers for copyright owners, in a sense that
5 folks like members or others go to these organizations
6 and say, we want to use these works, and the
7 organizations are the ones trying to find the
8 illustrators that Brad represents, or others, and say,
9 these people are using these works. Let's get them
10 together.

11 Is that a sort of model that we're trying
12 to reach for in coming up with a system that maybe not
13 - Brad hasn't talked about time to create those
14 things, but also maybe an incentive to help
15 illustrators organize, and graphic artists organize,
16 in a way that helps solve that problem.

17 So if anyone has reactions to that.

18 MR. FEDER: We do that to some degree.
19 But I think our European partners do it, carry this
20 further than we.

21 By the way, what we try to do, we maintain
22 a registry - and I'm not in favor of registries as a
23 requirement for orphan works, don't get me wrong - but
24 we have one of about 40,000 names, and if somebody
25 comes to us and looks for an artist, not on our list,

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1 and if we have that information, we do make an attempt
2 to keep information on nonmembers, we very happily
3 give that to the inquirer, but we don't always have
4 such things.

5 In Europe what often happens is that when
6 it comes to the distribution of collective monies, it
7 may be repro graphic fees, or retransmission, cable
8 retransmission fees, the distributing body in the
9 country gives a chunk of money to various qualified
10 claimants including the artists rights societies.

11 They don't distinguish between the members
12 of those societies, and the nonmembers. The notion
13 there being that the society will retain the
14 nonmembers' money in escrow, and maybe will print in
15 their newsletters, and perhaps in other formats as
16 well, other fora, that this money is available.

17 And they will at times ask their own staff
18 to try and check and track these people down. When
19 the claimant can be found, the formerly unlocatable
20 artist can be found, then that money is given over to
21 them.

22 And that is how a good deal of this is
23 done at the present.

24 MR. SPRIGMAN: Okay, so collecting rights
25 societies obviously have a big role to play, for

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1 commercial artists. And I think it is true to my
2 observation that this is done better in Europe than
3 it's done here.

4 But for noncommercial artists, for all the
5 people that Jeff has been talking about, and that Save
6 the Music is interested in, and many noncommercial
7 artists interact with Creative Commons and offer their
8 works, for license, collecting societies are never
9 going to be much of a factor.

10 These are people who are not the kinds of
11 creators who are going to be well served by a
12 collecting society. They are too diffused, their
13 interests are too different. What they want is too
14 different. And their works are too idiosyncratic
15 often to kind of fit in to the standard rate card type
16 format.

17 So I think there the collecting rights
18 societies have a limited role to play.

19 Now with respect to the issue of why is
20 this a problem, orphaned works now versus before, I
21 think it's pretty obvious. We've gone through this
22 huge transition from an analog to a digital world.
23 And that transition has enormous implications, and one
24 of the biggest implications is that it absolutely
25 transforms the economics of publishing.

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1 It's not like traditional publishing
2 houses are going to disappear, but their role is going
3 to be different, and there is going to be other kinds
4 of publishing operations that operate digitally and
5 operate in a much lower cost environment.

6 And in this kind of environment where the
7 economics of publishing are more happy, it's cheaper
8 to publish, lots of works and lots of uses of orphan
9 works that economics never would have allowed in the
10 past economics now allows.

11 And the barrier used to be economics, but
12 now it's law, because economics has fallen away as a
13 barrier. No one ever thought about an orphan works
14 regime when virtually every use you might want to make
15 of an orphaned work was too expensive to be worth it.

16 So some major publishing houses might use
17 orphaned works, but they have the resources to invest
18 in big searches. But now creativity is distributed.
19 We talked about the cell phone cameras yesterday in
20 the London bombings. Creativity is distributed. News
21 reporting is more distributed.

22 And in that world, the orphaned works
23 problem become a real problem. Europe is going to
24 have the problem too. It may be that the European
25 mindset is a little bit different, and typically I'm

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1 an admirer of the European mindset. In copyright, I
2 think it's a little bit muddled.

3 Article 15 is as you state, but it has
4 nothing to do with what the copyright remedies are for
5 an author's work. It's what an author has to do to be
6 identified with the work, which feeds into what moral
7 rights he might be due, which the U.S. subscribes to
8 only in passing.

9 But I think in looking at this that we
10 have a problem, the Europeans have a problem, and
11 we've kind of beaten them to the punch in recognizing
12 it. And that's good.

13 MR. HOLLAND: I am still uncomfortable
14 with people trying to determine in advance what work
15 is worth something and which isn't. A good example
16 would be B.B. King who for the majority of his career
17 probably was uncommercial and now does silly
18 commercials by virtue of his musicianship.

19 Cynthia Turner and I were contacted by a
20 woman, Lisa Hampton, the director of Copydan in
21 Denmark, who said she had the names of a number of
22 American illustrators for whom she had checks but no
23 way to find a way to deliver them.

24 This is almost the opposite of orphaned
25 works. There's no system in the United States willing

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1 to find those authors and to indemnify Copydan against
2 false claimants.

3 But if there were, then there would be an
4 exchange between Denmark and the United States, plus
5 Danish artists, however many of them there are, whose
6 work is used in the United States, could be returned
7 to them.

8 Also if you'll notice, Krissy Tipner, the
9 CEO of Vizcopy in Australia, in her submission to the
10 Copyright Office, mentioned that in her opinion the
11 lack of a reprographics collecting society for
12 American illustrators has probably hurt our market
13 value.

14 We agree, which is why we have made a
15 proposal as far as back as three years ago to the
16 Copyright Clearance Center to try working with us to
17 put something like that in place for American
18 illustrators.

19 We were asked to come up with a system
20 that would allow us to track artists, because they
21 said they had no way of tracking artists. So we
22 proposed a system to them of persistent identify,
23 objective identifiers that they could use.

24 We sent the proposal to them along with a
25 flowchart of a copyright bank and how the entire thing

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1 would work last October. And we've been sent a letter
2 thanking us for our patience, and waiting for a
3 response.

4 They can send us a letter again and again,
5 because I think they're expecting our patience for
6 quite awhile.

7 That's why I'm thinking, I think you are
8 right, Jule, that we would welcome not just the time
9 but an incentive on the part of publishers to work
10 with us to create a system that would give not only
11 users but artists the mechanism to come together and
12 facilitate the kind of transactions that everyone is
13 interested in facilitating here.

14 MR. CUNARD: Of course that would be a
15 wonderful goal. But I sort of share Chris' concern
16 that for a vast majority, for a large majority of
17 works that would be used, there isn't ever going to be
18 a collecting society.

19 This whole discussion over the last 2-1/2
20 days has been at the level of considerable
21 abstraction. But you have solicited comments from the
22 public at large, including, you know, we filed
23 comments, which had hundreds and hundreds of real
24 world examples.

25 So the question is to Brad and to you and

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1 to others would be, how would you deal in the real
2 world with all of these examples? It's great to say,
3 I'm an illustrator, somebody is ripping off my work.
4 No one wants that to happen. If the illustrator was
5 permitted to put his or her name at the bottom, and we
6 could go to a collecting society organized by Brad,
7 every single one of my members I'm sure would be
8 delighted with that.

9 But that is not the real world. The real
10 world is, I'm publishing photographs of works by
11 Haitian artists. The works are often not signed, or
12 the signature is illegible. It's impossible to trace
13 current ownership.

14 The real world is, I'm told, uncredited
15 photos of an early black architect from the yearbook
16 of a major university. The publisher of the yearbook
17 is out of business.

18 And there are, we documented 100 such
19 examples. I'm just giving you two at random.

20 The collecting society is not going -
21 there is no collecting society going to be established
22 for those kinds of works. And Brad Holland's group
23 and Lisa's group aren't going to help me with respect
24 to those, nor frankly is ARS or VAGA. I think.

25 MR. HOLLAND: Then use a disclaimer, use

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1 them and have the disclaimer. That solves it.

2 MR. CUNARD: The whole purpose of this
3 activity is, what happens if the photographer comes
4 out of the woodwork, or the Haitian artist's
5 grandchild comes to the United States and says, that
6 work was prepared by my grandfather 25, 30 years ago,
7 or something like that.

8 But I happen to be using one foreign work
9 and one domestic work. We could have equally colorful
10 and vivid examples from purely U.S. sources.

11 That I think is the hard question that I
12 think we should be focusing on.

13 MR. HOLLAND: I would recognize that there
14 is probably a broad number of cases that can't be
15 solved. We're talking about situations that can be
16 solved. If an orphaned work system includes the work
17 of Haitian authors, batik makers and Yiddish folk
18 singers and commercial illustrators, well, we're
19 dealing with a very wide range of artists.

20 We may not be able to solve the problems
21 for all those situations. What do I do with
22 photographs that I found in my grandmother's attic
23 that I'd like to duplicate? That is a different
24 system. I'd like to duplicate it.

25 When I read the notice of intent, I made

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1 a - to try to take the position of the user, I made a
2 list of situations where I had tried to track work,
3 one to give a speech, one to do a book actually from
4 the Library of Congress where I found some old stories
5 from the WPA from the 1930s.

6 In each of those cases I could see a
7 number of situations where I would be hindered from
8 using that work if I had to track all the authors.
9 But I know that if the system somehow involves
10 releasing copyrights on work, based on whether they
11 can be located, whether the author can be located or
12 not, you're using a very wide net to catch all sides'
13 fish.

14 If you came to us and said, this is a
15 great system, the idea of proposing a licensing
16 system, a collecting society for commercial
17 illustrators is fine, let's work on that, and then
18 we'll deal with the Haitian artists as a separate
19 category, that would be great.

20 MR. CUNARD: The problem is, we're dealing
21 with the copyright law as we have it today. And the
22 copyright law as we have it today draws not
23 distinction in terms of rights as far as I understand
24 it between a Haitian artist, Picasso's estate, or a
25 photographer who was doing photographs for a yearbook

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1 in the 1940s, that's what we heard yesterday from all
2 the people representing photographers.

3 The copyright law, as I understand it,
4 doesn't actually distinguish between those different
5 kinds of works. Now, if we're only here organizing a
6 system for illustrators and people who are in the
7 market, in the U.S. market exploiting their works
8 today, well, then we should be clear that that's all
9 we ever really hope to accomplish.

10 If on the other hand we hope to be solving
11 the orphan works problem writ large, which I would
12 submit at least from the standpoint of my membership
13 doesn't deal mainly with people who are actively
14 exploiting works in the market today, Ted's
15 organization's clients, Brad and Lisa's clients, the
16 professional photographers, then we need to grapple
17 with the larger universe of works that are protected
18 by United States copyright law, both U.S. and foreign.

19 MR. SIGALL: I will get to you in just a
20 second. Let me just clarify I think what I was
21 thinking of, at least in terms of incentive.

22 We can as you mentioned, Jeff, try and
23 deal with the situation - I guess I look at it this
24 way. We're trying to sort of smoke people out. And
25 in the sense that if you create one way to incentivize

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1 folks in Brad or Lisa's group, they may not think that
2 this is the best way to go, they may object to this,
3 one way is to create a orphan works system that says
4 to the illustrator, if you don't start getting part of
5 a collective, if you don't start participating in that
6 way, you might suffer the consequences of being lumped
7 in with the batik printmakers who are taking a lot of
8 abuse in this proceeding, you may be lumped in.

