

UNITED STATES OF AMERICA

LIBRARY OF CONGRESS
COPYRIGHT OFFICEORPHAN WORKS
ROUNDTABLETUESDAY
JULY 26, 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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A-G-E-N-D-A

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

9:00 a.m.

1
2
3 SENATOR HATCH: I have always wanted to
4 usurp Marybeth Peters' role. She thinks I do all the
5 time anyway. This is a very important meeting as far
6 as I'm concerned. This is a very crucial issue. I've
7 had to use so many pseudonyms in my music that I'm not
8 sure people know who owns the stuff that I've written.
9 Not that they care. I'm very, very grateful to see so
10 many luminaries here at this table -- these tables, I
11 guess I should say, around this room.

12 This is an important problem. We would
13 like to solve it. We would like to have your best
14 ideas. There are several that want to do it in a
15 rigid fashion and others who want a more flexible
16 fashion. I personally prefer a more flexible fashion.
17 We really love to listen to those who are real experts
18 in this area like yourselves. We would surely like to
19 do everything we can to kind of resolve not just this
20 problem but other copyright problems as well.

21 Marybeth has been very helpful to us in
22 many ways. As you know, we got into trouble over on
23 the Senate side when we filed the Induce Act last
24 year. I jokingly said that we should destroy the
25 computers after giving appropriate warnings of those

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1 who continue to pirate and steal copyrighted music.

2 That caused such a furor because people,
3 I guess, don't realize I have a sense of humor. I got
4 more nasty e-mails on that than almost anything I've
5 ever done and I've done some really nasty things
6 through my Senate service here.

7 We are very interested in this issue. We
8 are very interested in having your ideas. Of course,
9 we would like to come to some sort of solution. The
10 Induce Act actually was adopted by the Supreme Court
11 so I don't have to push that any more. As you know,
12 there's no easy solution to those problems. We would
13 like your ideas on those as well. I just came to pay
14 my respect and to let you know -- here, Marybeth.

15 MS. PETERS: No. I'm happy that you're in
16 my chair.

17 SENATOR HATCH: I know my place. I told
18 them that I have always wanted to usurp your chair and
19 your position.

20 MS. PETERS: Oh, I would be glad to give
21 it to you.

22 SENATOR HATCH: No, no. I know better
23 than that. We appreciate Marybeth. She has done a
24 lot to help us to understand these areas and these
25 issues. Let me just get out of your hair and I'll be

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1 very, very interested in what you come up with. I'll
2 be very interested in your suggestions and we'll try
3 to do what we can to carry them forward.

4 Mark Smith and I get along very, very
5 well. I think the world of him and the House members
6 who worked very diligently on these issues. We've got
7 some very serious people over on our side as well.
8 Just tell us what to do and we'll do it. Okay?
9 Thanks so much.

10 MS. PETERS: Thank you. Thank you so
11 much, Senator Hatch. I always wanted to have Senator
12 Hatch in my seat. Good morning. I apologize for
13 being a little late. The traffic today was not
14 cooperative.

15 Thank you all for being here. For me this
16 is a most important topic, one that I have cared about
17 for probably 23, 24 years. It raises lots of
18 extremely complicated and difficult issues, certainly
19 for authors, copyright owners, but also for those who
20 use the works.

21 I'm going to introduce our team and we are
22 going to let you introduce yourselves before we start
23 on the first of the roundtables. What I plan to do is
24 as soon as we introduce -- we get our introductions
25 over is turn all of this over to my very able

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1 assistant.

2 One of the things you love to do is have
3 an able assistant who will take the ball forward and
4 carry it throughout the day. I'm Marybeth Peters.
5 Technically the title is Register of Copyrights which
6 no one seems to understand as a title or be able to
7 spell right. It's good that the Congress put in
8 Director of the Copyright Office for those who might
9 wonder what the job was.

10 Jule Sigall, to my immediate right, is
11 Associate Register for Policy and International
12 Affairs. He when he came to the office expressed a
13 great interest in what I really had identified as what
14 do you do about unlocatable copyright owners. He
15 spearheaded an effort in the office to identify issues
16 and to move it forward. He actually has the
17 responsibility to put together the study.

18 There is a legal team within the office.
19 Several work for Jule and one works for David Carson
20 who just joined us. David Carson, most of you know,
21 is the general counsel of the Copyright Office and
22 there's two sets of lawyers who report to both David
23 and Jule. I have some reporting directly to me.

24 The key people who are on this team from
25 the office -- well, I'll start over here with Jule's

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1 people. To David's right is Oliver Metzger and to his
2 right is Matt Skelton. They are attorneys in the
3 Policy and International Affairs Office.

4 To my immediate left is Rob Kasunic who we
5 have affectionately called Mr. 1201. That is about to
6 start this fall. He is a principal legal adviser to
7 the general counsel so that is the Copyright Office
8 team. I'm just going to turn it over to Jule and let
9 him go from there.

10 MR. SIGALL: Thanks, Marybeth. Before we
11 go around and introduce the participants, I also want
12 to say a word of thanks to the House Judiciary
13 Committee and Chairman Smith and his staff,
14 particularly Joe Keeley who arranged to allow us to
15 use this room for the next day and tomorrow, a very
16 nice facility.

17 It has air conditioning which is a
18 benefit. I was telling someone earlier that if the
19 discussion doesn't go the way we would like it to go,
20 I will threaten to take this outside and we'll have to
21 do it outside to concentrate the mind, if you will.

22 Let's go around and introduce the
23 participants. Just tell us who you are and who you
24 are representing and where you come from. Let's start
25 on this side.

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1 MR. TRUST: Good morning. I'm David
2 Trust. I'm the CEO of Professional Photographers of
3 America and a few other photographic associations
4 under our umbrella but PPA is who I'm with generally.

5 MR. SPRIGMAN: My name is Chris Sprigman.
6 I teach at the University of Virginia Law School. I'm
7 here on behalf of Creative Commons and Save the Music.

8 MR. ADLER: Allan Adler. I'm here on
9 behalf of the Association of American Publishers, the
10 National Trade Association for America's book
11 publishers and journal publishers.

12 MR. ROSENTHAL: I'm Jay Rosenthal from the
13 Recording Artist Coalition.

14 MR. PETERSON: I'm Gary Peterson for the
15 Society of American Archivists whose 4,000 members run
16 most of the orphanages we are discussing today.

17 MR. PERLMAN: I'm Victor Perlman from the
18 American Society of Media Photographers. I'm general
19 counsel and managing director.

20 MS. MURRAY: I'm Kay Murray, General
21 Counsel of the Authors' Guild, the largest
22 organization of published writers in the U.S.

23 MR. MOILANEN: I'm Phil Moilanen. I'm the
24 Counsel for Photomarketing Association International
25 which gets about 26 billion orphan works a year.

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1 MR. METALITZ: I'm Steve Metalitz with
2 Smith and Metalitz here representing the Recording
3 Industry Association of America.

4 MS. URBAN: I'm Jennifer Urban. I teach
5 at the University of Southern California Law School.
6 I'm actually here representing Bien Bonita Metiez from
7 the Association of Independent Video and Film Makers.

8 MR. MacGILIVRAY: Alex MacGilivray here
9 for Mountainview on behalf of Google.

10 MS. LEARY: Denise Leary, Deputy General
11 Counsel for Programming at National Public Radio.

12 MR. HOLLAND: I'm Brad Holland. I'm an
13 artist and I represent an organization called the
14 Illustrators Partnership which is in turn representing
15 the Society of Illustrators, the Association of
16 Medical Illustrators, the Association of Architectural
17 Illustrators, and the National Cartoonist Society.

18 MS. DAUGHERTY: I'm Donna Daugherty. I
19 represent Christian Recording Studio in Georgia and
20 I'm a songwriter and we are very interested in
21 recording the public domain songs and the older songs
22 in the '20s and the '30s.

23 MR. CLARK: I'm Jeff Clark representing
24 the Consortium of College and University Media
25 Centers.

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1 MS. CHAITOVITZ: I'm Anne Chaitovitz with
2 AFTRA. We're a national labor union representing
3 television, radio, and sound recording performers.

4 MR. COPABIANCO: I'm Michael Copabianco
5 representing the Science Fiction and Fantasy Writers
6 of America.

7 MR. BAND: I'm Jonathan Band. This
8 morning I'm representing the Library Copyright
9 Alliance which is a group of five national library
10 associations.

11 MR. ATTAWAY: Fritz Attaway representing
12 the Motion Picture Association of America.

13 MS. SHAFTEL: Lisa Shaftel, National
14 Advocacy Chairperson from the Graphic Artists Guild.
15 We are a national labor union representing
16 illustrators and graphic artists.

17 MS. FERULLO: I'm Donna Ferullo, Director
18 of the University Copyright Office at Purdue
19 University.

20 MR. GODWIN: I'm Mike Godwin. I'm legal
21 director of Public Knowledge.

22 MR. SIGALL: Thank you. Just a word about
23 the microphones. They are important not only so that
24 folks in the audience and everyone can hear what you
25 say but they also are the means by which your comments

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1 get transcribed so it's important when you speak to
2 make sure you have a microphone on. A transcript of
3 these two days will be recorded and made available
4 over on our website after the proceedings.

5 Let's start with the morning session
6 designated for Topic 1, the issue of Identification of
7 Orphan Works. Let me give you just a preview of the
8 format for this. For each of these sessions we will
9 introduce the topic with a brief statement about what
10 it entails and what we're interested in. Then we'll
11 open with some questions and ask for your responses.
12 But we hope it's an open discussion.

13 After responses people who have things to
14 say can chime in and participate and we can get a good
15 discussion going back and forth not just between us
16 and yourselves but among yourselves as well in terms
17 of reactions and ideas and thoughts to what people
18 have said, to what they have said in their written
19 comments, and to other issues that are being raised.

20 This first issue is what I consider -- I
21 divide this orphan works issue up into sort of a
22 chronological timeline. The first timeline is the
23 beginning and how do identify a work whose copyright
24 holder is lost or unavailable. What steps do you take
25 to do that, to accomplish that task. That is the

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1 first task.

2 That's what we'll focus on this morning.
3 The questions and the comment should be directed
4 towards that precise question, trying to figure out
5 when a work that a user would like to use is, in fact,
6 an orphan work, when it receives a legal designation
7 that would trigger steps down the road to encourage
8 the use of that work or other consequences. That's
9 the second stage this afternoon and tomorrow morning's
10 session.

11 So we are focusing now on systems design
12 to identify when a work is truly orphaned, if you
13 will. Based on the submissions that we received,
14 there is sort of a spectrum of different systems to
15 accomplish that task. On one end of the spectrum
16 there is a very formalistic approach which says that
17 the copyright owner in particular has to register or
18 do something affirmative to indicate their continuing
19 interest in the work. If they fail to do that, the
20 work would be considered orphaned. Then the next
21 steps would take place.

22 On the other end of the spectrum is a more
23 flexible approach in the sense that it wouldn't
24 require anything affirmative of the copyright owner
25 but it would be more like a reasonable search or a

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1 reasonably diligent search undertaken on a case-by-
2 case basis by the particular user to determine whether
3 they can locate and identify the copyright owner. If
4 that reasonable search is undertaken and completed and
5 no copyright owner is found, then the user can go
6 forward and that would be the signal that the work is
7 orphaned.

8 In between those two ends of the spectrum
9 there are a variety of proposals that involve
10 voluntary registries as opposed to mandatory
11 registries that are part of a reasonably diligent
12 search that someone might make. There is a continuum
13 of different approaches that people have suggested you
14 could take to help identify accurately that a work
15 truly is orphaned and one for which an owner no longer
16 exist or the owner is no longer interested in
17 exploiting that work in any meaningful way.