9 I think the reality is that there is that
10 gray area of people who are sort of on the fence.
11 There are people who are very close to being in a
12 situation where they for whatever reasons don't really
13 want to actively manage their copyright, and willingly
14 allow use or just would be perfectly happy with a
15 default licenses I guess Chris would advocate.

16 But they may also, after thinking about
17 it, say, no, I want to start being like Brad Holland
18 actively manage my copyright.

19 So the question is, maybe you can identify
20 that group that your group wants to make most use of
21 in the negative, in the sense they're the ones who
22 have not managed to join a collective organization
23 like the one Ted operates or the one that Brad is
24 envisioning. They're the ones who haven't done that,
25 and in the sense that if your group - people in your

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1 group are trying to search, they search those places
2 that exist, and if they can't find them, that's most
3 of the way there, that's most of the way to a
4 reasonably diligent search, and you try to define
5 people in the negative.

6 And what you end up with is, I think, what
7 one of the goals as we described yesterday is that you
8 have a situation where those folks who otherwise
9 can't enforce their rights because litigation is
10 expensive, they're sort of prompted to become part of
11 an organization where they can at least get paid
12 something, and I think at the same time we're helping
13 folks identify that class of owners who are truly
14 orphaned works; they are truly not managed copyrights
15 and not - and you free up that kind of use.

16 So that's the sort of thinking in terms of
17 incentive that at least I had in my mind.

18 So I think Steve had his hand up.

19 MR. METALITZ: Just an observation, that
20 the discussion over the last few minutes, which I find
21 really fascinating, helps to underscore the importance
22 of approaching this, a lot of this anyway, on a
23 sectoral basis. Because the answers are going to be
24 quite different depending on the different kinds of
25 work.

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1 I understand that Jeff and Brad, they're
2 both talking about visual art works, but if you talk
3 about, you have submissions in the record, for example
4 from ASCAP and BMI, that assert that the number of
5 orphaned works in their sector would be either zero or
6 vanishingly small. I'm not asserting that it is zero,
7 but it is certainly much smaller, especially if we did
8 this in a stepwise fashion and started with U.S.
9 works.

10 That it seems like that the solution that
11 would apply for music wouldn't be the same as they
12 would apply to visual arts, whereas as we've just
13 heard, there are going to be a lot of orphaned works,
14 and there are collecting societies covering a great
15 many of the people involved. And it's just a totally
16 different environment.

17 So I think the idea of moving toward
18 looking at this on a sector by sector basis, I think
19 the discussion of the last few minutes supports that
20 approach.

21 MR. SPRIGMAN: So ASCAP put in some
22 comments, basically saying look, in our sector, we
23 have less of an orphan works problem because we have
24 ASCAP. I think that's what I heard from Steve.

25 And that's just not true. So Save the

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1 Music again is an organization devoted to the
2 preservation of Jewish culture, and especially Jewish
3 cultural music. We got ASCAP's comments, and we kind
4 of chuckled, because we've never been able to find
5 information about a work that we wanted to license
6 through ASCAP or BMI. And in fact we went through our
7 current list of things that we wanted to license, the
8 search results are zero for those collecting rights
9 societies.

10 And so the moral of the story is that
11 again there is a structural issue with the way this
12 roundtable is going with who is sitting at the table.
13 Save the Music is the closest I think organization
14 here to an organization that is actually using music
15 that isn't the kind of music that RA is concerned
16 with, that ASCAP is concerned.

17 But that is more and more our culture. So
18 a lot of this Yiddish culture music was written by
19 people who later went on to be big stars of Broadway,
20 and they created kind of American culture, red white
21 and blue American pie culture. This is where they
22 came from.

23 So this is enormously important to our own
24 understanding of our history. This world that Save
25 the Music lives in is orthogonal to the world, for the

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1 most part, that ASCAP, BMI and the RAA live in. That
2 is the problem.

3 So to talk about collecting rights
4 societies is good, I'm glad we're doing it. They
5 perform a very useful service. But they cannot cover
6 the field.

7 MR. METALITZ: If I could just respond,
8 because I did not say that ASCAP and BMI cover the
9 field, although their submissions may have said that.
10 And I'm not here to represent them today.

11 But I think the point is still valid that
12 they cover a heck of a lot of the field, especially if
13 we're talking about U.S. works. There are collecting
14 societies in many other countries for music, for
15 musical compositions. And I don't know the
16 particulars of your clients searches for example, and
17 to their equivalents in the countries where that music
18 was developed, and whether that information is still
19 available.

20 But my point is simply that it's a matter
21 of degree, but one that is so great that it becomes a
22 difference of kind, that some sectors have very
23 different issue here than other sectors, and that
24 probably ought to be recognized.

25 MR. CUNARD: The differences, though, are

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1 between coverage and sort of due diligence and
2 searchability.

3 So I think with respect to the sectors
4 represented by your membership, by Fritz' membership,
5 by ASCAP and BMI, the vast majority of works are never
6 going to be orphaned, and it may be asymptotically
7 approaching 100 percent or something like that, in
8 which case you'll be kind of out of the system.

9 On the other hand, either Save the Music
10 or the sorts of examples that we had in our comments,
11 somebody who is dealing with music of the silent film
12 era, the music was never recorded, so the ASCAP
13 database doesn't have any of the music.

14 We publish folk and children's songs
15 because we couldn't locate copyrights, we have no
16 original Native American song, Hanukkah song or
17 Spanish language song.

18 I'm a sound artist, I'm a creative artist,
19 someone who wants to pursue copyright. And I sample
20 from a cassette, from somebody's discarded answering
21 machine, old records and so on and so forth.

22 And I've searched, but obviously the
23 trails, the search trails are long since overgrown.
24 How do we deal with those people who are outside the
25 established systems of ASCAP, BMI, Sound Exchange,

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1 ARS, VAGA, the would-be illustrators partners,
2 partnership. We're going to search every single
3 illustration ever created in the United States.

4 That's what I think this proceeding really
5 should be focusing on, not the ones where it's
6 relatively easy to go to a database and find and
7 locate the copyright owner.

8 MR. SIGALL: I think now if people are
9 willing we could continue. But if we want to take a
10 short 10-minute break and move on to the next segment,
11 we could do that. We've gone for about an hour now.
12 I don't think we have much more to go through, I think
13 about another hour's worth of material, at least from
14 our perspective.

15 But we could continue, go on, and finish
16 early if people want to do it that way, or not take a
17 break.

18 Okay, sounds good.

19 I guess just to clarify a little bit, I
20 think to respond just a little bit to what Chris said,
21 I think what you just laid out in terms of with
22 respect to Save the Music and the works they want to
23 make use of is essentially the due diligence search
24 argument.

25 The non-presence of certain works in well

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1 known databases like ASCAP and BMI again takes you a
2 long way there. And the question is, if you have a
3 standard that says, not being present in these
4 databases helps establish that point, you may
5 incentivize people in Brad's group or Lisa's group or
6 some of the others to become part of those, or to just
7 stay on the sidelines in that sense.

8 So I guess my point is that collective
9 studies cannot cover the field, but the gap between
10 the field and their coverage is, and ascertaining that
11 gap, is sort of exactly the kind of evidence you have
12 with respect to reasonable search that is I think the
13 kind of things that courts or whomever is addressing
14 this, that's what they're going to be looking at,
15 that's really where the determination is going to be
16 made, those kind of gaps are what people are going to
17 describe.

18 Turning now to the question of the three-
19 step test, and the question of whether any system
20 that's being developed would - how does the three-step
21 test inform our deliberations about the type of system
22 that should be developed?

23 The first question that I have comes from
24 the first part of the three-step test, which is, the
25 first prong is the WTO dispute panel in 2000

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1 identified, it has to be certain special cases.

2 And I think there was a fair amount of
3 support and agreement for an orphan works regime that
4 would apply to all types of works, and that it
5 wouldn't be categorized into any type of work or even
6 type of use or type of users. There was - most
7 proposals we were talking about relatively broad
8 coverage.

9 And I guess the first question is, to
10 react to the assertion that such a broadly based
11 regime, how that could fit into an argument that it
12 fits certain special cases, as that's been interpreted
13 or as that's understood in WTO or in the international
14 community.

15 So that's the first question. Chris and
16 then Ted.

17 MR. SPRIGMAN: Okay, so the first thing to
18 say is that I think on anything but an absolutist
19 reading of 5.2 you never get to the so-called three-
20 step test, because the kind of formality that you're
21 envisioning is not a prohibited formality; it's rather
22 the kind of permitted formality that we currently have
23 in copyright law.

24 We've been over that.

25 The second point, though, which I think is

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1 also important, is that even if you get to Article
2 9.2, TRIPS Article 13, and the so-called three-step
3 test, it is far from clear that that three-step test
4 is in fact a three-step test.

5 What - whether the special cases language
6 has any independent fact on the determination at all
7 I think is still up for grabs. And I'll read you a
8 report on the Brank (phonetic) Revision Conference in
9 Stockholm from 1967, I'll read you briefly what they
10 said about Article 9.2

11 If it is considered that reproduction
12 conflicts with the normal exploitation of the work,
13 reproduction is not permitted at all. If it is
14 considered that reproduction does not conflict with
15 the normal exploitation of the work, the next step
16 would be to consider whether it does not unreasonably
17 prejudice the legitimate interests of the author.

18 Only if such is not the case would it be
19 possible in certain special cases to introduce a
20 compulsory license or to provide for use without
21 payment.

22 They're talking about a compulsory
23 license, or free use. Compulsory licenses, or some
24 limited use of compulsory licenses, are specifically
25 allowed for in Bern by virtue of that, separately,

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1 TRIPS. And this article is really a limitation on the
2 use of compulsory licenses, gratis compulsory
3 licenses.

4 We're not talking about gratis compulsory
5 licenses. We're talking about something very
6 different. We're talking about limitations on
7 liability.

8 And in that case you can understand -
9 well, let me back up. In the case of compulsory
10 licenses, you can understand why certain special cases
11 might actually have some meaning. Because compulsory
12 licenses are a removal of any copyright.

13 They are basically a dedication to the
14 public domain for free is what they are equivalent to.
15 And in that case you would have the notion in your
16 mind, I think rightfully, that if you do too much of
17 that, in either a numerical or a relative sense, you
18 destroy the market for that type of work, you take it
19 away.

20 On the other hand, if you get a price
21 signal like in the case that I proposed, if you get a
22 price signal from failure to either register or to
23 actively police or to manage it in the sense that you
24 are not findable, your work is an orphan, the damages
25 that you get probably exceed even at a very low level

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1 the market value of the work, which is low.

2 And so the normal exploitation of the work
3 is not interfered with. The market for the work is
4 not interfered with. And the certain special cases
5 language doesn't have independent bite in that case.

6 MR. FEDER: With regard to certain special
7 cases, I think it was Professor Ginsburg who pointed
8 out in her paper as to how could you define as a
9 certain special case a situation where everything is
10 available for orphan work?

11 Take your example for instance. If a
12 special case were Yiddish music of the late '20s and
13 early '30s of the city of Lodz in Poland, I could see
14 that as a special case. But the way this is
15 presented, it means all music from all periods, and
16 all ethnicities, are subject to being declared orphan.