18 So that's the spectrum of systems that
19 people have posed to us in the written comments. The
20 open question is targeted for anyone who has proposed
21 a system involving a reasonably diligent search, an ad
22 hoc case-by-case system where it would be based on the
23 user making a reasonably diligent search.

24 For anyone at this table who has proposed
25 that sort of system, the opening question is, "Explain

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1 for us in your view what the downsides of that system
2 would be." You have explained very well, I think, in
3 the written comments what you think the benefits of a
4 system would be but the question for those who are
5 proposing such a system what, in your view, are the
6 potential pitfalls and problems you might run into if
7 you adopted that approach. That's a general theme, I
8 think, that you should keep in the back of your mind
9 for all comments here.

10 One of our goals at the office is to try
11 to understand what the potential downsides are to any
12 particular system or approach or view towards solving
13 the problem so that we can get a good sense of the
14 cost and benefits and the tradeoff that might have to
15 be made in thinking about how to solve this problem.
16 So the question is for anyone who believes in a
17 flexible case-by-case reasonable search approach, what
18 are the downsides.

19 MR. METALITZ: Thank you. Whether you
20 call it reasonable diligence or reasonable search or
21 due diligence, I think there are two pitfalls that we
22 have to watch out for. One is although I think many
23 of us are proposing that there be a single standard of
24 due diligence, I think we need to watch out for the
25 pitfall.

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1 There is a fallacy of thinking that means
2 the same thing with respect to each kind of work. I
3 think one thing that came through quite clearly in
4 many of the submissions is that what is required to
5 have a due diligent search, or a reasonably diligent
6 search, is going to vary a lot depending on the kind
7 of work that is involved.

8 I think that is primarily because the
9 resources that are available out there to identify and
10 locate copyright owners are going to be quite
11 different when you're talking about motion pictures,
12 when you're talking about sound recordings,
13 photographs, graph work, graphic art.

14 This is why, for example, RIAA suggested
15 that one first step that ought to be taken might be to
16 convene some sectorial roundtables for people who are
17 creating that type of work and people who are
18 interested in using that type of work -- particular
19 type of work might get together and try to hammer out
20 some specifics about what resources ought to be
21 consulted, what steps ought to be the minimum required
22 for due diligence.

23 I think the other pitfall, of course, is
24 inherent in this approach is it is not quite as
25 certain as, for example, an extremely formalistic

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1 approach that says it depends on whether the copyright
2 owner says some magic words at a certain place at a
3 certain time in a certain way. If he does, it's not
4 an orphan work and if he doesn't, it is an orphan
5 work.

6 That has the virtue of simplicity. It has
7 a lot of defects in our view. The due diligence or
8 reasonable diligence approach inevitably is not going
9 to give -- may not give you 100 percent certainty that
10 you have -- that the work that you, the user, are
11 making use of is, in fact, an orphan work so it's not
12 totally certain.

13 MR. SIGALL: Jon.

14 MR. BAND: Yes, I would agree with Steve
15 on that, especially the latter point. The biggest
16 problem with a reasonable effort search is you never
17 -- you don't know if what you've done will satisfy a
18 court and that what you've done really would be
19 considered a reasonable effort search. You don't have
20 the certainty.

21 I agree with Steve to have a system that
22 is highly formalistic doesn't work either because that
23 would seem not to afford sufficient protection to the
24 copyright owner. Any of the formalistic systems would
25 almost inevitably make it almost too easy for the user

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1 to use the work so that is why we think that a
2 reasonable effort search, notwithstanding its
3 downsides, is probably the fairest balance of the
4 various approaches.

5 MS. SHAFTEL: I think one of the other
6 downsides is when you are looking at a reasonable
7 search you have to look at who is doing that search.
8 Universities and commercial entities have a lot of
9 resources available to them but an individual person
10 who wants to copy their grandmother's photograph might
11 not be thinking the same thing when they are looking
12 at a reasonable search. I think that is one of the
13 downsides as well. You are not going to have any
14 complaining.

15 MR. PERLMAN: I think that dealing with
16 the uncertainty issue that Jonathan and Steve
17 mentioned is the question of when is a search good
18 enough. I think at a minimum we would need some kinds
19 of regulations or, at least, guidelines that would
20 give some reasonable outline to the person trying to
21 make a search as to when it's okay to stop.

22 MR. COPABIANCO: One of the dangers I see
23 is that if we are not careful, we might set up a
24 system that allows basically automated harvesting of
25 orphan works. I think we need to be very careful not

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1 to have a system that does that. Clearly that may be
2 a goal of some large corporations.

3 MR. MOILANEN: One of the concerns that
4 the association with the photo images part of this has
5 is they process 27 billion prints a year. 99.9
6 percent of those are all orphans. We don't know who
7 the author of them would be. There is no identifying
8 information but they are all copyrighted under the
9 law. When you do a reasonable search how do you
10 document that you have done it when someone asks you
11 to reproduce an image. Clearly if there is a name on
12 it you have a place to start, at least. You have
13 something you can do but in many cases there is no
14 identifying information. One of the downfalls of
15 having to do a reasonable search is just the record
16 keeping to show that you did a reasonable search and
17 whether that needs to be a system you've followed
18 religiously which is sufficient, or if you need to
19 document each and every one of those.

20 MR. PETERSON: I would say one of the
21 downsides in an archives is the fact that you are
22 dealing primarily with unpublished works. Indeed, the
23 document may have an author and you may know the
24 author of the document. You may not know much more
25 than that. Then you are looking at the typical

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1 researcher who may use thousands of these documents so
2 you are looking at the sheer volume of search that
3 needs to be done for these unpublished manuscripts.

4 MR. TRUST: I think certainly if you look
5 at the possibilities that are out there, how do you
6 verify that a diligent search -- not only what
7 constitutes a diligent search but how do you verify
8 that a diligent search was actually conducted? You
9 could open up an avenue where people could just
10 basically go through a checklist and say, "I've done
11 these things, can't find it."

12 I think that some searches will be better
13 than others, as Donna was saying. Perhaps someone who
14 has more resources at their fingertips will understand
15 better how to do a search, how to conduct a search.
16 Whereas, an individual in their home may just
17 basically go through the checklist that they pulled
18 off line somewhere and said, "This is what we're
19 supposed to do so we can use this work. I did this
20 and now I can use the work."

21 I think the other issue is that when you
22 define so specifically, especially if it were defined
23 in statute what a diligent search is, then suddenly
24 you lose flexibility. What is a diligent search
25 today? We may learn in a year or in two years through

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1 experience that is not going to be the standard that
2 we want to hold this by. There has to be some
3 flexibility.

4 Maybe what a diligent search consist of is
5 a matter of regulation rather than statute, something
6 that the Copyright Office would look at. So you could
7 run into problems if we are too rigid in terms of what
8 we define as a diligent search and especially if we
9 put that in legislation.

10 MR. MacGILIVRAY: I think one of the major
11 issues here is to make sure that we do have some
12 flexibility without dealing with too much uncertainty.
13 The thing that I would encourage the Copyright Office
14 to consider is not just the very, very small scale,
15 the one user who wants to make use of the work, but
16 also the very, very large scale and talking in the
17 millions of works. The little bits of uncertainty can
18 be very troubling for those large amounts of works and
19 in terms of making the uses that this office
20 hopefully.

21 MS. LEARY: I spend a lot of my time doing
22 calculations under Fair Use for the kinds of content
23 that we do. We are both creators of material and
24 copyright owners but we are also users and a lot of
25 the stuff we do is transformative. Nonetheless, my

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1 concern -- we do agree with a case-by-case approach.

2 My concern would be that it not end up
3 like the Fair Use standards in which it is so case
4 specific that you are running a risk all of the time.
5 I think it has to be by category of works. In our
6 particular case we are often on a news deadline. It's
7 breaking news and so that needs to be taken into
8 account.

9 You know, how much time do you have as a
10 news organization to do the sort of due diligence
11 that's talked about. If we are doing a long
12 documentary that we plan a year ahead on Brown v.
13 Board of Education or something, that's one thing.
14 The sky is the limit in terms of what people at NPR
15 want to use.

16 I mean, I never know on a given day where
17 they are going off so that one approach might be
18 specific for noncommercial educational entities,
19 commercial entities, and factors that take that into
20 account. I think we need more criteria than we
21 currently have even under developed case law. That's
22 the downside of the case-by-case approach for us.

23 MS. WAXMAN: One concern with the
24 standards for due diligence is how it will be adapted.
25 Again, as everyone has pointed out, one size fits

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1 most. In terms of the visual arts it's very hard to
2 search for images even if they are registered with the
3 Copyright Office. I think there needs to be
4 flexibility in that area for what steps you need to
5 take.

6 One concern is that someone will do some
7 type of Yahoo or Google engine search and they will
8 come up with a user that may not be a legitimate user
9 and that is an issue along those lines. The other is
10 there is some technology that is developing and
11 hopefully will improve that might make visual image
12 searching much easier.

13 There is a number of image recognition
14 companies that are starting to come on the market.
15 I've seen testing of someone named E-day in Canada and
16 Text Scout in Israel that have almost changed images
17 into a thumb print that will be easier to search and
18 find them.

19 MR. SIGALL: Nancy, can you introduce
20 yourself and who you represent.

21 MS. WOLFF: My train schedule and walking
22 here didn't coincide completely. I represent the
23 Picture Archive Council of America. It's a trade
24 association of all the stock for the libraries so they
25 have large databases of images.

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1 MR. ATTAWAY: Seems that everyone agree
2 that uncertainty is the downside of a flexible
3 standard but I think Mr. Perlman suggested the remedy
4 for that and that is guidelines. I think Steve
5 Metalitz described the kind of guidelines that are
6 needed. They should vary depending on the type of use
7 and the type of work being used. I would suggest that
8 the Copyright Office take a look at experience with
9 two sets of guidelines that I've been involved in over
10 the years. One was the All Fair Home Taking for
11 Educational Use Guidelines. The other was the
12 University Multi-Media Fair Use Guidelines, both of
13 which, as far as I know, have worked pretty well. I'm
14 not aware of any litigation over either set of
15 guidelines. I think people are pretty happy, both the
16 users and the owners.

17 MR. SPRIGMAN: So one downside of the
18 case-by-case approach is uncertainty. I think some of
19 the uncertainty is intractable. There are ways to
20 make uncertainty less acute through guidelines and the
21 like but some uncertainty is always going to exist.
22 There is another downside which I think is completely
23 intractable and that's expense.

24 What you are going to set up in a case-by-
25 case system is the necessity for every potential user

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1 to do searches. You could imagine some piggybacking
2 rules that allow some to benefit from the searches of
3 others but mostly searches are going to be private
4 information not available to others who want to do
5 searches about particular works.

6 You are going to distribute the cost of
7 orphan works to the public and you are going to make
8 people who wish to use orphan works incur that cost
9 for each orphan work they wish to use. Given the
10 intractable elements of uncertainty, those costs are
11 likely to be at least reasonably high. We have heard
12 some talk already this morning about a formalistic
13 system.

14 Creative Commons and Save the Music have
15 proposed such a formalistic system. What I want to
16 try to talk about a bit today later is that formalism
17 is not a pejorative. We have formalism in many areas
18 of law for a very good reason, it's cheap and it's
19 effective.

20 For example, when you buy a house you
21 record the title to your house and no one complains
22 about formalism in the real estate recordation law for
23 a very good reason, your house is worth a lot of money
24 and if you didn't record the title, there would be
25 gigantic transaction costs that get in the way of real

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1 estate sales.

2 Houses have that characteristic. They are
3 expensive forms of property so we want certainty.
4 Well, copyrights have that characteristic, too, in a
5 different way. I own an object. I own a painting.

6 That doesn't necessarily mean I own the
7 copyright so unlike a lot of forms of property where
8 ownership of the property is usually associated with
9 possession, in copyright often it is not so questions
10 of ownership become quite important and they are
11 actually very often obscure, this entire proceeding I
12 think lays bare.

13 So the formalistic approach I think has a
14 lot of virtues which I hope to get to later. I think
15 if properly structured it would be quite respectful
16 for the rights of owners and would be a much more
17 efficient way to deal with this.

18 MR. ADLER: Regarding sound recordings, I
19 think that addressing the issue of guidelines one of
20 the problems that should be looked at is the different
21 status of the copyright owners. Certainly there is a
22 difference between trying to find a record label, even
23 a small record label, and an artist who has somehow
24 regained control over their copyrights or who have
25 never given up that control.

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1 Add to that complexity is the issue of
2 estates. Certainly estates of any recording artist
3 would be hard to find so I think that maybe when
4 you're dealing with guidelines you have to look at the
5 status of the different parties and there may have to
6 be more due diligence for some than for others.

7 MS. MURRAY: Yes. Just to respond to the
8 comment on the expense of having to do searches over
9 and over again. I think that could be addressed in
10 large measure and a lot of the uncertainty addressed
11 in large measure. If the Copyright Office or some
12 database was set up to allow people who did do a
13 diligent search simply in a self-reporting way set
14 forth the steps they took to do a diligent search and
15 to make this publicly available to others.

16 That could really allow people without
17 having to allow for piggybacking rules to actually
18 learn a lot about the steps taken in the various
19 sectors that work and that don't work.

20 MR. HOLLAND: I think it's safe to say
21 that most artist would prefer that if their copyrights
22 be taken, they be taken on a case-by-case basis rather
23 than a blanket seizure. But I think that since we are
24 talking about diligent searches and orphan
25 designation, we have to note that a lot of the work --

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1 I'll speak for illustrators here because I can speak
2 from experience with my own work and knowing people.

3 A lot of the work that is under
4 consideration here was done before the 1978 Copyright
5 Act. During that period you have to distinguish
6 between the copyright holders and the authors so that
7 even after you have done a diligent search and
8 determined that a work is an orphan, you may have only
9 determined that the publishing company that bought the
10 work from the author, in fact, may have required that
11 the author sell the rights as a condition of
12 employment similar to the all-rights contracts that
13 are being extracted from authors right now.

14 Once you have found that the copyright
15 holder is, in fact, out of business, you still haven't
16 established that the author of the work may have an
17 interest in that work. While you have legally
18 ascertained that you may have a right to that work, do
19 you have a moral obligation to the work as well.

20 MS. URBAN: So as been mentioned several
21 times around the table, for film makers as well as
22 certainty is probably the biggest issue for reasonable
23 effort search. Those for the film maker who wants to
24 know when to stop and when they will have certainty
25 that they will be able to use the work. And also

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1 because film makers are, of course, copyright holders
2 as well and really depend upon their copyrights. They
3 like to be sure they are found if somebody is looking
4 for them.

5 I agree with Kay that we could probably
6 approach this problem in part through allowing people
7 to record their efforts and letting other people have
8 some guidance perhaps combined with the Copyright
9 Office based guidance that Fritz and Steven suggested.
10 We might be able to come to a level of certainty that
11 is acceptable even though we will never get to 100
12 percent.

13 MR. SIGALL: Based on those comments,
14 there are a fair amount of issues that people have
15 addressed. There is a question of guidance that
16 people have as to what a reasonable search is.
17 Whether that guidance is broad enough to encompass all
18 the different scenarios in which this situation might
19 arise, the individual photograph, the illustration,
20 the various circumstances you might find, the question
21 whether the user could be certain that they have
22 committed or accomplished a diligent search, whatever
23 standard you might have.

24 One question about the suggest for
25 guidelines and the suggestion for guidance and

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1 discussing that the Copyright Office or someone else
2 convene parties in different sectors. The question is
3 how do those -- where do those guidelines ultimately
4 exist in the law or in regulation?

5 How do you convey them to the public and
6 to the courts, whoever is going to be dealing with
7 these issues? Should they be in the law? Should they
8 be in regulation? Should they be, as I think the
9 example, as Fritz brought up, just guidelines that are
10 published somewhere but not formally part of any
11 regulatory scheme.

12 The general question is how do you provide
13 the kind of guidance that people seem to want to the
14 courts and to the public and to the searchers and to
15 the copyright owners? What do people think is the
16 best vehicle to do that is?

17 MS. PETERS: I have a question with regard
18 to what is sometimes called the CCUMC Guidelines, the
19 digital ones as well as the All-Fair taping ones.
20 Those were ones where the party sat down and got
21 together. At least with the All-Fair taping there was
22 some congressional push because that was the
23 unfinished business of the 1978 Act.

24 Both of those in some way got
25 congressional blessing although there was some debate

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1 that one was in a nonsubstantive report and one was in
2 a substantive report and did that make a difference.
3 I would just like to add when you are commenting on
4 that, does congressional blessing and what kind of
5 blessing make a difference?

6 MR. BAND: I think it would be better to
7 stay away from congressional blessing or any the kinds
8 of negotiations that went on between user groups and
9 authors groups. I think that will just take a huge
10 amount of time, especially if you imagine trying to
11 have those kinds of negotiations and discussions in
12 every sector and then they have the same problem of
13 rigidity.

14 I think technology is going to change and
15 over time will make searches easier and easier as
16 databases increase and technology improves. I think
17 it would be better if as much as possible for
18 guidelines to be set up by the various authors groups,
19 various groups of copyright owners and creators about
20 what they think a reasonable search is.

21 I think to the extent that we have
22 databases that as much as possible that they be
23 charged with setting up the databases and coming up
24 with a database that works as well as possible for
25 them. By the same token, user groups can set up their

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1 own guidelines as what they think are reasonable
2 searches and then ultimately people will try to do the
3 best they can under the circumstances and if there is
4 ever a dispute.

5 Again, we have to remember that the
6 likelihood of an owner reappearing is very, very small
7 in the vast majority of these cases and to a large
8 measure this is what has been called the gatekeeper
9 problem, how do you get past the library general
10 counsel, the publishing house general counsel to use
11 the work given that there is, again, a high
12 probability that the author is long dead and no one
13 knows and it really is an orphan work in that sense.

14 To have a system that is just too
15 complicated and bureaucratic will just not do the
16 trick. I think, again, it's just better to leave it
17 up -- let a thousand flowers bloom.

18 Let every group kind of set up what they
19 consider to be a reasonable effort search and have as
20 many different groups put up their own databases and
21 organize their own databases. Then ultimately if a
22 court has to decide something, let it decide whether
23 the user did what was reasonable under the
24 circumstances.

25 MR. GODWIN: I think congressional

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1 blessing works best when there is a large basis of
2 experience to draw upon. Here we are really solving
3 -- you know, we are taking our first stab at solving
4 the orphan works problem. It seems to me that in
5 order to be -- you know, it's going to be the case
6 that whatever we cook up -- we means everybody
7 invested in this issue -- whatever we cook up we are
8 going to find out that some sets of guidelines don't
9 work as well as others.

10 We are going to have some experience at
11 finding, for example, that some systems that work well
12 maybe for film or music don't work so well for
13 photography or for certain kinds of writing. It is
14 important to have flexibility so we can have an
15 evolving understanding of what due diligence really
16 ought to be.

17 Then there might be some day in the future
18 where congressional blessing is called upon where it's
19 appropriate because we have a very clear consensus
20 understanding of what due diligence ought to be but I
21 don't think we are going to be there right out of the
22 starting gate.

23 MR. PETERSON: I would suggest that what
24 Jonathan said would work in the main but I'm not sure
25 it would work for unpublished documents and in

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1 archives because there really is no group to negotiate
2 with that represents the authors of those works. In
3 that particular case insofar as archives are concerned
4 I'm not sure that would work.

5 Secondly, I think the question needs to be
6 put to -- this question needs to be put to the
7 publishers. In my case I would refer to academic
8 presses because they have become so risk adverse. The
9 publishing margins are so small that not having
10 lawyer's fees seems to be a good idea so they have
11 become extremely risk adverse and publishers are sort
12 of like little kids in grade school. Once a cold
13 starts, everyone gets it.

14 I think we need to find out what they
15 would accept as a good search or what would be --
16 should it be in law, should it be in regulation or
17 whatever. I think we can live with it wherever it is
18 as long as it serves our goal of getting information
19 out and having people be able to use it and publish.

20 MR. ADLER: I would first like to just
21 thank the gentleman for that highly sympathetic view
22 of the industry that I represent which includes
23 academic publishers as well. When I was listening to
24 the discussion before this about where the advocates
25 of the reasonable search approach were asked to talk

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1 about the downside, I sort of thought for a moment of
2 the comment attributed, I think, to Churchill about
3 democracy being the worst form of government except
4 for all the others.

5 That was the reason why, I think, the
6 publishers came out strongly in favor of a
7 reasonableness requirement. Not because we thought it
8 was without fault but because in thinking of the other
9 approaches to it we saw that it had a great deal of
10 merit in terms of some of the other overall objectives
11 that we sought to achieve in allowing orphan works to
12 be used more than they can today.

13 I think in the same way that I would say
14 that, again, using that as a metaphor, democracy has
15 a variety of different forms of rules that govern
16 conduct in it. I think that here, too, we really
17 should be fixated on whether they should all be in a
18 regulation or all be codified or left to the voluntary
19 device of various industry organizations.

20 I think that what we need to look at is
21 once we have identified these problems as we are doing
22 now, we need to see where the strongest points for
23 taking responsibility for providing guidance might
24 serve.

25 I think in terms of the notion of

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1 congressional blessing, we should perhaps if not
2 involved at all, leave it only to the most contentious
3 areas that can't be utilized in any other way because
4 I think the process is certain to be more contentious
5 than any other involved.

6 I think we would want to rely, on the one
7 hand, on various industry representatives or various
8 artist representatives who best know the problems
9 associated with particular kinds of works that they
10 use to help describe the ways in which today from
11 their own knowledge those works are kept track of and
12 how one might be able to follow a logical search
13 pattern in order to be able to reach a conclusion at
14 the end that one has done what would be considered
15 reasonable, albeit having failed to ultimately achieve
16 the goal of the search.

17 And then with respect to the issue of
18 regulation, I think once we have seen how some of this
19 can become devised by the private sector, I think it
20 may make sense to codify those in regulation that seem
21 to be clearest, that seem to be most useful not so
22 that there would necessarily be any kind of
23 consequence attached to whether or not you have or
24 have not adhered to them, but more to the point that
25 it would make them more familiar to people and get

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1 them out to people and give greater credibility to
2 people and being influenced by them.

3 MR. ATTAWAY: When Jonathan was speaking,
4 I found myself agreeing with everything he was saying.
5 I started to get nervous. Toward the end I realized
6 where he might be going and I felt the need to say
7 something. I think guidelines can or cannot have
8 congressional endorsement.

9 I don't know that makes a whole lot of
10 difference. I think what does make a difference is
11 that they be the result of reasonable accommodations
12 of the interest of both users and owners. They can't
13 be set up unilaterally by one group or another.

14 A group of users can decide that a
15 reasonable guideline is that you look at the work and
16 that the name, address, and telephone number of the
17 copyright owner is not there and then it's fair game.
18 That's not the kind of guideline we're talking about.
19 We need to be talking about guidelines established
20 among users and owners that reasonably take into
21 account the interest of both groups.