17 And I think it goes against the meaning of
18 this provision.

19 MR. CUNARD: So I have a few thoughts.

20 First, I think the WTO panel decision is
21 one data point, one massive almost unreadable data
22 point, but a data point nonetheless, and was one
23 obviously that was decided in a circumstance I think
24 radically, almost 180 degrees different from what
25 we're talking about here.

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1 We're talking about some work where people
2 had in fact normal exploitations of work that were
3 ongoing and had been ongoing for several years, and
4 they were being sort of pared back.

5 We're talking about something potentially
6 quite different here.

7 And second, with respect to the panel
8 decision and its view on special cases, if you look at
9 what it said, and you look at what Daniel Gervais
10 (phonetic) says, there are sort of two ways in which
11 you can think about a special case.

12 One is that it is clearly defined in
13 national legislation, and narrow in scope and reach.
14 And I may disagree here with Ted that certain and
15 defined doesn't mean with respect to a actual
16 particular work or set of works. It means
17 particularized or narrowly circumscribed with respect
18 to a particular application, and here, as we've
19 described it, it's a very narrow, narrow, narrow set
20 of circumstances, where the copyright owner's rights
21 would be circumscribed.

22 And second, the panel I think intimated
23 that it was possible that special purpose could be
24 read by reference to a sort of special legislative ore
25 a national or a statutory or a public policy purpose,

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1 and of course that's really the genesis of the
2 copyright office's notice that under U.S. law it
3 really makes some sense to have these works which are
4 truly orphaned find their way back into the commonweal
5 of discourse, which seems to be in fact a very
6 legitimate public policy purpose.

7 I also don't think we should ignore,
8 although Professor Ginsburg dismisses it, the idea
9 that a limitation on remedies is not really a
10 limitation or exception in the way that we have
11 referred to these things in U.S. copyright law.

12 We in fact have structured our copyright
13 law to put the limitations and exceptions in one
14 place, and the remedies in another place. And so
15 although some have dismissed the notion that the
16 proposal here is possibly not subject to the three-
17 part test, we shouldn't ignore the possibility that
18 maybe the three-part test isn't really applicable in
19 this circumstance.

20 MR. METALITZ: Just a couple of
21 observations.

22 Certainly to the extent that the orphan
23 works regime is clearly defined, and the due diligence
24 standard is well defined and I guess I would say
25 rigorous, that helps the case that this is a special

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1 case. That was one of the points that Jeff made.

2 The fact that, at least we've heard many
3 times, and most recently from Jeff but others have
4 said it and we've said it, that there are certain
5 sectors in which there will be very, very few orphan
6 works, certainly I think is some evidence that it is
7 not the situation where everything has equal potential
8 to be an orphan work.

9 In practical terms, I think it's fair to
10 say, a commercially released sound recording in the
11 United States has very little potential to be an
12 orphaned work. It's not zero, but it's very small.
13 Whereas Jeff has given us many examples of works of
14 visual art that may have a very high risk or potential
15 to be treated as orphan works.

16 I think that differential in itself again
17 suggests that we're talking about a special case.

18 I guess the final point I would make,
19 which I've made before, is one way to take a little of
20 the tension off this question is to apply this to U.S.
21 works, and I say that even though from the perspective
22 as the recording industry's user, it would probably
23 make sense for it to be applied to all works, because
24 we may want to use non-U.S. works whose authors can't
25 be found or identified.

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1 But for other reasons I guess we'll get
2 into later, this is one reason why it would probably
3 make sense to start just by dealing just with U.S.
4 works, because then you don't have to confront this
5 question.

6 MR. FEDER: I am by no means a Bern
7 Convention expert, so I've been reluctant to say a
8 whole lot. But if I may just offer what may be very
9 simplistic thoughts, it seems to me that if we require
10 a standard of due diligence in determining what work
11 is an orphan, that limits the category of works to a
12 small and limited number.

13 And if you require compensation as I hope
14 you do in the event that the author does eventually
15 show up, then I think the standard of normal
16 exploitation and prejudice to the author is met, and
17 it seems to me that you have satisfied the three-step
18 test.

19 UNIDENTIFIED SPEAKER (SC) 3:11:03): But
20 I think it misses the point, because you're going to
21 undertake the due diligence after you've chosen the
22 work from the world's work, and therefore, it's the
23 category of the world's work which is not the special
24 case. You've taken one and you've applied due
25 diligence to it. That doesn't make it somehow a

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1 special case.

2 It's a special case perhaps in everyday
3 parlance for you, it's important to do that. But you
4 had the world's copyrighted works to choose from.
5 It's not as if you had narrowed it down to a 100 works
6 of a particular kind, a particular genre, and said,
7 now I'm going to do due diligence on one.

8 So I just wanted to bring that up.

9 MR. SIGALL: The next question I have is
10 going to the next element of the three step test, the
11 question of conflicting with the normal exploitation
12 of the work, and specifically, would a provision as we
13 discussed earlier today and yesterday, a provision
14 allowing continuing use after the owner surfaces, of
15 some sort, how does that interplay with the
16 requirement that the limitation or exception, assuming
17 that you've gotten past the hurdle that it is a
18 limitation or exception, should not conflict with the
19 normal exploitation of the work?

20 How does that all sort of come out in the
21 mix of this analysis?

22 MR. METALITZ: Well, I think to echo what
23 Fritz was saying, to the extent that the system
24 provides in that circumstance for the copyright owner
25 who comes forward to, even if they're not able to

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1 enjoin further ongoing use is what you're saying, even
2 if they're not able to enjoin that, if they are able
3 to claim compensation that is equal to what the
4 reasonable licensing fee would have been, it would
5 certainly ameliorate at least the impact on the normal
6 exploitation of the work.

7 They would be presumably in the same
8 situation they would have been had they been reached
9 and had they agreed.

10 Now obviously they were never given a
11 chance to refuse based on the facts here. But had
12 they been reached, and had they agreed, they in theory
13 would have come up with the same outcome.

14 So I think that would at least weigh in
15 favor of the argument that this doesn't conflict with
16 normal exploitation of the work.

17 If in fact they get nothing, or they get
18 only a nominal amount that doesn't bear any relation
19 to what the market might have produced, then you might
20 have a different situation.

21 MR. FEDER: I think it very much depends
22 on what happens after the work has been exploited. It
23 seems to me if no author shows up, then the user of
24 course is likely to continue to exploit the work
25 without having to pay a fee.

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1 And by the way, this is tangential, but
2 the Canadian system, if I understand it correctly,
3 would have obliged the user who couldn't locate the
4 work to deposit a fee, a fixed fee, probably a modest
5 fee, with the CCB, and then they would distribute it
6 to the artists as the artist does appear.

7 This is something, as I pointed out
8 before, that the collecting societies are prepared to
9 do and do do in different European countries.

10 So one scenario is that nobody shows up to
11 claim interest in the work so it continues.

12 Another is when the artist shows up, and
13 what do you do at that time? Do you negotiate for the
14 future?

15 Logic would say yes. Now the artist may
16 not want the thing to be on the market, and that is a
17 little bit like that the old NIE and restoration, you
18 had to decide what to do on the basis of the artist
19 showing up and making a claim.

20 There is an issue of course as to whether
21 it's possible to make a deal which involves a
22 retroactive payment as well as a future payment.

23 And the third, but it's the most dangerous
24 thing, is there should be no piggybacking on the first
25 use. In other words, a second or third or fourth user

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1 should not come along and say, because the first
2 person cleared the rights, I can now use that
3 clearance and go on and make exploitations.

4 But I think the marketplace tends to
5 resolve these issues. I think it's an important fact.

6 MR. CUNARD: I think it is intuitively
7 appealing to say that where the copyright owner is
8 unlocatable, and is not exploiting the work, that the
9 exploitation of the work by the user does not conflict
10 with the normal exploitation of the copyright owner.

11 That seems to be intuitively appealing.
12 I realize others wish to poke holes in that intuition,
13 but to me that just seems like a matter of common
14 sense.

15 The question is whether or not when the
16 copyright owner comes forward, there is a conflict
17 then between the users continued use and the normal
18 expectations of the copyright owner.

19 And to be sure there may not be agreement
20 for the reasons we've all talked about here, but there
21 would be a sort of limited set of remedies of one sort
22 or another that would be made available to the
23 copyright owner, and I accept for the moment and for
24 the sake of argument that a reasonable license fee
25 would be more appealing from a three-step point of

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1 view.

2 But I don't accept for the argument that
3 a cap approach is necessary inconsistent with Bern in
4 these circumstances.

5 MR. TAFT: As someone who doesn't really
6 know the international law on this, I wonder about the
7 concept of normal exploitation, especially as applied
8 to traditional cultural expression.

9 Normal exploitation might be in a
10 completely noncommercial context, and how does that
11 relate when a commercial entity wants to use some
12 piece of art from a traditional cultural expression.

13 MR. METZGER: For Chris I think I
14 understood you to say that there would be a difference
15 between a compulsory license and a limitation on
16 remedies.

17 And I'm just trying to understand, under
18 some of the systems contemplated here, what would be
19 the difference between a compulsory license and a use
20 without permission for a fixed fee?

21 MR. SPRIGMAN: Both the Stockholm revision
22 statement and the single WTO panel dispute, the 110.5
23 panel dispute that dealt with this, both deal with
24 compulsory licenses that are set for a fee of zero,
25 okay, gratis uses.

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1 And the difference would be, at least
2 under our proposal, that we are trying to use a real
3 market mechanism, not some false or unreliable market
4 mechanism, like a judge looking I don't know at what
5 to try to figure out what a bargain for exchange would
6 have looked like.

7 We're using a real market mechanism, which
8 is a signal sent by the user about the commercial
9 value of a work. And that signal I think the
10 Copyright Office data suggest that that signal is
11 pretty robust.

12 We're using that signal to set a price,
13 and we're pricing a default license at that price.

14 Now what would the price be? You can
15 think of the price of the default license, the fee
16 that gets paid to the rights holder, as a cost of
17 complying with the requisite formalities.

18 So the requisite formality in the first
19 instance would be registration, and then keeping your
20 address up to date, or your contact information, or
21 nominating an agent to handle this for you.

22 You could come up with that price, and if
23 a work was expected to return below that price, the
24 person would basically choose the default license. If
25 the work was expected to return above that price, the

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1 person would choose to use the formality and retain
2 all their remedies.

3 And the point there is, you actually get
4 a market mechanism. That sends a price signal. And
5 the compensation you would get from the license is
6 actually the closest thing you can get to a market
7 rate.

8 So I also think that cap damages, capped
9 at a certain level, would be acceptable under Bern,
10 but I think that the default license system is a
11 better system because it makes use of the information
12 we can actually get.

13 I think that copyright arbitration panels
14 come up with a market price. I think they come up
15 with some notion of equity. But the market,
16 typically, equity is kind of a subsidiary concern.
17 It's supply and demand, and that's typically what the
18 economy runs on, and that's what we're trying to
19 provide.

20 MR. SIGALL: Can I ask you a follow up
21 question clarifying? I want to make sure I understand
22 your position, especially with respect - because much
23 of your position I think hinges on the notion that
24 failure to register is a signal by the copy owner of
25 the value of the work.