22 MR. MOILANEN: Having been through this
23 route before in 1995, the photo industry, including
24 Mr. Trust's predecessor, Mr. Perlman, and many others,
25 users and producers as well, did come up with some

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1 guidelines for the photo industry. For 10 years they
2 worked really well, I think. Got a lot of the
3 litigation and contentiousness out of what was going
4 on but the industry has moved on. Digital has changed
5 substantially and made it much more difficult for
6 people to comply.

7 In the process over the last 10 years we
8 have asked the office a couple of times to kind of
9 give a blessing to the guidelines that we had come up
10 with. They determined that they really didn't have
11 the authority to do that.

12 I would suggest that even if you don't get
13 congressional blessing on what is adopted, I think
14 getting office authority where they determined that
15 there is an industry consensus that makes some sense
16 and they decide that there has been sufficient input
17 from various members of the industry that they could
18 give a blessing to an industry proposal and maybe have
19 the authority to withdraw that if they later determine
20 that it's not a good idea what the industry has come
21 up with but give you some authority to give some
22 blessings to industry proposals and maybe give notice
23 to the world so that anybody who thinks that these
24 guidelines aren't sufficient they have an opportunity
25 to come in and say here is where their problem is.

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1 Ultimately then even if obeying the
2 guidelines isn't the same as having to obey a law, it
3 would at least say to any court that is asked to
4 interpret whether or not a reasonable search has been
5 conducted. Well, you followed the guidelines and
6 those all made sense and everybody had an opportunity
7 to participate in drawing those up so the court would
8 say that was reasonable if they followed them.

9 MR. PERLMAN: A number of us at this table
10 probably have middle-of-the-night flashbacks to 10
11 years ago. We had two parallel and very similar
12 endeavors going on. One was the CONFU which I view as
13 at least a quasi-governmental endeavor. The other was
14 the CCUMC which was much more of a private industry
15 kind of project.

16 I don't think it's accidental that the
17 CCUMC endeavor succeeded in coming up with guidelines
18 that have been working very well and CONFU was, in my
19 opinion, a disaster of almost Biblical proportions.

20 MS. LEARY: My Concern would be if the
21 library has to take a role in this is that it not
22 become some unfunded mandate on top of all of the
23 other work that you have and then the industry, all
24 the users and owners, come up with a set of guidelines
25 that are reasonable.

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1 They are held up potentially for comment
2 or whatever out of the woodwork. People who have a
3 very oddball idea of what they are entitled to. I
4 think if there were going to be that level of
5 involvement by the office, I would beg you all to make
6 sure it's funded at whatever level is appropriate.

7 MR. SIGALL: One of the suggestions in the
8 comments we received about a reasonable search
9 standard and approach was that it would be potentially
10 a defense to an infringement claim. You could say
11 that you've made a reasonable search and, therefore,
12 your remedies that could be imposed against you would
13 be limited in certain respects.

14 The question related to guidelines and
15 that type of approach, is it the thought that a
16 statute would be enacted that provided that kind of
17 defense to an infringement claim and the courts would,
18 at the same time as these guidelines being developed,
19 would deal with these on a case-by-case basis?

20 Or would these guidelines have to be
21 developed in advance of any statutory change to
22 address the problems? Or would they be parallel
23 efforts in some respects for those who are proposing
24 the guidelines be developed and considered? Would
25 this be something that would be in parallel or in

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1 sequence in terms of the development of the issues?

2 MR. BAND: I would think that they would
3 develop in parallel, especially if you have a very
4 flexible concept of guidelines. I mean, I think if
5 the industry groups and the user groups can sit down
6 and work out an agreement, that's great but we know
7 how long it takes and we know how unlikely that is to
8 happen in our lifetimes.

9 Given that, you know, I think we have a
10 more flexible approach but we shouldn't hold up a
11 statutory solution to this problem waiting for
12 guidelines to emerge. I think it would just be easier
13 to go ahead, have a statute that talks about in very
14 general terms what a reasonable effort search is, and
15 then at the same time groups on their own or together
16 would be developing guidelines.

17 If the Copyright Office wants to encourage
18 people to do that or to participate in some way, that
19 would be great if they want to facilitate it in some
20 way. But at the end of the day I think the solutions
21 need to be done by the individual groups or groups
22 working together without too much office involvement.

23 I think the minute the office gets
24 involved again it just becomes a whole other ballgame
25 and I think it takes more time and is less likely to

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1 lead to a quick solution to this problem.

2 MR. METALITZ: I would just like to say on
3 behalf of RIAA, at least, and I think many of the
4 others that made this suggestion, our proposal was not
5 that this be a defense to infringement but that it be
6 a remedial limitation. It would still be infringement
7 if no other defense applied if their use were no
8 applicable but there would be limitations on the
9 remedies.

10 I think it's important to recognize the
11 flexibility that the courts already have under current
12 law in the area of remedy. Certainly if the statutory
13 damages are involved they have a great deal of
14 flexibility. Of course, the statute tells us that
15 works that are not registered before the infringement
16 commences aren't eligible to receive statutory damages
17 anyway which is yet another limitation on the
18 exposure, let's say, that the user might have in this
19 circumstance.

20 While there may be some things in this
21 sphere that do require legislation, I think Mr.
22 Moilanen's suggestion that possibly conferring some
23 statutory authority on the Copyright Office would be
24 necessary in this area.

25 There is also a lot that could be done

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1 without statutory -- without any statutory change. I
2 think certainly convening these roundtables, these
3 sectoral groups, getting them together, as Mike said,
4 these guidelines will work best if they are based on
5 experience.

6 The fact is there is already a lot of
7 experience. There are people who every day are
8 undertaking this job of trying to locate and identify
9 copyright owners. Some of them work at libraries and
10 archives and so forth. Others work for the copyright
11 industry and record labels, motion picture studios,
12 publishing houses. There's a lot of expertise already
13 out there that I think can be brought to bear on this
14 to try to develop some good guidelines.

15 I think there are other steps that can be
16 taken, again, without legislation that would help
17 facilitate this such as bringing online all the
18 Copyright Office records regarding registration, not
19 just the post-1978 records. There were several
20 submissions that suggested this. It wouldn't require
21 -- obviously it would require funding but it wouldn't
22 require substantive legislation.

23 MS. PETERS: We actually do have a process
24 by which we are going to bring them online. I think
25 the estimate to bring them all online was something

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1 like \$35 million. We are going to segment them and
2 actually, I think, even this year we are preparing one
3 for the 2007 budget to start that process. I think we
4 are going to go with the ones are most needed first
5 and then work backwards. So, yes, we're doing that.

6 MR. GODWIN: I think that keeping in mind
7 that one of the goals that we have here in attacking
8 the orphan works problem is to see that more works get
9 out there and they are usable and they are not
10 needlessly locked up. One concern is going to be that
11 if you make -- if you require that a critical path
12 that includes the development of sectoral guidelines
13 that may hold things up for years.

14 In contrast if you have a parallel process
15 like the one that Jonathan described, I think you
16 actually create incentives for the sectoral groups to
17 get off the dime. If they see cases beginning to
18 develop or they see precedent's being set that fall
19 out the wrong way either for users or for owners, you
20 know, that drives people to the table so I kind of
21 favor a parallel process.

22 MR. TAFT: I think one thing that would be
23 helpful would be a body of case studies. I mean,
24 everyone around these tables here deal with different
25 kinds of creators with different problems and there

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1 are different individual guidelines for addressing the
2 issues of different kinds of creators. I deal a lot
3 with traditional performers, often anonymous or semi-
4 anonymous, if one can be that. It would be very
5 interesting to see case studies of different
6 approaches, what worked and what did not work.

7 Certainly where there has been litigation,
8 it would be very interesting to have a body of
9 knowledge somewhere centrally where you could go to to
10 look at how other people have approached this general
11 problem before you try to establish any general
12 guidelines.

13 MR. COPABIANCO: I would just like to
14 caution that it's important to keep in mind that the
15 technology that we live with every day and the
16 Internet and database technology and computer
17 technology is evolving very rapidly. A solution to
18 these problems that may seem appropriate today five
19 years from now may seem completely ridiculous.

20 MR. SIGALL: My next question is about the
21 role of registries. I want to make sure that any of
22 my Copyright Office colleagues if they had any
23 questions to continue this discussion a little bit
24 further, that they have a chance to.

25 MR. METZGER: I have one question for the

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1 people who I think there were a couple of comments
2 saying that it might be a good idea to allow the
3 people who had done searches to put the results of
4 their searches on a voluntary copyright database. I
5 believe, Kay, you made that comment.

6 I was hoping you could comment on how the
7 problem of inaccurate information would be addressed
8 there. Other people have commented that a lot of
9 people might not be very good searchers. They might
10 put false or misleading information on this voluntary
11 database and nobody would be policing it.

12 MS. MURRAY: Well, our idea was to require
13 as part of a diligent search for whatever benefit you
14 could get from that to actually make your database
15 entry an affirmation of a diligent search setting
16 forth the steps that were taken and have this be, you
17 know, admissible, obviously in court in case of
18 litigation and, as I said, to make it an affirmation
19 of good faith and diligence.

20 MS. URBAN: We had also suggested that the
21 reasonable effort search could possibly be filed
22 somewhere and it would include an affirmation of good
23 faith given that we need flexibility because, as we
24 have discussed around this table, what will be a
25 reasonable search will change. It will depend upon

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1 what kind of media with which you're working having
2 people at least make the statement that they are
3 engaging in a good faith effort we thought would
4 address that problem.

5 MS. PETERS: I actually had a question
6 that was going on that line, too. I was just trying
7 to figure out exactly what you're suggesting be put
8 online. I actually did the searching for the Library
9 of Congress probably for about three years and did
10 photographs and motion pictures and soundtracks or
11 whatever. After that they hired a lawyer who did that
12 pretty full time and the efforts were considerable.
13 The search results were considerable.

14 Are you suggesting that you put all of
15 your efforts online what you found, where you looked,
16 or is it just more like a skeleton, "I was looking for
17 an author of a photograph," and all the steps that you
18 went through without putting what you think are the
19 facts that you found.

20 MS. URBAN: So we were a little vague on
21 that. I think there probably was a very good reason
22 which is the challenges that you mention and the fact
23 that I think we felt we weren't probably in the best
24 position to decide exactly what it might look like.

25 This second thing you mentioned was more

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1 along the lines with what we were thinking, something
2 like a list of the kinds of things that you did not in
3 terrible detail but enough to give a court or the next
4 user some idea of where you looked combined with an
5 affirmation that you made these efforts in good faith.

6 MS. PETERS: So what you're really saying
7 is that part of the search would be I was trying to
8 identify the author of name the work. It is a
9 photograph so you would have that piece as part of it
10 so you are tying it to a particular work.

11 MS. URBAN: Right. And that is one
12 challenge because if a work is an orphan, of course,
13 it doesn't have the name of the author. It probably
14 doesn't have a title so there would have to be a
15 description of the work, I think, on that statement.

16 MS. PETERS: Probably there is. You do
17 know what the work is but you may not know the author.
18 In my search it was much more that I didn't know who
19 the current owner was. I had a clue and I went down
20 that path and people would tell me they didn't own it.

21 I was tracking them and saying, "But you
22 registered a renewal so what did you do with it?"
23 That kind of thing. Photographs were probably the
24 most difficult or illustrations where you don't have
25 that. A lot of it there was a clue to start but the

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1 path got cold pretty quick.

2 MS. MURRAY: I would just, you know, want
3 to point out, too, that there are lots of published
4 works, even works that were published not too long ago
5 where you might know who the author is. You might
6 know who the publisher is but you may have a very hard
7 time finding that author and if it's gone out of
8 print, it's likely that the publisher doesn't own the
9 rights anymore, that the rights have all reverted.

10 I would just say we hadn't really fleshed
11 out our ideas too much either but we did do a survey
12 of our members which are part of our submission to the
13 office and our reply comments. We asked them what
14 ways did you -- by the way, it's very interesting 85
15 percent of the people who took the survey said that
16 they had rarely or never failed to find the author of
17 a work that they wanted to use in their works.

18 Anyway, we did a list of the methods. We
19 asked them how they -- what steps they had taken in
20 their search. You could actually envision it as a
21 checklist actually that you could just check the
22 boxes. You know, contacting the work's publisher,
23 other publishers that published this author, the
24 Copyright Office, online research, directory
25 assistance, Whitepage.com, that sort of thing.

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1 MR. TRUST: I appreciate the comments by
2 Kay and Jennifer. I want to put this in perspective
3 of a photographer, though. I think that the searches
4 that will be conducted for the billions of photographs
5 that are created each year, I think those searches are
6 going to be fairly unsophisticated.

7 I think a system like this you are running
8 the risk of adding one back search on top of another
9 bad search and that it can really just become a
10 nightmare, at least from a photographer's standpoint.
11 Really that is my concern.

12 By the way, I might point out that could
13 work against the consumer as well as the creator so I
14 just have the worry that adding one search on top of
15 another, especially as it pertains to the work of our
16 members, I think that you are going to find pretty
17 unsophisticated searches taking place, not searches by
18 people who are actually skilled at conducting those
19 kinds of searches. They are going to do their best
20 but they are not going to be up to standards and you
21 are going to be adding one bad search on top of
22 another.

23 MR. CARSON: It's not clear to me what the
24 proposal is with respect to the consequences of
25 posting that kind of a search. One extreme I could

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1 imagine a proposal that says if you do a search and
2 you post your results and you show, "I did all of this
3 and I couldn't find the owner," then I can rely on
4 that search I don't have to retrace those steps.

5 I'm not sure if that's what's being
6 proposed. The other extreme might be you put that up
7 and it's just sort of general guidance for other
8 people on things they might want to do when they are
9 searching for other works. But it's not clear to me.
10 What exactly are you proposing would be the
11 consequences of someone putting those steps up and
12 making them available to others?

13 MS. MURRAY: In the context of possibly
14 changing the statute to allow for a limitation on
15 remedies, upon the conduct of a diligent search this
16 ought to be part of that diligent search. The benefit
17 of it could be great for those people who would rely
18 on the database to get some guidance for doing their
19 own searches.

20 As to the point where there could be one
21 bad search on top of another, I think it would be
22 interesting if you could do so to pull your members
23 kind of the way we did or your constituents the way we
24 did to find out what people are doing and what their
25 rate of success is.

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1 I just think this could be both a great
2 basis for getting information among all the various
3 sectors about how people are conducting these searches
4 and what uses -- you know, how people are doing it and
5 the level of success they're reaching.

6 MR. CARSON: Are you suggesting that I can
7 use your search efforts and what you report as the
8 result of your search efforts as a substitute for
9 engaging in my own search?

10 MS. MURRAY: No, not at all. Not at all.
11 I'm suggesting that if you're looking for John Smith
12 who published this book that went out of print 20
13 years ago, you might benefit greatly from a search
14 that was done for the same guy a year ago. You can do
15 those steps again.

16 With technology advancing the way it is,
17 it's quite likely that you could find him the second
18 time around, but at least you would know of a place to
19 start. You could go to a database and find out what
20 somebody who was backed up by a university and
21 research assistance was able to do and go from there.

22 MS. WOLFF: I think there are benefits of
23 having people share information. I think that is
24 going to happen anyway. I mean it seems like no one
25 can resist sharing information on the Internet. There

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1 are more blogs every day. I would hesitate making it
2 part of any kind of regulation or requirement to have
3 people's efforts put up there.

4 I think what would be much more beneficial
5 if there were, for example, maybe just guidance as to
6 where you could go to different organizations and
7 associations that had information and if there was
8 maybe a page on the Copyright Office website or trade
9 associations, organizations, and different sectors of
10 various rights holders and users that had their own
11 websites or things like that.

12 I think to have the extra level of some
13 type of required, "Here's what I did to find Joe
14 Smith," just adds more and more layers and the ability
15 to perhaps either rely on bad information or say I
16 don't need to do it myself.

17 MR. GODWIN: I think in the public
18 knowledge comments we did anticipate that subsequent
19 users of the work would be able to piggyback on the
20 efforts of the original search. What we anticipated
21 was that this would be permissive rather than -- in
22 other words, this is something that they could do but
23 if it turns out that the original search is fraudulent
24 or there is fraudulent information posted or if simply
25 inadequate, then you take on that risk as well.

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1 One of the things we want to do is unlock
2 the possibility, say, of individual creators or
3 reusers or transformative users to come along and
4 perhaps piggyback on the searches of a university or
5 the Copyright Office or whoever. We do anticipate the
6 possibility of using that but the search that you rely
7 on only protects you to extent that search is really
8 a good one and we'll have to figure out what that
9 means.

10 MR. BAND: And I think this goes back to
11 Oliver's original question which is the search is only
12 as good as the person who did the search. To the
13 extent that I want to rely on it or build on it, that
14 would be sort of -- I would be unnoticed and it would
15 be my risk.

16 If I rely on one of Donna's searches from
17 someone who is skilled in the university context where
18 they really do the right thing and do an exhaustive
19 search and it was very recent, then maybe if I choose
20 to rely on it, then maybe I will be able to convince
21 the court that was a reasonable effort search. On the
22 other hand, if someone relied on the search I did and
23 I have no idea what I'm doing, you know, a court could
24 conclude otherwise.

25 I think it all depends -- again, that is

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1 ultimately the benefit of keeping something that is
2 very flexible and not a statutory requirement or
3 anything. Then completely the utility of the system
4 is up to the people who use it and up to a court
5 viewing it.

6 I think the kinds of things that Kay is
7 talking about could be very helpful to see what other
8 people did and then decide, "I can do that. The
9 technology is new. That was a couple years ago and
10 now I can go further." Or you could say, "They looked
11 at it but that was a crummy search. I'm going to have
12 to start from scratch.

13 Again, a very flexible system and everyone
14 then can make their own determination as to what they
15 think is a good search and it's up to them and if they
16 make the right decisions, they are in good shape and,
17 if not, it's all on them.

18 MR. METALITZ: I think just to put this
19 discussion in a little bit of context, the idea of
20 posting what you did, I agree, by the way, with Kay
21 about piggybacking. Piggybacking at your own risk to
22 me kind of involves into don't piggyback or don't rely
23 on it which I think is the right outcome.

24 I think the context this might come up in
25 our proposal is that, at least in general, a user who

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1 wants to claim the orphan works status should post a
2 notice of intent to use the work and should try to
3 identify the work and spell out to some extent, at
4 least, what steps have been taken to try to identify
5 and locate the owner.

6 I think the advantage of this is that it
7 would be, in a sense, a failsafe for copyright owners
8 whose works are about to be used. If they were to
9 check this database, they would, at least, have --
10 obviously there are difficulties with describing and
11 identifying works of such photographs or graphic works
12 and so forth.

13 At least it would increase the likelihood
14 that the copyright owner would be located and
15 identified which I think we should remind ourselves is
16 the purpose of this exercise. The purpose is not to
17 enable users to use works without permission of the
18 copyright owners. It is to try to facilitate getting
19 the users and the copyright owners together so that
20 they can reach an agreement upon the use of a work.

21 I think one step that may facilitate that,
22 it's not a panacea by any means but one step that may
23 facilitate that would be a general requirement,
24 perhaps with some exceptions in the hot news areas, as
25 Denise mentioned, for a user to post a notice of

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1 intent to use.

2 MR. MacGILIVRAY: It's always dangerous
3 when I feel like I'm completely agreeing with Steven.
4 I would say I do completely agree. We do have to
5 remember here, and one of the biggest problems, I
6 think, with the reasonableness approach is that there
7 are a couple of major opportunities the Copyright
8 Office has here.

9 One is, of course, getting more use of
10 this work but the second is to make copyright holders
11 more locatable to make it so that people who want a
12 licensed content, as my company certainly does in many
13 respects, can be able to go find those people and
14 license the content.

15 In terms of what Mr. Metzger said in terms
16 of the problem of the errors in this type of database,
17 it's also an opportunity. It's an opportunity for
18 copyright holders, particularly if there is some sort
19 of delay there, to be able to correct the errors and
20 to point out where they are locatable which I think is
21 a huge opportunity for us.

22 MR. HOLLAND: Yeah, I would just like to
23 second David Trust's observation that this might work
24 better for authors of written material than, say,
25 photographs or illustrations for a couple of reasons.

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1 One, a book has a specific title just the way a motion
2 picture does. If you are looking for Charlie Chan
3 Story, it probably has a name that everybody can agree
4 was its name.

5 The same thing with a movie. A movie has
6 a title that everybody can agree. Everybody know what
7 Gone with the Wind was. If you're talking about
8 photographs and illustrations, you are often talking
9 about work that has no title.

10 Also in terms of volume, even a prolific
11 author. Has anybody ever tapped Isaac Asimov? Even
12 a prolific author like that would have, what, a
13 thousand books or something under various names. A
14 photographer may do that many photographs in a couple
15 of weeks. Well, yes, a couple of days.

16 Illustrators less so but a prolific
17 illustrator will still have several thousand works all
18 of them unnamed. Then there's the case of
19 immigrations and plagiarism where an imitation of a
20 picture is so close to the original that even the
21 author of the original has to look twice to know which
22 is his and which is the copy.

23 MR. ADLER: In our comments the publishers
24 had opposed any mandate with respect to either a
25 requirement to somewhere post the results of one's

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1 search or for a notice of intent to use. Our thinking
2 on the two of them was somewhat different and then
3 sort of came to one place on an interesting point.

4 With respect to the issue of the posting
5 of search steps, I think some of the comments that
6 have been made clearly identify some of the dangers
7 with respect to the utility of allowing reliance upon
8 them, especially for the piggybacking concept and,
9 again, remembering, as Jonathan had said, if the
10 orphan works concept is what I think is generally
11 understood it is, we expect that the copyright owner
12 will emerge very rarely in those cases.

13 At least under this concept, the only real
14 purpose of knowing or being able to document one's
15 steps is in the circumstance where the copyright owner
16 emerges, at least with respect to the person who has
17 actually conducted the search. What we are only
18 talking about now is whether or not a requirement to
19 post one's search steps might be useful to other would
20 be users who come sequently.

21 One of the things that I think we are also
22 concerned about is the extent to which we are changing
23 basic principles of copyright law. Right now, of
24 course, when you are going to make use of a
25 copyrighted work, there's absolutely no requirement

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1 that you publicize your intent to do so. To do so, to
2 have any requirement that you would do so, I think
3 would have a very significant, creative, and
4 competitive consequences.

5 For example, I think that in my own
6 experience I remember years ago how Congress reacted
7 to its knowledge that the Freedom of Information Act
8 was being used more by industry to see what other
9 industry elements, its competitors, was doing rather
10 than to find out actually what the government agencies
11 were doing.

12 I think in this area it would go without
13 saying, for example, that it would be of great
14 interest, say, to Paramount to be able to find any
15 evidence of copyright searches, orphan work searches,
16 or notices of intent to use that were undertaken by
17 Disney. I think the same thing would be true in
18 almost any other area.