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1 So let's take a specific example from a
2 Supreme Court case. The documentary television film,
3 what was it called, Crusades in Europe, produced -
4 about General Eisenhower, General Eisenhower's memoirs
5 from World War II, it was produced and exhibited on
6 television in the '50s and '60s.

7 It was not renewed in 1978 or so, or
8 somewhere thereabouts, and therefore fell into the
9 public domain, which allowed the company, Day Star, to
10 repackage it and avoid copyright issues with respect
11 to the case that went to the Supreme Court.

12 I guess I'm understanding your position to
13 say the fact that it was not renewed in 1973, say, for
14 example, was a signal by the creators of that work
15 that their work was worth less than \$10 or however
16 much it was - cost to register at that point.

17 That's what we should, the marketplace
18 should conclude about that activity?

19 MR. SPRIGMAN: Right, so the way to look
20 at that example is to say, as economists would, that
21 in any regulatory system error is endogenous, which
22 means basically that individuals will make errors, but
23 we rely on incentives to properly incentivize classes
24 of people. And you can deal with individual error
25 within our proposal. I'll get to that in a minute.

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1 But the real question is, for 95 percent
2 of rational individuals, will they respond to
3 incentives? And the evidence that we see in the
4 historical data suggests that, yes, they do respond to
5 incentives.

6 And we see that today. There is no
7 requirement that you register your copyright, and yet
8 thousands and thousands of people a month, and
9 corporations, do, because they have valuable
10 properties, and they wish to have the very important
11 remedies of statutory damages and attorneys' fees
12 available to them. And so they take advantage, they
13 invest, in that protection, because it's an
14 investment. It's an investment of money and time.
15 Not a large one, but it's an investment.

16 So okay, properly incentivize your
17 rational person. And then how do you deal with error?

18 Well, in our proposal we try to deal with
19 error in two ways. One of which we talk a lot about,
20 the other I talked a little bit about yesterday.

21 The first way of dealing with error is,
22 don't make the formality immediate. Wait. We suggest
23 waiting a quarter century for most works. Allow
24 people to understand what their value is.

25 You're not going to deal with the orphan

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1 works problem in full, but you're going to reduce the
2 risk of error individual cases.

3 The other thing that we talk about a
4 little bit is this possibility of reclamation. If you
5 turn out to be wrong, you can cut off future uses
6 prospectively by complying with the formality.

7 You may in fact not be able to cut off the
8 use that was made before you registered, but that's
9 kind of life. That's a necessity for the system to
10 work.

11 There is one other thing that I think is
12 worth saying, and that is, that our experience with
13 formalities was lengthy. We had almost two centuries
14 of them. But we had formalities under the old regime
15 of paper and nail and you know copies on carbon paper.

16 We are living in an age where a system of
17 formalities can be made very cheap, very efficient,
18 and in fact, largely privatized, so the collecting
19 rights societies, they collect enough information
20 where they can format it properly and feed it into a
21 registry. I can happen like that.

22 And for creators that aren't in a
23 collecting rights society, businesses could compete to
24 solicit their information as well.

25 We have competition in the Internet domain

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1 name space, and registration has gotten easier, and
2 it's gotten cheaper.

3 So this is the model. And the idea is, we
4 are using the market mechanism where we can find it.

5 MR. SIGALL: I guess - I understand the
6 point about error. But what I don't understand is the
7 point that you can conclude something about the value
8 of the work from the failure to register.

9 Imagine the situation in 1976, where you
10 have both the seller and the buyer of that particular
11 work completely ignorant of both the copyright law and
12 the current situation in the Copyright Office with
13 respect to the renewal of that work.

14 It seems impossible to me that if they
15 negotiated to make VHS, maybe a Betamax version of
16 that work, for sale to the consumer, that if they came
17 to a conclusion that a reasonably fair price for the
18 license to do that was \$10,000, I don't understand how
19 that - that seems to be completely at odds with the
20 notion that the value of the default license should be
21 somehow pegged to the value of paying - of not
22 registering or registering.

23 I guess I don't see that - I'm trying to
24 understand how that's an argument against the use of
25 a reasonable royalty approach, or as a measure of

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1 fixing the value that the user should pay for the use
2 of the work.

3 MR. SPRIGMAN: Okay, so the argument
4 against a market or a reasonably royalty approach is
5 that there is neither a market nor in most cases
6 reason, there is just a few guesses as to what this
7 might be worth.

8 The author comes in saying, I'm Picasso,
9 and the user comes in says, no, you're Joe Schmoie.
10 And the value is set somewhere between Picasso and Joe
11 Schmoie, but there are no principles or test that tell
12 you how to do that.

13 The argument that a decision whether or
14 not to comply with formalities suggest something about
15 prices, the argument is not that it suggests exactly
16 what the work is worth, because that's a bargain for
17 exchange; we only know that later. But it suggests a
18 threshold. It suggests either that the work is above
19 a threshold or below it.

20 And the threshold is the value of the time
21 taken to educate oneself about and comply with the
22 formality, and the actual expense of complying with
23 the formality. That is the threshold.

24 Now the case of a videotape, people put
25 idiosyncratic values on things. So it might be, I

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1 don't know who owned that, Time-Warner? Okay, it
2 might be that Fox made a mistake about what they
3 thought it was worth. That ended up being a Lanham
4 Act case because of that mistake they made.

5 But it may be that they made a mistake
6 about what that was worth. It may be that they
7 screwed up and just didn't think about it, and they
8 let it fall into the public domain. That will happen
9 too.

10 If you make the formalities simpler and
11 more straightforward, and keep the rules simple, that
12 will happen less. You will push the rate of error
13 down, but you will never get rid of it, and there will
14 always be error.

15 And so you come up with mechanisms to try
16 to remediate error as much as you can. That is the
17 25-year delay, which gives people time to think about
18 it and get educated.

19 And you come up with mechanisms even after
20 they make the error for them to vindicate as much of
21 their right as they can. That's the reclamation idea.

22 But again, the concept of the copyright
23 law as it applies to orphan works is, can we free up
24 some of these risks for good valuable socially
25 valuable pieces? And we could spend a lot of money

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1 and a lot of time on a complicated system, and we
2 could still get error. We're going to get so-called
3 market licensing fees that are either above or below
4 market. There's going to be error in the system, no
5 matter what system you pick.

6 MR. FEDER: You cannot reinstate
7 formalities without incurring the great displeasure of
8 the WTO and the rest of the Bern members. I mean
9 there is just no question about it.

10 I mean the formalities as they were so
11 long practiced by the United States, some of which
12 still survive, are really a dead letter as far as our
13 Bern partners are concerned. It just won't fly.

14 MS. SHAFTEL: I'm pretty much surrounded
15 by IP lawyers, and there is a lot of legalese going
16 around, and I'm visualizing a lot of ivory towers.

17 So I want to throw out a little reality
18 check for those sitting in the ivory towers.

19 I know how many people are members of the
20 Graphic Artists Guild. I have a pretty good idea of
21 how many people are members of the Illustrators
22 Partnership and the other organizations within their
23 coalition.

24 I read a really interesting statistic a
25 couple of months ago out of the blue that the IRS for

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1 2003 recorded that some 120,000 people claimed that
2 their profession was an artist.

3 We don't have 120,000 members in the
4 Graphic Artists Guild. There are a lot of people out
5 there who are, at least to the IRS, claiming that they
6 are artists, whatever that means to them, however much
7 of their income is from that, who are not going to
8 join an organization; who are creating works that they
9 are not registering.

10 The information about copyright has been
11 out from quite some time now, certainly since 1976,
12 the requirement for formal registration has been
13 dropped.

14 I didn't learn any intellectual property
15 law in my so-called professional program in arts
16 school, right through a master's degree. And as much
17 effort and time as the Graphic Artists Guild and the
18 Illustrators Partnership and other organizations put
19 into educating our members in artists about copyright,
20 the hordes are not registering.

21 And it's not because they don't think
22 their work is valuable. They either, as Ted said, do
23 not want to be part of that system, don't think they
24 should have to be, whether they realize it in that
25 sense or not believe in their moral rights of the

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1 inherent ownership of their work, and do believe that
2 their work has intrinsic value.

3 And just because I don't have a client for
4 something that I create today, or a nearly final
5 sketch that I create for a client is rejected because
6 they decide they want something else doesn't mean that
7 somewhere down the road there isn't a client who's
8 going to come up who describes to me they want exactly
9 what's sitting in my portfolio from a couple of years
10 ago, and I can pull it out, tweak it, and it's worth
11 the market value of what that usage is that that
12 client is going to use it for.

13 And yes, of course, Pablo Picasso is going
14 to command more money than my niece. That's obvious.
15 And it also has to do with usage. And as I discussed
16 yesterday at least for illustration and graphic art
17 and all the related fields, there is some
18 documentation of the range of fees charged by artists
19 that has been documented for the last 20 years in the
20 Graphic Artists Guild pricing and ethical guidelines.

21 The information is there.

22 I also want to define some misconceptions
23 that a lot of Americans have about what is an artist
24 and what is art. And I hear this said in this room
25 today, and I hear this all the time. You say the

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1 word, artist, to a person, and I get this. What do
2 you do for a living? I'm an artist. And the
3 immediate thought that people have is the smock, the
4 beret, an easel, a canvas, oil paint, and a little
5 brush, tickle tickle and I'm making paintings and I'm
6 selling in a gallery.

7 The number of Americans that actually do
8 that are about this many. The number of Americans who
9 do that who make a living selling those paintings in
10 a gallery are about that many.

11 There used to be two different terms -
12 fine artists and commercial artists. And fine artists
13 and commercial artists both resented both of these,
14 because the implication was if you were a fine artist
15 your work had no commercial value. You were doing it
16 for the love of making art.

17 And if you were a commercial artist, well,
18 it wasn't fine art work, you weren't a real artist.

19 So now we have this generic term. We have
20 politically correct. We have new words now for
21 everything. We are graphic artists, one who creates
22 graphical works. And any artwork, whether it is fine
23 art, whether it is folk art, whether it is an
24 illustration, has commercial value.

25 A painting can be scanned or photographed

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1 and then reproduced.

2 An illustration that is created digitally
3 in an immediately reproducible format obviously can be
4 reproduced.

5 Chrissy Tenter (phonetic) who Brad
6 mentioned who heads up the Australian reprographics
7 rights royalties organization, told me that she is
8 oddly and inadvertently found herself in a situation
9 of actually acting as an agent on behalf of the
10 aboriginal artists in Australia. And it has become
11 very popular in Australia to use aboriginal artwork,
12 those patterns, those designs, in commercial
13 reproduction of clothing textile patterns, what have
14 you, and those artists never registered their
15 copyright, and in many cases aren't traceable.

16 And she is inadvertently found herself in
17 a situation of negotiating usage rights on behalf of
18 that work, and returning that monies to aboriginal
19 tribal councils.

20 So that batik block print that maybe was
21 produced as a one off for a sarong could possibly be
22 commercial art, and there is nothing to say that the
23 original illustration, perhaps, that was done on
24 traditional media doesn't have a separate value as a
25 work of fine art unto itself, aside from its value to

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1 be licensed or reproduced.

2 MR. CUNARD: So the position of Brad and
3 Lisa is, I've found the picture of the batik in a
4 book, and I want to use it in a book that I'm doing,
5 studying images of batik art or indigenous folk art
6 around the world.

7 The position of Brad and Lisa, as I
8 understand it after two days is, you should not be
9 able to do that because you cannot find the artist,
10 period, end of story. That is your position.

11 MS. SHAFTEL: That's not what we said at
12 all.

13 MR. CUNARD: That's what I'm hearing.

14 MS. SHAFTEL: No, what we said was, we
15 both agreed, after due diligence search.

16 MR. CUNARD: Which is going to be hard. So
17 if the image was created sometime between 1940 and
18 1975, in Indonesia.

19 MS. SHAFTEL: If the search was in good
20 faith, and Ted gave the example of a disclaimer, for
21 lack of a better legal word - correct me if I use the
22 wrong one - that can be attached to the publication,
23 which says, sorry we tried, if you turn up come
24 contact us, we'll pay you.

25 That is the best case scenario, but what

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1 we are concerned about as creators is that there is no
2 free lunch. Any time a work is used there should be
3 payment made, and that keeps the integrity of the
4 whole legal principle of copyright intact. You must
5 pay for usage, even if there isn't an individual to be
6 paid; you must pay for usage.

7 Because otherwise works that are truly
8 orphaned are free, and that devalues other works where
9 the creator does exist.

10 So in my example, the great grandson of
11 the grandson of the person - purported grandson of the
12 person rings me up after my book has been published by
13 Abrams, by some major commercial publisher, and says,
14 that was an important batik print of my grandfather,
15 who lived on such and such an island. Please pay me
16 \$10,000. And the book has only sold 1,000 copies at
17 \$20 apiece and has made no money.

18 So the Brad/Lisa view of the world is, the
19 person should be able to go to court and get an
20 injunction against the publication of that book, get
21 attorneys' fees, and if I don't - unless I pay the
22 \$5,000 - that as I understand is your proposal?

23 MR. HOLLAND: Yeah, if I can just speak
24 for myself for a second, I'm reminded of the fact that
25 of all the people who would love to have a Van Gogh

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1 painting hanging in their dining room, very few of
2 them would probably want to have him over for dinner
3 because of some kind of scene he might make.

4 I don't understand the disdain of users
5 who say they're having difficulty clearing the rights
6 from artists for self help efforts by artists to find
7 means of clearing their rights for users.

8 We're basically like a neighborhood watch
9 organization that has gotten together to try to find
10 some way to police our neighborhood when the law isn't
11 exactly doing the job.

12 Now I - the examples that you have given
13 of folk artists and so on, I have great respect for,
14 I've learned a lot from folk artists. And I don't
15 think that the case that we're making here as artists
16 is much different than those folk artists would make
17 if they were here in our place.

18 I don't know that they would want to be
19 patronized by people who say that their work is
20 basically worthless and therefore should --

21 MR. CUNARD: I didn't say that. As you
22 know, I didn't say that. No one would be publishing
23 an entire book about it, somebody's life, somebody's
24 work, somebody's career, is going to be based on
25 republishing it.

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1 I'm saying precisely the opposite. I
2 think it's important to understand that that work has
3 as much validity and as much dignity as the work of
4 your membership and as the work of Lisa's membership,
5 and those people should be entitled to be paid.

6 The question is, how much do you pay them
7 when there is no market rate available, as there is
8 for the work that you and your membership create?

9 MR. FEDER: I would just pick up on some
10 of the things Brad said.

11 It seems to me that there is a market
12 rate, but you've postulated a guy in Bora Bora as the
13 grandson of the original batik maker who is going to
14 get hold of a lawyer, an intellectual property
15 specialist in the state, going to get him to demand a
16 very large sum of money, and it's going to take the
17 time and effort to track this. It just doesn't happen
18 that way. Real life is not that way. It is not that
19 way in almost every case. It's very exceptional, the
20 person will actually go to court.

21 And why won't they? This is true of our
22 European members and American members. Because they
23 know it's a nightmare to go to court in the United
24 States on copyright questions. It gets dragged out.
25 There are so many provisions in American law,

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1 especially those that survived from before 1978, and
2 have to do with formalities, that it drives these
3 people insane.

4 And even when they have money, like the
5 Matisses, they don't want any part of it. And what
6 they will do increasingly is, they'll try to bring an
7 action if possible in their own countries, where the
8 law is more favorable to them.

9 I'm talking about things that are
10 distributed not only in the United States but abroad
11 as well.

12 MR. TAFT: Yes, I want to go back to what
13 Lisa said about 120,000 people saying their artists.
14 In fact that's the tip of the iceberg. It's really
15 everybody. We're all creators in one way or another,
16 and you never know if something you create, whether
17 it's an email or a song you sing, will somebody - if
18 it's been recorded - become of value.

19 And there's just no way until that
20 particular item is used that you can put a value on
21 it.

22 And I hate the thought, for instance,
23 Chris, what you were saying, that those of us who are
24 not even in that 120,000 are somehow left out because
25 they would have absolutely no idea that what they are

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1 considering is - will ever have any value.

2 And again, I bring back the case I brought
3 up yesterday, the arrangement that Poor Lazarus sung
4 in the film, "Oh Brother Where Art Thou?" by a
5 prisoner from the 1950s or whatever.

6 Now there is a good chance that that would
7 have been a orphaned work, and the prisoner would have
8 been out of luck. After the film came out, then went
9 to the producer and said, I want some money for this,
10 he may have been out of luck, under certain regimes,
11 Chris, perhaps what you were talking about.

12 Fortunately, he was found before, and he
13 got a check for six figures or five figures,
14 something. He got a good check for singing that song.

15 So I guess that's my concern with sort of
16 having some kind of cutoff for those who don't
17 consider themselves as artists, who don't consider
18 their creativity to be of value.

19 MR. SPRIGMAN: Yes, again, I agree with
20 Michael's predicate, which is that we are all in some
21 sense creators. I mean the stronger version of that
22 is that creativity is just becoming more and more
23 dispersed, and people are able to get their creativity
24 distributed in more ways than before. And that's
25 important, and it's good.

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1 And then I don't agree with the subsequent
2 point, though, that there is a danger of being left of
3 it, it being the copyright system.

4 The copyright system is not a lottery,
5 okay. Just like very few people hit the lottery, very
6 few people hit the lottery with a creative work as
7 well. This is the domain of exceedingly few people.
8 Most people don't make money from their works. Not
9 all artistic works have a market value; exceedingly
10 few do.

11 They may have wonderful values in other
12 ways, important values culturally, academically. But
13 many works do not have market value.

14 So the question is, if these works are not
15 being exploited through the copyright system, and
16 there is no revenue being recovered by the vast
17 majority of works through the copyright system, then
18 what do we do with them?

19 And any system that is expensive and
20 expends a lot of money deciding what to do with them
21 is a system that won't be used.

22 And this whole discussion about
23 litigation, the costs of litigation and the costs of
24 coming into U.S. court I think makes the point
25 exactly, that if you design a system that depends on

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1 litigation, expensive litigation, people get very
2 little relief.

3 MR. SIGALL: I guess on that last point,
4 I guess just for argument's sake to take a contrary
5 point on this, the prospect of very expensive
6 litigation for both sides, owner and user, may
7 actually prompt them to sit down and avoid that
8 litigation in some respects.

9 I think much of the discussion between
10 Jeff and Lisa could in part boil down and be resolved
11 to the question of, when the owner resurfaces, what
12 are they entitled to receive?

13 If you have a system that essentially they
14 could not receive an injunction against the continuing
15 ongoing use, and that they were entitled to some
16 compensation, it may come down to the question of what
17 the statute says about what that level of compensation
18 is.

19 And the question, I think, is, you have to
20 look at it in terms of whether, if you say that the
21 compensation is capped at a certain amount, what that
22 does to the question of expense and uncertainty in the
23 minds of the parties who are considering litigation,
24 and what that does to their incentives to avoid
25 litigation.

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1 I think I've heard some people say that if
2 the cap is too low, it prompts some people to do what
3 I think the AAP is trying to avoid in their submission
4 of saying, the user saying I'm just not going to pay
5 you at all, go sue me in federal court for the \$500 I
6 might owe you. I'm just going to completely let you
7 - so sue me approach that some people might take in
8 that circumstance.

9 The question is, would - the task is I
10 think to try and pick a statement of the amount of
11 compensation that doesn't push either side to avoid,
12 I mean in the question of marketplace rate, you hear
13 it from Jeff and others, you say it's a marketplace
14 rate, that prompts the owner to put a hold up value in
15 front of the user, saying, \$30,000, that's my
16 reasonable rate, here's my evidence of it's
17 reasonableness, and so therefore, I am going to sue
18 and I don't really care what you say. I'm going to
19 ignore your reasonable counteroffer, in the other
20 construct.

21 And the question I think in part, and I
22 think generally, is if you can calculate, if you can
23 calibrate and state a level of compensation that tries
24 to give - I don't want to say it this way, I guess,
25 but create uncertainty, enough uncertainty that people

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1 will actually try to avoid litigation by coming to
2 reasonable fair results outside of litigation.

3 That might be the goal and the hope that
4 you have, and it's a question I think of trying to
5 avoid at least other statements of the value, or other
6 statements of the amount of compensation that would
7 prompt litigation one way or the other, or not
8 encourage that settlement.

9 So at least from what I take from the
10 discussion of the past couple of days, that's one way
11 to try to address the question, try to resolve a lot
12 of the problems.

13 There may be other practical questions
14 about actually getting paid that amount, and how you
15 do that. That's at least the way I view part of our
16 task, is to try to deal with that in that way.

17 MR. METALITZ: I know we've gotten very
18 far afield from the international issues, but I just
19 wanted to emphasize what I heard from Ted and from
20 others here as well, which is, as a practical matter,
21 once you have a situation in which the user and the
22 right holder are in contact, you're often able to -
23 very often able to arrive at some negotiated solution,
24 because a lot of things would have to fall in place
25 for Jeff's nightmare scenario of the \$30,000 demand

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1 from Indonesia to come into play.

2 So I think that means that in what we
3 hope will be a small percentage of cases in which due
4 diligence does not enable someone to locate and
5 identify the copyright holder, in the small percentage
6 of that small percentage in which the copyright owner
7 then comes forward, I think you are right to focus on
8 what is the background, what is the default we want to
9 have there that will most likely encourage them to
10 reach a quick amicable solution at some level.

11 My view is that it is probably best to say
12 that if they can't decide, if they can't decide then
13 someone will have to decide what the market rate would
14 be. That's what they're trying to do, and didn't
15 succeed for whatever reason. And while it will be
16 difficult in some cases, maybe there weren't any books
17 published about Indonesian batik last year, maybe
18 there was one published on Malaysian textiles, and
19 maybe there was one published about - there was a
20 compilation recording of Indonesian Gamelan music, and
21 maybe there was enough play - and there were some
22 actual licensed transactions in those works - maybe
23 there is enough evidence to be able to come up with
24 that.

25 So in the very rare, hopefully exceedingly

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1 rare, case in which this does have to be litigated -
2 and again, I would urge that we think whether in cases
3 where infringement is not really in dispute, or
4 authorship is not really in dispute, finding a quick
5 administrative way to do this, I just think this is
6 the best we can do to try and create the situation
7 that you're talking about.