19 While the copyright law doesn't
20 necessarily in this area have to facilitate the
21 competition, I think its creativity and competition go
22 hand in hand in this sense. I think that we would
23 want to think really hard before we would mandate in
24 any way the requirement that people would have to
25 disclose their intent to use a particular work for

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1 what that might mean to people who might decide to
2 preempt their ability to do so by doing so ahead of
3 them.

4 I think the same is true even with respect
5 to search steps. The more one, in fact, provided a
6 clear roadmap of the search that was conducted, the
7 more it might indicate, in fact, what it was that
8 person contemplated in doing with the work once it
9 located the copyright owner. I'm not sure that it's
10 necessary to be able to facilitate orphan works
11 searches as to provide that kind of information.

12 MR. SIGALL: Let me just ask a general
13 question based on something that Steve brought up. I
14 just want to get a sense from the folks in the room if
15 there is general agreement to his opening statement a
16 few minutes ago that the purpose of this whatever we
17 do with respect to orphan works is to encourage more
18 owners and users to get together, first and foremost,
19 as opposed to simply creating a potential exemption or
20 more freedom for users to use works generally. I want
21 to see if anyone agreed with that statement that Steve
22 put out.

23 MR. SPRIGMAN: It's nice to encourage
24 owners and users to get together but I think one of
25 the problems in this particular category of works is

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1 that we have owners who are not particularly
2 interested in getting together with users. We have
3 owners who for one reason or another, typically
4 because the work is not producing revenues that would
5 merit their actively managing the property, we have
6 owners who are not particularly interested in taking
7 action.

8 If we think that those kinds of owners are
9 going to take action, then, for example, we might
10 think a private solution like Creative Commons
11 licenses would be a good solution for those owners
12 because they would -- if they thought there was some
13 use of their works that could be made and they didn't
14 think there was a commercial loss involved, they might
15 come and do a Creative Commons license and license
16 those works on whatever terms, some-rights-reserved
17 terms, they preferred.

18 Creative Commons doesn't think that is the
19 solution. For owners who are properly incentivized,
20 for owners who believe they have some interest either
21 a personal financial interest or a kind of altruistic
22 interest in putting their works out, then Creative
23 Commons is there for them but this is not the
24 solution, as we said, in our comments for the category
25 of orphan works.

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1 I would state the objective a little bit
2 more broadly which is that these works, orphan works,
3 like other works, have built on our culture and they
4 should be available to help build our culture further.
5 The copyright system makes works available, does a
6 good job of making many works available through
7 licensing where owners are readily identifiable and
8 that is right and good.

9 The copyright system could do a better job
10 of making works available where owners don't make
11 themselves identifiable and that is, I think, the
12 broader statement of the problem.

13 MR. GODWIN: Jule, I sort of agree with
14 Steve but I want to add to it. I mean, I think that
15 a properly constructed orphan works solution both
16 creates incentives for rights holders and would-be
17 licensees to get together and frees up works that
18 otherwise would be locked up for lack of being able to
19 identify a rights holder.

20 I mean, I don't think that these are
21 inherently antagonistic goals. I think that if we
22 properly construct this anyone who goes through the
23 orphan works process is going to identify the rights
24 holder when he's identifiable. If he can't identify
25 the rights holder, then he has a process. That is one

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1 of the things that we said expressly in the public
2 knowledge comments.

3 We saw the primary problem as being one of
4 freeing up works that were locked up for lack of
5 identifiable rights holders but we constructed our
6 comments always with an eye to creating incentives for
7 rights holders to come forward or for the proper
8 dialogue to occur between rights holders and
9 licensees.

10 MR. BAND: The way I would define the
11 problem is that -- or the objective here is to allow
12 uses of works that have very low or no economic value
13 but have high cultural and educational value. If it
14 turns out that the work does, in fact, have some
15 economic value then, of course, the right holder (a)
16 will be found or will emerge from the weeds and
17 something will be worked out probably.

18 But I think, again, in the vast majority
19 of the cases we are talking it is orphaned because it
20 has no economic value. If it had economic value it
21 probably would not have been orphaned and we wouldn't
22 be in this situation.

23 MR. ATTAWAY: I would think that the
24 objective of this process is two-fold. One is to make
25 the existing system work better by helping users and

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1 owners to get together. The other objective is to
2 create a safety valve for users that genuinely cannot
3 find an owner so that they can use a work,
4 particularly for transformative purposes.

5 Something that Christopher said struck me,
6 that Creative Commons is one way for users who simply
7 don't care if other people use their work to allow it
8 to be used. I want the record to show that there is
9 a major distinction between owners who simply don't
10 care if their work is being used and owners who don't
11 want their work to be used whether it is a motion
12 picture studio that is resting a film for a few years
13 before re-release, or an individual who simply doesn't
14 want his letters published in someone else's book.

15 I hope everyone here is in agreement that
16 we are not talking about instances where the issue is
17 not whether a copyright owner can be located but the
18 issue is that the copyright owner doesn't want other
19 people to use his work. We are not talking about the
20 latter, I hope.

21 MS. SHAFTEL: I can't think of any
22 instance where professional artists would not want to
23 be paid for their work. I say professional meaning
24 this is our profession. This is not my hobby. This
25 is how I earn my living.

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1 In this day and age due to lower fees for
2 illustration and photography, competition from stock
3 images, it is very difficult for an artist or a
4 photographer to make a decent living working full-time
5 only creating their work. Most of us have other jobs
6 that we do as well.

7 What may seem like a pittance to
8 corporations of a royalty for a small or limited
9 usage, \$50 here, \$100 there, adds up to a lot to us
10 over the course of a year when it's one illustration
11 here for one use, one photograph there for another
12 use. We are talking about my electric bill each
13 month.

14 It's a very different playing field for
15 individual creators than it is for corporations.
16 There is certainly nothing stopping a creative
17 individual from posting their illustrations, their
18 photographs on a website and posting a notice that
19 says, "Anybody can use this."

20 It's out there for everyone to use and
21 that is still part of what our existing copyright law
22 is. It is certainly the primary purpose of, for
23 example, a list of potential users who are describing
24 a use that they want to make the material for a visual
25 artist to be able to check that list periodically on

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1 their own free will to see if any of their works are
2 up there since, as Brad Holland mentioned, typically
3 illustrations and photographs a lot of them don't have
4 the creator's name attached or a title. How do you
5 describe it?

6 It would be very easy for one of us to
7 look at a list of intended users periodically and go,
8 "Hey, that's mine." Whereas it would be very
9 difficult for a potential user to search for the
10 copyright owner of an illustration or photograph
11 because there is no licensing agency such as AFTRA for
12 visual works.

13 MS. WOLFF: I think in defining our goal
14 I think we have to be careful not to equate lack of
15 identity with lack of any economic value. I agree
16 with Lisa from the Graphic Artist Guild that because
17 it may be difficult to identify owner doesn't mean
18 that they don't care about their work or that they
19 don't want some compensation if it's used.

20 I think also there is a distinction
21 between individuals and corporate entities. I think
22 it would be very difficult for an individual creator
23 to have to check some type of registry on a continual
24 basis to make sure his or her work was not being used.

25 MR. SIGALL: Let me turn now to an issue

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1 that Fritz' comment raised. There seemed to be a fair
2 amount of contention in the written comments which
3 relates to the question of unpublished works and
4 whether unpublished works should be categorical
5 excluded from any sort of orphan works system.

6 I guess the question is from Fritz'
7 comment which is that how do we address the question
8 of an unpublished work where the author does not want
9 the work to become part of some other work or some
10 collection. Yet, give freedom to what you hear from
11 archivists and others who want to make use of works
12 that are predominately going to be unpublished works.

13 I'm going to ask an open question. If you
14 believe the unpublished work should be excluded from
15 the system, can you give us the reasons for that and
16 then the potential, again, pitfalls of trying that
17 approach saying that unpublished works are off limits
18 from this orphan work system.

19 MS. CHAITOVITZ: Well, I see three reasons
20 why an unpublished work should not be covered. First
21 the author, the copyright owner, has a right of first
22 publication and by it not being published they have
23 obviously made that choice and you are overriding --
24 the use is then overriding their choice.

25 The other thing is all of a sudden we are

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1 then moving to copyright law to privacy. Unpublished
2 works are private. I can see private letters. If
3 tomorrow somebody were to publish a J. D. Sallinger
4 letter not knowing that he wrote it, he might be
5 pretty upset because he obviously made a decision not
6 to publish his letters.

7 Nude pictures of somebody. You could find
8 in your achieve nude photos and they might be pretty
9 upset when they see that in a book. Then there's also
10 the artistic issue. An artist goes in and records
11 four different tracks, picks the one they want to
12 release. That's an artistic decision.

13 Somebody else doesn't have a right to come
14 in and then publish a track that a decision was made
15 for artistic reasons not to publish. I think we are
16 leaving the copyright area and getting into another
17 area, or when we stay in the copyright area we are
18 actually overriding an exclusive right where the
19 author made a decision. We may not like their
20 decision but they did exercise a right not to publish
21 it.

22 MR. SPRIGMAN: A couple of points. The
23 first about privacy. We have state privacy law. We
24 have privacy torts that can be brought for invasions
25 of privacy that are unrelated to the copyright status

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1 of a work. We have that independent body of law upon
2 which in part we can rely.

3 The second point is about the right of
4 first publication. Again, I think this -- and
5 hopefully we'll talk about this at some point, this is
6 another benefit of a registry approach is that if you
7 do not wish to have your work used, your unpublished
8 work, you can simply register it and that makes it
9 clear that it can't be used.

10 We can work on deposit requirements in a
11 way that maintain the privacy of the work while making
12 clear, sending a clear message to the public that this
13 is off limits, that the full panoply of copyright
14 remedies are maintained. Here is a different use of
15 a registry. This is a voluntary registry but it's a
16 way of telling people, of signaling to people this is
17 private.

18 MR. ROSENTHAL: I want to support Anne's
19 comments on this and raise just a sense that with
20 recording artists dealing with recording studios and
21 also the recording of unauthorized concerts. You do
22 have an unbelievable amount of material out there that
23 has never been technically published with intent by
24 the performer that's sitting out there in the digital
25 world and that this should really be taken into

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1 consideration.

2 I think that we need to fall a little bit
3 more on the side of staying away from giving some kind
4 of status to that type of work. This also raises the
5 issue of knowledge of the user down the road if they
6 find something on the Internet of a concert that's
7 been unauthorized, taped, or they find a track that
8 was not released. There's such a great problem with
9 security in recording studios today in terms of the
10 tracks that are recorded and somehow leak out.

11 There's got to be some kind of
12 understanding that we need protection of that. I
13 would really say that the unpublished side, the
14 unpublished issue that we are dealing with here should
15 really be focused strongly in favor of the original
16 author, the original creator. x

17 MR. TRUST: You know, I don't think there
18 should be a designation or distinction for published
19 and unpublished. Again, this goes back to the
20 perspective, I think, of at least some photographers.
21 It's interesting as you read the comments, I don't
22 think the photographic association around the table
23 here necessarily agree on this issue.

24 Part of that is because there's a little
25 bit of confusion with photographers anyway what

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1 constitutes published versus unpublished anyway.
2 That, in itself, is a little bit difficult. Let's
3 assume that there wasn't that confusion there. A
4 photograph that's made today that has very little
5 value today may have great value in five years or in
6 a year or in 10 years based on things that change,
7 styles that change.