8 MR. SIGALL: Another thought I had
9 yesterday, and I don't think I expressed it here, was
10 that maybe part of the system is in addition to
11 creating a record, and users creating a record of
12 their reasonable search, at the same time that they do
13 that, it would seem anyway in many cases it would not
14 be hard for them to also create the record of what a
15 reasonable payment might be for that use. Because in
16 many cases they'll be clearing rights to similar
17 works. They will probably be in the exact same
18 context. It would seem that you will have a variety
19 of results in clearing your rights to a particular
20 book for example or a documentary film. You'll have
21 works that you found the owner. You'll have works
22 that the owner says you can use it for free. You will
23 have works that the owner says you pay this much.

24 So at the same time the user creates two
25 records, a record of their reasonably diligent efforts

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1 to find the owner, but also a record that they've paid
2 this much for these works. They haven't paid at all
3 for these works. These were provided for free. And
4 they sort of create that record in the event, that's
5 part of the insurance that they're obtaining in the
6 event the copyright owner arrives.

7 They can ideally present this evidence to
8 a surfacing copyright owner and say, look, here's what
9 I have. I have a very clear record of making a
10 diligent search. I have a very clear record of the
11 kinds of payments I have made, including the fact that
12 for all of these works that I used I didn't pay
13 anything, because I'm a library or I'm an archive. So
14 I think I have a very strong case of zero royalty
15 here.

16 And ideally you would have copyright
17 owners who could take that and would react to that in
18 a way that doesn't say, that would forestall the
19 \$30,000 demand or forestall the threat of litigation
20 over a \$30,000 demand.

21 So that's at least the concept, I think,
22 that might be - that you might encourage users to make
23 those kinds of recordkeeping and those kinds of case
24 building in the course of doing their search.

25 The last part of the international thing

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1 that I wanted to get across, or discuss and bring out,
2 was the question of whether - I think Steve has
3 proposed it, and I think Jeff has expressed an
4 interest in talking about it - of excluding foreign
5 works from this system for at least an initial period,
6 and just to get the reactions of those around the
7 table to that proposal, and the pros and cons of that
8 approach.

9 I think Jeff had --

10 MR. CUNARD: Well, I know you skipped over
11 the third part of the TRIPS test, and I want to say
12 that I don't believe that the schemes that are
13 proposed here would unreasonably prejudice the
14 legitimate interests of copyright owners, and we could
15 go into that in writing at some later date.

16 I think with respect to foreign works,
17 actually the vast majority of works created in the
18 world are foreign works. That should be obvious.

19 The vast majority of works that are
20 orphaned works are likely to be foreign works. I
21 mean there is no question about it. It is absolutely
22 a core element of not only U.S. culture and history
23 but global culture and history to work with works from
24 around the world, whether it's native Americans who
25 happen to be located within the 50 states, or native

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1 Americans who are located just north of the border or
2 just south of the border; whether it's art historical
3 scholarship involving artists who were born in Europe
4 and moved to the United States; whether you're filming
5 a documentary of World War II and you're using a photo
6 taken in France of the GIs marching ashore at Omaha
7 Beach, it would be a woefully pathetically incomplete
8 view of a solution to orphan works only to focus on
9 U.S. based works.

10 And that leaves aside the question, which
11 is not unimportant, raised by Steve, which is, how do
12 you know if a work is truly orphaned, and you can't
13 even identify the copyright owner, how do you know
14 whether the photo was actually taken in Normandy by a
15 French person who was brought back to the United
16 States, was painted by someone who was in an
17 internment camp in Europe, or was painted in the
18 United States after they came - were free. Those are
19 some intractable problems, but perhaps don't apply to
20 some subset of works that are clearly American.

21 MR. OAKLEY: Well, I certainly understand
22 why Steve proposes the idea of doing this in two
23 parts, to try to deal with the area that is relatively
24 certain, which is our own people first, and come to
25 the more difficult question later.

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1 But I think, as Jeff says, that would
2 really be inadequate. And it's important once we're
3 engaged in this process to try to push harder, and try
4 to think it through, and try to get a more
5 comprehensive solution.

6 Certainly the need is no less for foreign
7 works. The same problems must exist out there,
8 particularly because they haven't had formalities for
9 such a long time. There's no doubt a lot of works out
10 there that are not being exploited.

11 In particular from the library
12 perspective, substantial parts I don't have a number,
13 but it's got to be at least half of library
14 collections must have come from foreign jurisdictions,
15 and library initiatives in terms of preservation, that
16 many libraries are now undertaking, would like to
17 include those, and if we don't include those, then our
18 efforts are inadequate.

19 And it's going to be divided into the same
20 two parts. People are going to have to do half now
21 and half later, and it will be quite inadequate.

22 And so it seems to me that a solution that
23 excludes foreign works is really only half a solution.

24

25 MR. METALITZ: Well, I think I'm making

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1 progress here. Jeff thought my idea was pathetically
2 incomplete, and now Bob says it's at least half a
3 solution. So the trend is good.

4 Let me just offer very briefly three
5 reasons why -- although I agree, it's an incomplete,
6 it's not a very satisfactory solution - three reasons
7 why it would be the best first step to take.

8 One I've already mentioned, which is that
9 it just avoids these questions about compliance with
10 Bern and TRIPS, and I think some experience under an
11 orphan works regime might shed some light for example
12 on how special a case is this. It might shed some
13 light on how it impacts the normal exploitation of a
14 work, or even legitimate interests of authors. We can
15 make a lot of abstract pronouncements about it, but
16 maybe we will know more after we have some experience.

17 The second reason is that, again, coming
18 back to something I said yesterday, and others said as
19 well, if one of the goals - and I would say the
20 paramount goal of this process is to try to reduce the
21 population of the orphanage, increase the level of
22 information about the whereabouts and the identity of
23 right holders and bring them together with users, we
24 have a paradigm here in the U.S. that we may make
25 progress on that with an orphan works system, but

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1 there is no reason to think it would have any such
2 impact outside the United States.

3 I mean we don't know, or at least Jeff
4 probably has clients that do know, but most of us
5 don't know much about the database of Haitian painters
6 and how that can be brought online and made more
7 accessible to people who want to make use of Haitian
8 paintings.

9 When we bring our works together, I think,
10 in sectoral roundtables, if that were to happen, I
11 think we would learn a lot more about how to find
12 copyright owners and authors in the United States, and
13 much, much less about how to find them outside the
14 United States.

15 So it is not clear to me that - and you
16 know, the standards of due diligence would be much
17 harder to formulate, I think, on a worldwide basis
18 than it would be on a U.S. basis.

19 And the third reason quite frankly is I
20 think we have to be looking at this with an eye
21 towards what other countries may do in similar
22 circumstances.

23 This orphan works issue is, people have
24 pointed out, is not unique to the United States, and
25 I think we have to be concerned about how if we bring

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1 foreign works into an orphan works regime and lay out
2 a path for users to make use of foreign works without
3 obtaining permission, and for a very limited
4 compensation to the right holder, we have to be
5 concerned about how other countries will treat U.S.
6 works in a similar regime.

7 And I think the care and attention and
8 effort to cast a broad net that this proceeding
9 represents, and I think also the goodwill that we've
10 heard to a great extent around the table for the last
11 few days may not be present in other countries, which
12 may approach this much less transparently, and in a
13 way that provides much less input for all the
14 interested parties.

15 And you end up with a situation where
16 people in most countries are given a path to
17 designating what's an orphaned work and thereby making
18 a free or uncompensated or virtually uncompensated use
19 of it, I think then we have a lot to be concerned
20 about.

21 So again, I think those are three good
22 reasons why, although there are a lot of problems with
23 excluding foreign works, I agree with that. It leaves
24 a lot of the problem unsolved. I think it's still the
25 most prudent way to proceed.

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1 MR. FEDER: This proposal about orphaned
2 works, it is important to point out, is essentially a
3 unique United States proposal. It's not as if all the
4 European countries have comparable things on the
5 board, or practice orphan works as we've been
6 discussing them.

7 The closest they get, as I mentioned
8 before, is, a society may receive money for artists
9 who have not been located, but they then will
10 distribute the monies to the artist. But there is no
11 notion that the works of these artists has fallen into
12 some orphan unprotectable kind of domain.

13 The mere notion of orphan works
14 contributes to the dissolution of the Bern Convention
15 as we know it, and Bern is meant to protect copyrights
16 and not to contribute to their loss.

17 So I just - it will not be tolerated on
18 the part of our partners. I think they're going to
19 have to feel that retaliation of some kind is in
20 order. I'm sorry to say that. And the copyrights
21 that deserve protections of American works will be
22 under pressure in a number of European countries.

23 There is one other thing I want to
24 mention. It goes a little bit far afield in a way,
25 but if I may. And that is that there is orphan users

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1 as well as orphan works. And I'm talking about those
2 people who use works without the permission of the
3 creators, perhaps on the basis of their being
4 unlocatable, and exploit these works. They're very,
5 very difficult to track by societies. We've tried to
6 do so in a great many instances, and they are often
7 untrackable by virtue of their being essentially fly
8 by night.

9 It would be ludicrous for us to ask the
10 government to compensate creators for the loss and
11 illegal taking of their works by such people, totally
12 ludicrous.

13 But it's no less ludicrous for the
14 government to sanction the unauthorized taking of
15 creative works by the users on the mere claim that the
16 users couldn't find the creator in question.

17 And once again there is a system for users
18 to employ works without the permission of the
19 creators. It's called, for noncommercial works, for
20 a user, commercial works it's analysis, market
21 analysis, risk analysis.

22 And thirdly, I talked about the use of the
23 disclaimer. I think those three things are more than
24 adequate to cover the whole spectrum of what we're
25 talking about. And orphaned works is just extraneous

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1 as far as I'm concerned. Everything that should be
2 done is already available to users.

3 MR. SPRIGMAN: Well, that last part just
4 blinkers a lot of what was said earlier here today
5 about the entire part of our culture that is orphaned.
6 And this process has produced hundreds of comments
7 detailing cases where works are orphaned. So
8 obviously fair use, and collecting societies and risk
9 analysis are not taking care of the problem.
10 Otherwise we wouldn't have all these hundreds of
11 comments.

12 But I want to go back to the idea that
13 Bern binds us. I don't think Bern binds us. And in
14 any event we here in the States have our own copyright
15 tradition, which is distinct in some ways from the
16 Europeans.

17 And people overblow this. They say that
18 we have a utilitarian tradition; the Europeans have a
19 natural rights tradition. And this is deeper than we
20 probably want to go at the moment, but I think our
21 traditions, both ours and theirs, are mongrel. There
22 is no purity to either system.

23 We strike a somewhat different balance
24 between the interests of authors and the interest of
25 the public in access. The Europeans strike a somewhat

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1 different balance from us, but we're both striking a
2 balance.

3 European copyrights are not perpetual, so
4 they have utilitarian aspects to their system as well,
5 and that's all to the good.

6 So in other instances where we in the
7 states decide that there is some important policy
8 objective in intellectual property laws, we have no
9 hesitancy in patiently, respectfully, pressing these
10 views on our European friends.

11 The Europeans have a different regime than
12 we do for example with respect to software patents.
13 And I know for a fact that there are both on the
14 government level and in the private sector there are
15 people working to align the European regime with ours.

16 And that's our policy. Now what we're
17 talking about here in the orphaned works area is a
18 policy that would better balance the interests of
19 users with the interests of creators for this category
20 of orphaned works.

21 If we have some convincing to do, we
22 should start doing it. This is an issue that has
23 come up perhaps first in America, because our culture,
24 our vibrant culture, our wired culture, is producing
25 a lot of uses of orphaned works, and is bringing this

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1 problem up.

2 But the Europeans are going to get there.
3 And when they get there, they are going to see some of
4 the same policy issues that we do, and we should start
5 talking to them now.

6 In the meantime I would not exclude the
7 majority of works, which are foreign works, from this
8 system. I think we can be protective of their works,
9 and when we lay out the policy, whether it's a
10 reasonable search policy or a finality based policy,
11 I think we will be able to convince them that this is
12 in everybody's interest.

13 MR. HOLLAND: In response to the hundreds
14 of letters that you're referring to on behalf of
15 people concerned about orphaned works, I would point
16 out that we put together on very short notice, and we
17 had to create - we had to create our own network,
18 because one didn't exist in February. We had to put
19 up a website to reach people by mass email, and to try
20 to locate artists who there were no existing websites
21 to find, there was no existing list of artists to
22 find, we had to create the list from scratch.

23 In that short period of time, in a matter
24 of a couple of weeks, we found over 1,500 individual
25 artists who took the time to express their own concern

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1 about this orphaned works issue, and that includes 42
2 artists organizations, I think 20 of which come from
3 overseas, from collecting societies as experienced as
4 Copinar (phonetic) and artists associations like the
5 Association of Illustrators in England.

6 So this does concern people in other
7 countries. And the - this idea that - one of the
8 things that I think Creative Commons has done is, it's
9 tried to describe all artists as a species of users.
10 I know that in speeches, Professor Lessig has talked
11 about how all art is based on art of the past. That's
12 not necessarily true. Collage is a form of art, but
13 creativity is not a form of collage. Creativity is a
14 much more complex things, as psychologists, or artists
15 or even kindergarten teachers can tell you, the
16 ability to take something and make something out of
17 nothing is a very complex thing.

18 It's not as simple as going on the website
19 and remixing. So I think the concern that we located
20 just in a short period of time, based on - starting
21 from scratch, indicates that there is a concern on the
22 part of artists around the world about what's
23 happening with this study in the United States.

24 MR. CUNARD: I just want to respond I
25 think to Steve's second point, which is, we need to

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1 distinguish between the separation of U.S. and non-
2 U.S. works, and the possibility that whatever uses are
3 made of works in the United States will be perceived
4 or displayed or performed or distributed overseas.

5 Once a work is in the United States,
6 whether it's a U.S. work or a foreign work, it's
7 essentially entitled to the same treatment. And
8 whether it's a U.S. or foreign work, if it's put into
9 a book and a book is distributed overseas it's only
10 going to be subject to orphaned works treatment, and
11 frankly only subject to fair use treatment, in the
12 United States.

13 So even today, to Ted's point, scholars
14 and artists live with territoriality, and it's
15 limitations, in deciding whether to make fair use of
16 a particular work. And that's an incomplete solution,
17 because books are now distributed globally. Websites
18 are accessible globally.

19 And so I think people similarly would be
20 cognizant of the fact that whatever benefits they get
21 from orphan work status, that is to say, a limitation
22 on remedies in a lawsuit brought in a U.S. court,
23 however unlikely that would be, isn't going to benefit
24 them at all overseas whether it's a U.S. work or a
25 non-U.S. work.

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1 MR. METALITZ: I think I didn't express
2 myself very clearly, because that wasn't the point I
3 was trying to make, although I think you're right that
4 there is going to be this question of what are
5 people's expectations about once they have the orphan
6 work status and there is an educational effort to
7 undertake it to make it clear that it only affects
8 rights under U.S. law.

9 My concern was a little bit different,
10 which was not with the status quo of what laws are
11 outside the United States, although I would note that
12 many countries have orphan works provisions on the
13 books. Just to name two not insignificant markets,
14 Japan and Korea. And Korea is now moving to make its
15 orphan works provision, which is basically an
16 authority to a government ministry to set a license
17 rate. It's similar to the Canadian provision.

18 They're moving to make that applicable
19 only to Korean works. And for the reason, the stated
20 reason, by the way, that they are not sure that to
21 make it applicable to foreign works would comply with
22 their Bern obligations.

23 Those countries already have laws on the
24 books, but my concern is with what other countries
25 will do if the U.S. moves toward an orphan works

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1 regime, and what impact that would have on foreign
2 works in those countries, particularly U.S. ones.

3 So this I think is a reason to move
4 cautiously in this area. I'd emphasize again that
5 from the perspective of the recording industry as a
6 user, it would probably benefit us to have this regime
7 apply to foreign works, because there are foreign
8 works which we want to make use of and we can't
9 through due diligence locate or identify the copyright
10 owner. So it would be good from that perspective.

11 But I think from the other perspective, we
12 should be cautious about how it would impact the
13 protection of U.S. works in other countries.

14 MR. SIGALL: Jeff hopefully reminded me
15 that I did skip over that last prong of the three-step
16 test. We did actually have a specific question
17 related to that. And it plays off of - and I think
18 this will be the last topic that we have - it plays
19 off of a discussion yesterday that would involve the
20 question of how you put unpublished works within this
21 system.

22 A lot of concern was expressed about
23 including unpublished works in this system regarding
24 the creator's ability to keep works that it wouldn't
25 want published away from the public.

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1 I'm thinking most specifically in this
2 case of works that for creative reasons they think
3 aren't the ones that should be out there representing
4 them, to avoid questions of privacy and other laws.

5 If we could stick to that kind of example.
6 And I guess the question is, in an orphan works regime
7 that would be applicable to unpublished works, and
8 that would result in a situation where the user could
9 make use of an unpublished work, and then even after
10 the owner surfaced and said, that's not - that's my
11 work and I don't want it published, if a regime would
12 not permit some sort of injunction to stop the use of
13 the work, but only require compensation, how does that
14 square with the command of the three-step test to not
15 unreasonably prejudice the legitimate interests of the
16 right holder?

17 I guess we're talking about interests in
18 the form of nonmonetary creative control interests of
19 the right holder, particularly in light of the
20 perspective of European countries with respect to
21 moral rights and other rights of integrity with
22 respect to works, that kind of analysis in light of
23 their approach to that issue, how does this work, if
24 we had a system that would permit use of these
25 unpublished works requiring only some form of

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1 compensation.

2 MR. SPRIGMAN: Obviously the scope of
3 moral rights is an issue on which our U.S. outlook is
4 somewhat different from the kind of norm among
5 Europeans, although it's wrong to say that the
6 Europeans are monolithic on this. They actually
7 differ amongst themselves. So to speak of a European
8 approach to this is a little too broad.

9 But crudely, we here in the States have
10 insisted for some time that the combination of the
11 incidents of copyright law and the Lanham Act and
12 state defamation law and state unfair competition law,
13 you put those altogether, that equals sufficient
14 respect for moral rights for us to actually accede to
15 Bern and to satisfy its standards.

16 And that has been our position for a long
17 time, and that continues to be our position. And
18 there are some complaints, but there isn't a
19 tremendous amount of pressure on that position, and I
20 don't foresee a tremendous amount of pressure on that
21 position.

22 So that position was reiterated what is it
23 last term by the Supreme Court in the Daystar case,
24 where they basically said that the right which was
25 sought, which was kind of a permanent right of

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1 attribution was not available under the Lanham Act for
2 this particular piece of property, and the copyright
3 law didn't provide it either, so it did not exist.

4 So again the narrowness of our conception
5 of moral rights is pretty clearly established in U.S.
6 law.

7 There is nothing in the systems that we've
8 been talking about, either the reasonable effort
9 system or the kind of categorical system that we favor
10 that would detract from the level of respect for moral
11 rights that the U.S. already accords.

12 We have the Visual Artists Rights Act, we
13 have these narrow incidents where we have special
14 rights. None of that goes away.

15 So I think that this question of
16 reasonable interests, reasonable author's interests,
17 is untouched.

18 MR. SIGALL: Let me clarify my question.
19 I probably shouldn't have mentioned moral rights at
20 the end. That may have confused the question.

21 I don't think it's a controversial
22 statement to say that many authors and copyright
23 owners believe that it is their interests of copyright
24 to control first publication of their work separate
25 and apart from a question of whether that's a moral

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1 right or not. The copyright they get gives them the
2 ability to stage the release of their works, and to
3 not release drafts of their works, and to control
4 that.

5 So I'm trying to focus mostly on what
6 everyone would agree U.S. copyright law does give an
7 author, which is the ability to do that, and I think
8 that's reaffirmed in the Harper & Roe case in the
9 Supreme Court, the question of first publication
10 predominantly.

11 That, the question is whether that
12 expectation and that legitimate interest of a
13 copyright owner in the context of this, an orphan
14 works regime like the one we are describing and
15 talking about yesterday, whether that raises
16 international issues, and how a third prong of the
17 three part test affects that type analysis in that
18 specific situation to give us some frame of reference
19 to analyze these issues.

20 MR. CUNARD: What the third prong says,
21 and that do not unreasonably prejudice the legitimate
22 interests of the right holder.

23 So people have analyzed what is meant by
24 unreasonably prejudice and legitimate interests. And
25 a position that would say that unpublished works could

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1 never be the subject of this Bern exception would take
2 the position that any use of an unpublished work, not
3 matter how small, no matter whether it had an economic
4 effect on the copyright owner or not, unreasonably
5 prejudices the rights of the copyright owner.

6 And I think United States law pretty
7 conclusively responds to your question by saying that
8 in 1992, when Section 107 was amended, Congress
9 specifically acknowledged that fair use could be made
10 of unpublished works, presumably in conformity with
11 Bern, and presumably because people thought that fair
12 uses, which by the way are not limited to particular
13 limited sense of Yiddish songs from Lodz, but apply
14 generally to every conceivable kind of copyrights work
15 under the horizon, that those kinds of fair uses did
16 not unreasonably prejudice the legitimate interests of
17 the copyright holder.

18 And as I said at the beginning of this,
19 it's ultimately up to Congress to make the
20 determination as to what unreasonably prejudices those
21 legitimate interests. We concluded, I think, in 1992
22 that unpublished works were not categorically excluded
23 from special treatment by virtue of the third prong of
24 the Bern test.

25 MR. KASUNIC: Well, I certainly am not

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1 either. But in terms of comparing orphan works and
2 fair use, I think we have some significant differences
3 between the two, when we're talking about commercial
4 use of works for any purpose, as opposed to in the
5 fair use context where you have a limited scope or a
6 limited purpose on a case-by-case basis.

7 Here we are talking about whole classes of
8 works involving every - we're talking about all works,
9 and scope is really not in anyway limited.

10 MR. CUNARD: Well, I was really responding
11 to the threshold question, which was, sort of
12 categorically could - would unpublished works always
13 run afoul of the third prong of the Bern test. And I
14 think the answer to that is no.