8 Well, it could be anything but a
9 photograph that doesn't have so much value today could
10 have a great deal of value in a few years. If that
11 photograph just because it wasn't published, or even
12 15 years or 20 years if it wasn't published initially,
13 and over a period of time just became public domain,
14 suddenly that photographer has lost some substantial
15 income.

16 I think there's some difficulty there.
17 Let me point out I do agree with what Steven has said
18 about at least part of the purpose of this meeting
19 today. I think it is significant that we do something
20 to bring the consumers and the creators together
21 whenever we can because I think from the creator's
22 standpoint that amounts to income for creators.

23 I talked a little bit about the difference
24 in some consumers. Who would be the consumer here?
25 In the case of those who are consuming photographs, I

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1 think that they are going to look at this and say
2 published versus unpublished and they are going to
3 look at some of the criteria. It's just going to have
4 the effect of scaring them away from this process.

5 From a photographer's standpoint when
6 someone is scared away from this process what does it
7 mean? Too complicated. I'm just going to go
8 photocopy it somewhere or I'm going to scan it at
9 home. That will be the net result, I think, for
10 photographers if we get -- if we make this too
11 difficult to process for the consumer.

12 MR. GODWIN: I wanted to respectfully
13 disagree with Anne that you could infer the intent of
14 the creator not to publish from the fact that it had
15 been not published. I mean, I have written some poems
16 that I think are really good. I have not yet
17 published them. I haven't found a publisher for them.

18 Do not infer from this that I do not want
19 them published. The unpublished works that we're
20 talking about are works in which the creators or the
21 rights holders cannot be identified. I think there
22 are going to be unpublished works all the time where
23 the recording artist has decided not to put that track
24 on the album but we'll be able to identify who the
25 artist is or who the publisher is and go through a

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1 normal sort of copyright negotiation process if
2 someone wants to use those tracks.

3 I think the same thing is true for
4 Sallinger letters. We know who Sallinger is. We
5 never see him but we know he's there, or his estate is
6 there. I just want to drill down on the issue of
7 unpublished works. The only unpublished works that
8 we're talking about including in this proposal in the
9 orphan works designation are those which the creator
10 or rights holder can't be identified. I would not
11 infer from the fact that something had not been
12 published that the creator did not want to publish it.

13 MR. PERLMAN: I want to validate David
14 comments that the photography associations don't
15 necessarily agree with each other because I totally
16 endorse Anne's point of view. I think what Mike said
17 is true but you can't do the reverse. You can't
18 assume from the fact that something hasn't been
19 published that the author really did want it to be
20 published.

21 MS. LEARY: We, too, would favor something
22 that includes unpublished works. I agree that you
23 really can't tell the value of what it is or what the
24 intent of the author or creator was. I think an
25 unpublished work, the scope of what you use and how

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1 you use it can be kind of taken into account in the
2 guidelines much as it is embodied in the statute for
3 fair use.

4 There are all kinds of wonderful materials
5 like pioneer diaries that are still covered by
6 copyright or snippets of music that we might find
7 included in a piece that we would want to use and it
8 becomes impossible to locate the providence. We have
9 people go around the building and sing and try to get
10 somebody to identify the song so that we can then take
11 it into a database.

12 It's time consuming so you might adjust it
13 in terms of the guidelines that are developed within
14 each industry but we would feel very strongly that
15 unpublished works you're talking about letters of
16 politicians. You're talking about all kinds of things
17 that go beyond the scope of people represented in this
18 room.

19 MR. BAND: I think, and this is echoing
20 what David was saying before, part of the problem is
21 that the definition of what is published or
22 unpublished is a very complex issue and published
23 under the copyright law means copies have been
24 distributed to the public. I feel Mike's pain for his
25 unpublished poems but let's say I amazingly enough had

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1 a painting that was hanging in the National Gallery.

2 That would never happen but assuming I
3 did, that is not published. Even though every day
4 thousands of people walk by it and see it, that is an
5 unpublished work. Similarly it's not clear if
6 something is posted on the Internet is that published
7 or unpublished? It's unclear.

8 Given that the definition is a highly
9 technical definition that comes from the analog era,
10 to then sort of try to limit the availability of
11 orphan works instead of just to published works will
12 create all sorts of artificial barriers that really
13 make no sense anymore.

14 Also, again, in terms of the cost, it
15 would just significantly drive up the cost of, again,
16 trying -- it would be sort of a threshold obstacle
17 that people would have to consult with a lawyer to
18 decide if this published or unpublished. Sometimes it
19 will be easy if you're talking about a letter but a
20 lot of times it will be very difficult to determine
21 whether it's published or unpublished. Again, that
22 would just undermine the whole point of this process.

23 MR. HOLLAND: If we are talking about
24 releasing into the public domain only orphan works,
25 only unpublished work whose authors can't be located,

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1 then aren't we talking about dispossessing an entire
2 class on the grounds that a few people might not
3 object? I don't see how one can take the prerogative
4 to do that on behalf of identified people.

5 As for whether it's unclear if work is
6 published on the Internet, once it's published on the
7 Internet it can be downloaded and published so it's as
8 good as published. If someone takes someone's work
9 and puts it on the Internet as unpublished, someone
10 else can pick it up, do derivative works on it, it's
11 as good as published.

12 MS. DAUGHERTY: We limit ourselves to
13 Gospel music at our studio and from what I know about
14 the Gospel song writers, they would not want that
15 their unpublished works were not included in this
16 because of the reason that they wrote the Gospel music
17 in the first place was mainly for ministry.

18 Not very many of them do it for a full-
19 time living so they are more likely to give away their
20 work. They are more likely to give away their
21 soundtracks and to let somebody record their music for
22 free without claiming royalties. Many times they are
23 not always in the situation where they can have their
24 song published in a hymnal or have their song
25 published in sheet music.

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1 They are not always able to afford
2 recording. So I think if each industry sets up a
3 different algorithm or checklist, that the Gospel
4 music perhaps should be a little separate. Some of
5 the songwriters have said that themselves to me that
6 they would like to see different types of copyright
7 laws set for Gospel music versus other music because
8 of what they do with the music.

9 I think that if their music was said to be
10 orphan work if you found it through a checklist or
11 through an algorithm and it had not been published in
12 a hymnal, they would still want you to be able to use
13 the music.

14 MR. CARSON: Most of the comments I've
15 heard this morning from those who object to including
16 unpublished works in some kind of orphan works regime
17 seem to be addressing situations where the author of
18 that unpublished work is, in fact, known and probably
19 identifiable.

20 I wonder if those of you who have problems
21 with including unpublished works in whatever orphan
22 works regime we come up with could articulate for me
23 why you would have such an objection in the case where
24 you don't know who the author is or can't locate the
25 author because that, I think, is what an orphan work

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1 is.

2 When we're talking about orphan works
3 we're not talking about works where you know who owns
4 the rights and you can go to them. We're talking
5 about, in fact, the case where you can't figure that
6 out. Why do you have a problem in that case with
7 including unpublished works in whatever orphan work
8 regime you have?

9 MR. PERLMAN: Because a person isn't known
10 or identifiable at the time that the use is being made
11 doesn't mean that person is forever unidentifiable.
12 There is also the privacy aspect that Anne mentioned.
13 Everybody in this room has collections of photographs
14 that for one reason or another would be horrendously
15 embarrassing if they were suddenly published on the
16 front page of some tabloid.

17 MR. ROSENTHAL: I think this gets back to
18 the problem of the different status of copyright
19 owners. I think that when you speak of, let's say,
20 recordings on the Internet, to give an example
21 hypothetical, you have a situation where you may know
22 and may be able to find the copyright owner very
23 easily if it's a label, even if it's a larger more
24 famous artist.

25 Here I'm trying to make that distinction

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1 of, okay, we have the larger artist that you can find
2 and you have the labels that you can find. Then what
3 happens if you have the artist who you really can't
4 easily find who really aren't as accessible? Again,
5 it is really changing fundamentally their copyright
6 and what they've done.

7 If they have performed something, they've
8 got the copyright. To say that, okay, some kind of
9 reasonable due diligence has been done to be able to
10 use this, yes, whether it's published or unpublished
11 really the potential user may not even know if some of
12 this is unpublished or published realistically
13 especially as it relates to music.

14 I think that is taking a lot away from the
15 original copyright owner and I'm wondering if again we
16 are dealing with the purpose which I think Steve
17 really hit upon is to try to get them together. If
18 you're dealing with an artist that you can't find and
19 it's not a very famous artist, maybe it shouldn't be
20 used and maybe it shouldn't fall into this orphan
21 works category if it's not clear that the work is
22 published. We are addressing the published versus
23 unpublished issue. I think we just have to air in my
24 estimation on the side of the author.

25 MR. TAFT: The archive where I work we

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1 have the largest repository of Native American
2 recordings where the author or the creator may not be
3 known but the community of interest is certainly
4 known, the tribal council. We are very careful about
5 consulting with tribal counsels before we publish or
6 have others publish our materials.

7 I think there is a constituency that has
8 an interest out there. It may not be an individual.
9 It might be a community. It's certainly true of
10 Native Americans and may also be true of other groups.
11 There is a whole range of creativity that I deal with
12 every day which is intimate. It's personal in some
13 way because it's folklore, however you define that.

14 There are people out there who would
15 certainly be interested to know the work is being used
16 even if they never envisioned or the question of
17 publication never came up. Most folklorist when they
18 go out and do research and collect a song or tail or
19 whatever it is from somebody, the question of
20 publication is not really there.

21 The question is we want to document this
22 tradition because it's important and we want to put it
23 in an archive. It may come up and the question you
24 get sometimes is, "Are you writing a book?" The
25 answer the folklorist usually gives, unless they are

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1 writing a book, is, "No, this is so we can document
2 the tradition and place it in an archive where it will
3 not be lost," etc., etc.

4 After the fact, of course, a publication
5 can often come up. There is a very interesting case
6 of this. The, "Oh, Brother, Where Art Thou?" film
7 which took some of Alan Lomax' recordings which he did
8 as a folklorist back, I think, in this case in the
9 '50s and used at least one song from a prisoner and
10 the prisoner was still found to be alive and kicking
11 in Chicago, I think.

12 He received a nice check for his
13 adaptation of "Poor Lazarus." After the fact there
14 can be certainly publication when in the original
15 instance of collecting or documenting, however you
16 want to describe it, publication was not at issue at
17 all.

18 MR. ADLER: We in our comments the
19 publishing community came out in favor of not
20 excluding in anyway unpublished works primarily
21 because there are whole genres in publishing today,
22 biography and history, for example, that one can't
23 imagine without the ability to access unpublished
24 works in order to be able to get to the reality of
25 what occurred in someone's life or what occurred with

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1 respect to an historic event.

2 The issue of so-called writer first
3 publication some people might be surprised to find was
4 not really much of an obstacle for us to get over once
5 we went back and considered that Congress in an early
6 1990's amendment had made it clear that the fact that
7 a work is unpublished is simply one factor to consider
8 when applying the fair use calculus which means that
9 there is no per se right of first publication in that
10 sense as much as authors might wish there were.

11 This ties us back into one of the things
12 that I think was sort of the elephant sitting on the
13 table in an earlier discussion about bringing
14 copyright owners together with users, and that is I
15 noticed in many of the comments perhaps one of the
16 most emotional areas that is going to be discussed in
17 this proceeding is the question of what happens when
18 basically in conducting one search the result is one
19 doesn't get a response from the copyright owner but
20 doesn't know whether that's because they didn't locate
21 the copyright owner or the copyright owner simply
22 chose not to respond.