15 But then I think you're right that we
16 would need to analyze on its own bottom the question
17 of whether an orphan work regime with respect to
18 either published or unpublished work would run afoul
19 of that third prong.

20 And as I alluded to earlier, I don't think
21 that it does, because I don't think that it
22 unreasonably prejudices the legitimate interests of
23 the rights holder. And for that even though the panel
24 decision might be viewed as having gone in the
25 opposite direction from those who would propose an

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1 orphan works regime here, I think there is language
2 through the panel decision which would say that in
3 this situation where somebody isn't enjoying actual or
4 potential revenues from the exploitation of the work,
5 there is no loss to or prejudice to the economic
6 interests of the copyright owner that would run afoul
7 of that prong.

8 I mean this is the kind of issue that I
9 think frankly is better not described in this setting,
10 or discussed in this setting, but perhaps either in a
11 kind of written analysis or in a sort of more intimate
12 environment, because it's really hard to sort of work
13 with all the legal precedents, even those of us who
14 are sometimes in ivory towers and sometimes now would
15 prefer perhaps just to sit down and talk about it in
16 a small room setting.

17 UNIDENTIFIED SPEAKER: I graduated from a
18 marble tower to an ivory tower, and I submitted this
19 written work, and this analyzes these issues.

20 The way I would characterize the panel
21 decision is, on balance, it's actually favorable for
22 a system to address orphan works. And the owners of
23 the works, subject to the 110.5 provision, were
24 actually receiving some fraction of revenues from the
25 establishments that they were serving.

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1 It was the compulsory license put into
2 place that deprived them of any revenues. So it's not
3 a categorical imperative that there be no deprivation
4 of income. The question is whether it's an
5 unreasonable deprivation of income, given the kind of
6 policy that you are pursuing.

7 So I think again the complexities of the
8 110.5 decision are deep, but it involves compulsory
9 licenses that are not really similar to what we're
10 talking about. And even so it approved many of the
11 uses that were sought under 110.5.

12 MR. FEDER: Suppose you came across a 10-
13 page Salinger short story. Or a part of a short story
14 if you will. And he kept writing Salinger and he
15 didn't answer. Salinger is a well known recluse. And
16 you couldn't get hold of him, and you kept writing,
17 kept writing. And finally you published the work.
18 It's going to have a strong impact on the financial
19 value of that work when and if he comes to publish it
20 himself, or if his heirs come to do it.

21 MR. CUNARD: But I think even the most
22 radical proponents of an orphaned works regime would
23 not consider that use subject to orphan works status.

24 MR. HOLLAND: Why not?

25 MR. CUNARD: We covered this at great

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1 length yesterday. Because the owner has expressly
2 made it clear that he refuses to license it. It's
3 absolutely within the right of the copyright owner to
4 express his or her refusal to license.

5 That is clearly not a case of
6 unidentifiable, unlocatable copyright owner.

7 MR. METALITZ: I was just going to say, I
8 think Jeff is too moderate to speak for the radical
9 view of orphaned works, because we certainly saw many
10 submissions in this proceeding that said, in that
11 circumstance where you get no answer, no answer and no
12 answer, can you be charged with notice that J.D.
13 Salinger has this view?

14 Maybe it's not J.D. Salinger, it's the
15 next author who is not such a well known recluse.
16 Some people do think that's an orphaned work. I
17 don't. And I think it should be made clear that it's
18 not.

19 But that's a universally held view.

20 MR. HOLLAND: Steve just made my point.
21 You're basing your argument on the assumption that
22 since J.D. Salinger is known as a recluse that that
23 would count some sort of due diligence.

24 If he weren't well known but had the same
25 proclivities, would he be entitled to the same rights

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1 not to see his work used?

2 MR. CUNARD: Yes, the hypothetical,
3 whether it's J.D. Salinger or not, is that there is a
4 known person whose name is associated with; that
5 you've contacted that person; that person has refused
6 to authorize permission.

7 That's different from a situation where
8 you're sending a letter out to 20 people and saying,
9 are you the copyright owner? You have no idea whether
10 any of them is the copyright owner. And they all
11 refuse to answer the letter.

12 The hypothetical was, it's either J.D.
13 Salinger or somebody else who is a known identifiable
14 findable individual who refuses to license the work.

15 And I would say - I don't know what every
16 comment would say, but I would say that at least our
17 position and the position I think of many people would
18 be that that is not an orphaned work situation.

19 MR. SPRIGMAN: That would be our position
20 too.

21 MR. HOLLAND: Just one follow up to that.
22 I know of artists who entered the business about the
23 time I did, 30 some years ago, who dropped out of the
24 business as I mentioned earlier today.

25 I'm sure they still value their work, but

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1 they also valued their families and had to do
2 something to make a living.

3 I don't - these are people who were
4 colleagues of mine and somewhere over the years, even
5 though I had their phone numbers, I couldn't locate
6 them myself right now.

7 If I had access to their work, I would
8 have a known commodity. Would I be permitted to
9 publish that work because I don't know how to find the
10 person any longer?

11 MR. CUNARD: Well, the question isn't
12 whether you're permitted to. You wouldn't have any
13 license to do so. And so if the person emerged and
14 sued you, the question is, what would you do?

15 Really all of this boils down, I think as
16 Jule had said, whether you are going to pay the person
17 a reasonable license fee? Does the person get a right
18 to enjoin the use? Or do you pay him or her some
19 capped amount or actual damages or something like
20 that?

21 That's really what all this boils down to
22 in my view.

23 MR. HOLLAND: If it were capped, at some
24 of the sums that I've seen here, \$100 or \$500, I might
25 figure it's just a reasonable business expense to go

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1 ahead and publish it and pay it as if it were a fine
2 for a misdemeanor.

3 MR. CUNARD: Or you could conclude that
4 the person is going to come forward and say, all
5 right, the reasonable license fee for this, my work at
6 the time was going for, pick a number, \$400, \$500, you
7 have to tell me what his or her work was going for at
8 the time.

9 And even at that, the guy will come
10 forward, and I'll risk having to pay him \$4-500 at the
11 time. The point is that you wouldn't have a license
12 to use the work. All of this is really about what's
13 the remedy, and in your case, really, what's the risk
14 analysis you're going through in deciding whether or
15 not to publish without getting permission.

16 MR. SIGALL: I think Oliver has a
17 question, final question.

18 MR. METZGER: On this third step in the
19 three-step test, I have a question for the archives
20 and libraries. It seems like we've discussed often
21 the sort of paradigmatic example of taking a lot of
22 photographs from the basement and making them more
23 available. I assume that means putting them on some
24 type of website.

25 We've also heard that sometimes making an

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1 item available in digital form on the web can
2 permanent end the market value, however much that
3 exists, for that work. I think Kay said earlier for
4 novels that would probably be the case, that once it's
5 out, a publisher would no longer publish it.

6 So I'm just wondering, in the example,
7 like the setup that Jule gave us was, in a regime
8 where continuing use can continue even after the owner
9 reappears, if Cornell or whatever has its 300,000
10 photos up there, is the 300,000 or even if one of
11 those users comes back and says, okay, please take it
12 down, and they say fine, we'll take it down, how would
13 that interplay with the unreasonably prejudice the
14 legitimate interests of the right holder?

15 I mean my concern obviously is, is the
16 right holder going to say, it was up there for six
17 months. Who knows how many copies were made. I'm
18 never going to be able to publish that again.

19 MR. OAKLEY: Yes, I think one of the key
20 things to remember that we're assuming that there is
21 going to be a relatively small, maybe very small,
22 number of people coming forward. Many of these works
23 are very old and have not been economically exploited
24 for a very long time.

25 I think that Jonathan said yesterday that

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1 in the case of a digital use of the work, some kind of
2 notice and take down kind of thing, would be
3 definitely a possibility. That's different from the
4 case of other kinds of uses of the works, such as when
5 it gets incorporated into a new book or movie or
6 something that's out there on the market. You can't
7 pull that back in the same kind of way.

8 So I think the library community would
9 accept some kind of notice and take down provision.
10 Whether that completely eliminates the market for that
11 work is a more difficult question. It's really hard
12 to sort of know what that market might have been.
13 Certainly, there hasn't been any market for it up to
14 that point.

15 MR. METALITZ: I just want to say, first
16 of all I see that my mike comes on when yours comes
17 on. You raise a very interesting question we only
18 barely touched on, and I'm sure we're not going to get
19 into now at this hour of the second day, and that is,
20 is there some category of use that is so invasive of
21 a copyright owner's interest that it shouldn't be
22 subject to orphan work status, it shouldn't have these
23 limitations.

24 I think you put your finger on it by
25 saying if there is a kind of use that totally destroys

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1 the future market value of the work, I would certainly
2 be uneasy with the idea that that would be subject to
3 orphan works treatment, the same way as all the other
4 uses we've been talking about here, the library and
5 archives uses, and many others, even commercial uses,
6 that don't necessarily destroy the future value.

7 It's a little hard to say what that kind
8 of use might be. It might have to be something that
9 is very time sensitive, for example, because
10 otherwise, works that are used once often do have an
11 afterlife.

12 But I think it's worth noting, to think
13 about whether there is some such category that
14 shouldn't be subject to orphan works treatment.

15 MR. HOLLAND: I think one of the concerns
16 we've tried to express is that the more esoteric
17 categories of, say, cultural work not become a wedge
18 that opens up an expanded kind of royalty-free stock
19 house of other people's work.

20 I don't think anyone anticipated when the
21 copyright law was written that the work for hire thing
22 would be expanded into this forever and in perpetuity
23 clause, and used under threat of not being able to
24 work for a client.

25 We saw a kind of situation this morning

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1 where Paul suggested that these work for hire
2 agreements would limit the number of orphaned works,
3 because they would be going to large corporations like
4 Conde Nast.

5 Well, that would give Conde Nast greater
6 bargaining power to demand work for hire agreements
7 from artists. And if anything, artists would love to
8 see the work for hire provision reformed, rather than
9 given greater - rather than see orphan works used to
10 give it greater bargaining power in our negotiations
11 with clients.

12 MR. SIGALL: Okay, I think we've exhausted
13 our topics. And I think we had a good discussion on
14 this last panel.

15 And I think that will conclude the
16 roundtables here in Washington.

17 I would like to thank all the participants
18 here for a very cordial and thoughtful and productive
19 discussion. I know that we may have succeeded only in
20 multiplying the number of issues and uncertainties and
21 questions in trying to resolve this problem, but
22 that's always the first step towards actually getting
23 something that is right and useful.

24 So I think by that measure our goal, from
25 the office's perspective, was accomplished, and

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1 accomplished very well and very easily, mostly to your
2 participation and your skills in articulating your
3 thoughts and issues, and your ability to listen to
4 others and participate in a real thoughtful
5 discussion.

6 So I thank you for that, and for helping
7 to make this a very productive two days from our
8 perspective.

9 (Applause.)

10 MR. OAKLEY: And Joel, I would like to
11 thank you and the Copyright Office for tackling this
12 problem head on. This has been a huge issue for
13 libraries over the last 10 - 20 years as we've gotten
14 more into the preservation problem, and the office is
15 to be congratulated and thanked for tackling it and
16 trying to resolve it. Thank you.

17 (Whereupon at 4:33 p.m. the above-
18 mentioned proceeding was adjourned.)
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