23 There may be people here who feel that is
24 an inappropriate thing to allow the law to protect the
25 ability of a copyright owner to simply ignore people

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1 who want to make use of their works. Currently under
2 the law that is perfectly permissible. One would
3 imagine quite a tectonic shift in copyright law if
4 there were to be some injunction against a copyright
5 owner simply not wanting to respond to the many people
6 who may want to contact them and ask for permission.

7 The other thing is that, again, and I just
8 wanted to clarify because I may have misunderstood
9 something that Brad said before but, of course, when
10 we're talking about the treatment of a particular use
11 of a work as an orphan work, and we in our comments
12 put in a footnote.

13 We didn't want to go at this at length
14 because we knew if we urged that we changed the
15 discussion to talking about orphan uses rather than
16 orphan works, that would only confound people. The
17 reality is we're not talking about creating a
18 permanent status for a work as an orphan work.

19 The fact that a work is going to receive
20 orphan work treatment certainly doesn't put it into
21 the public domain. That is a very important thing to
22 remember because when we define the purpose of this
23 rule making in terms of orphan works, what we had
24 actually said was we are talking about a situation
25 where we are protected by copyright.

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1 We want somebody to be able to lawfully
2 engage in a proposed use of the work that implicates
3 the rights of the copyright owner when such use would
4 not be authorized by any of the statutory limitations
5 or exceptions applicable to those rights and the user
6 cannot identify and locate the copyright owner.

7 Why did we say the first qualification?
8 Because we simply assume that if somebody is using a
9 work and believes that use is fair use or is otherwise
10 covered by one of the express limitations on the
11 rights of copyright owners under the Act, frankly,
12 they are not going to go through the orphan works
13 process.

14 In that situation also you are going to
15 have to have great deal of clarity about what the
16 consequences are for dealing in any particular case
17 somebody's desire to use an orphan work receiving
18 orphan work treatment. It will not put the work into
19 the public domain. It ordinarily would not mean that
20 work is -- that use is not necessarily fair use. Nor
21 is it a use that is covered by a limitation.

22 When we get to that elephant standing on
23 the table, which is the question of what do you do in
24 the situation where a nonresponse in conducting one's
25 reasonable search may simply mean that the copyright

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1 owner chose not to respond for reasons of that
2 individual's privacy, for reasons of if it's a
3 corporation wanting to hold very tightly to the plans
4 for use of those particular works.

5 I think we are going to have to again
6 adhere to a basic principle which some of us went into
7 this proceeding with and that is the idea try to do
8 only minimal change to basic existing principles of
9 copyright law in accommodating the use of orphan
10 works.

11 I say that having said that publishers are
12 not just proprietors of copyrighted works, but you
13 can't find a book published today where the publisher
14 did not have to go out and ensure that they had the
15 appropriate permission to include certain images or
16 other material within that book.

17 MR. MOILANEN: From a photo standpoint
18 apart from when you identify what is or isn't
19 published, at the time most photo processors see it
20 they have no clue as to whether it's published or not
21 and will never be able to find out if you don't have
22 a name or something that helps you identify who to go
23 ask whether it's published or not won't be known.
24 That's probably true for most works.

25 MR. METALITZ: This is a very complicated

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1 issue. The RIAA did not want to exclude unpublished
2 works all together. In fact, we wanted to make sure
3 that some types of unpublished works were not eligible
4 for orphan work status. I think Jay has already
5 referred to the problem of pre-release material.

6 In fact, the pending rule making that the
7 Copyright Office now has going on works being prepared
8 for commercial distribution may help to define a
9 category of published works that in our view should
10 not be subject to this orphan work status. It may not
11 be exactly coextensive but maybe that will help.

12 I would certainly second what Allan said,
13 that we are not talking here about works going into
14 the public domain and the RIAA. Although we see
15 ourselves probably more as users in this discussion
16 than as owners because we think very few commercially
17 released sound recordings will, in fact, be orphan
18 works under any reasonable due diligent standard, we
19 still think the uses that are made under this ought to
20 be the subject of compensation. We'll get to that, I
21 guess, in later sessions. We're not talking about
22 putting material into the public domain here.

23 Finally, the point that Philip made and
24 others have, too. Publication is a very arcane and in
25 some ways obsolete concept. Many of the precedents

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1 flow from the 1909 Act. It is often going to be the
2 case that you can't really determine whether it's
3 published or unpublished.

4 Whatever the rule is you have to have some
5 way to accommodate the user who in good faith may
6 think even if you are excluding certain unpublished
7 works the user may in good faith think it's published
8 and you have to have some method of accommodating
9 that.

10 MS. WOLFF: I believe excluding all
11 published works would lose a lot of benefit of trying
12 to have a reasonable balance between those people who
13 want to use works when we can't identify an owner.

14 I know in terms of photography the
15 difference between published and unpublished not only
16 is the biggest nightmare in trying to register
17 photographs but now not putting myself as a stock for
18 the library but imagine myself as an institution or a
19 museum that has been donated a collection of mixed
20 prints, negatives, transparencies. How anyone would
21 know whether any of them are published or not I think
22 would deprive a lot of potential beneficial uses of
23 something like that.

24 MS. URBAN: I don't want to repeat a lot
25 of what has been said about the complexity in figuring

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1 out what is published or unpublished but we discussed
2 this at length in the film maker's group and we came
3 on the side of not excluding unpublished works from
4 any kind of a solution largely because it's a great
5 historical benefit of being able to use a large
6 variety of works that may be unpublished such as home
7 videos or letters or old photographs which we have
8 already discussed here.

9 MR. PERLMAN: The elephant that is sitting
10 on the table is that there is what I kind of consider
11 the wired mindset which is that if a work exist, one
12 way or another everybody has a right to use it. I
13 have kind of detected some underpinnings of that
14 philosophy in some of the comments. I just want to
15 point that out as a very dangerous swamp that we can
16 fall into.

17 I think in working under public knowledge
18 -- well, first of all, I want to underscore what Allan
19 said. I think even though it may be confounding to
20 talk about orphan uses, I think, in fact, that is what
21 we are really trying to drill down to which is in
22 particular instances where you have a transformative
23 or other kind of republication use and you do whatever
24 due diligence is to identify the rights holder or the
25 owner or the creator and you can't find them, you want

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1 to be able to go forward with some certainty as to
2 what the outcome of that choice is going to be.

3 We anticipate -- we wrestle with this with
4 public knowledge with the issue about what to do with
5 the rights holder who shows up after you have already
6 published this textbook, say, that used an image or
7 used a letter that had previously been unpublished.
8 What we really wanted to do was say we want to create
9 some certainty for that instance, for that use, but
10 without eroding in any other sense the rights here in
11 the rights holder.

12 It seems to me that one of the questions
13 that you have to ask yourself is the consequences of
14 orphan works designation. I know this is really
15 another topic but the consequences of orphan works
16 designations. There are retrospective consequences
17 and prospective consequences.

18 The things you want to do is not penalize
19 people who have done the job that they should do
20 according to the orphan works process. At the same
21 time you want to preserve rights holders who do come
22 forward because we know there are going to be cases
23 where they do.

24 MR. HOLLAND: Since Vic has pointed out
25 the elephant on the table, I would like to just make

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1 a comment on it. If the actual purpose of copyright
2 was to facilitate dissemination, then I don't know why
3 we need the copyright law in the first place since
4 dissemination would be possible without a copyright
5 law. Isn't the purpose of copyright law to set limits
6 on dissemination?

7 MR. PETERSON: I'm not sure we have time
8 to debate that question.

9 MR. HOLLAND: Isn't that what we are
10 debating?

11 MR. PETERSON: I would like to set to rest
12 the privacy issue. Archivists are concerned about a
13 number of issues when they look at the records that
14 they're looking at. One of them is copyright.
15 Another big issue that they deal with on a daily basis
16 is the unwarranted invasion of personal privacy. So
17 we certainly don't view that as an insignificant
18 issue.

19 That is a huge issue but we don't -- just
20 because we can look at an orphan work and say we can't
21 find the person that produced the orphan work, there
22 could be information in that work that would be an
23 unwarranted invasion of personal privacy and
24 archivists are concerned about that. I think we
25 should take that issue off the table insofar as

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1 archives are concerned because that is a big issue for
2 archives on a daily basis.

3 MR. SIGALL: Let me just ask a question
4 following up from that and the discussion a little
5 bit. If the system were not to exclude unpublished
6 works as a category, would it be able to address the
7 concerns that have been raised regarding unpublished
8 works as part of the analysis of a reasonably diligent
9 search?

10 I believe the publisher's comments
11 suggested that approach to say that -- I hesitate to
12 use the word unpublished versus published given the
13 baggage that comes with under copyright law.
14 But with the concerns being raised about protecting
15 authors or anyone who creates the works and their
16 ability to control a work from being disseminated, if
17 you will, can that be addressed in the standard of
18 reasonable search in some way?

19 If so, how could it be addressed if you
20 weren't going with a categorical exclusion but you
21 were putting it into the mix of analysis of a
22 reasonable search. Is that a possible approach that
23 would address the concern?

24 MS. CHAITOVITZ: As you know, of course,
25 I don't favor including unpublished works but if we

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1 were to do so, I think you could then create maybe
2 extra hurdles because, first of all, I think for
3 unpublished works if it's fair use, you've got that
4 already and that's enough. But if not, perhaps you
5 say, well, you can publish an unpublished work if you
6 are able except if you know that the creator --
7 whether you can identify the creator or locate the
8 creator obviously is necessary.

9 If it's orphaned, you can't identify or
10 locate but suppose you can say this person has other
11 work out there, published works. We can't locate them
12 but we know that it was X who we are trying to track
13 down and X has these five published works out there.
14 Then this work is an unpublished work.

15 You can assume that X decided it was
16 unpublished. Or things that are an invasion of
17 privacy, personal letters, nude photographs, things
18 that clearly would be an invasion of privacy to be
19 excluded.

20 MS. LEARY: I really don't think that has
21 to be set out in a statute or the regulations because
22 there is a very substantial and constantly increasing
23 body of law about invasion of privacy. I mean, that's
24 the area -- I do news as well -- that we worry about
25 with news-gathering torts and if you are exploiting

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1 somebody's likeness or you are exploiting a so-called
2 right of publicity because you are tapping into some
3 sort of creative content they have created.

4 I think that issue really should be laid
5 aside because there are ample remedies in existing law
6 for the use and publication of what would be otherwise
7 private material and they turn on state law. There
8 isn't a federal sort of standard and I think that if
9 it were included in the copyright law we would be
10 imposing a federal level of privacy where it really is
11 unwarranted.

12 MR. PERLMAN: I think Anne and I and
13 others are talking about as violations of rights of
14 privacy, we are not using rights of privacy as a term
15 of art here. Rights of privacy are extremely limited.
16 What we are talking about is things like some
17 photographers absolutely never let anyone outside
18 their studio see anything except their selects, the
19 photograph out of the entire shoot of hundreds of
20 photographs that they want the public to see.

21 For the public to be able to see their
22 mistake is something that would cause them great --
23 whether rightly or wrongly great personal
24 embarrassment. The United States barely gives
25 anything in the way of moral rights. To me what we're

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1 talking about here is the rape of moral rights.

2 MR. BAND: I guess I would have to take
3 the opposite point of view. Not that I'm in favor of
4 rape but it seems to me, again, if we are talking
5 about -- the one you are likely to be using in
6 unpublished works is really when you are dealing with
7 works that have some incredible cultural or historic
8 significance. I mean, again, as a practical matter
9 that's when it's going to be used. We are not talking
10 about sort of just letting everything go. Again,
11 we're not talking about things going to the public
12 domain.

13 We are not talking about this uncurrent
14 that anything that is published -- anything that is
15 written should be disseminated. We are talking about
16 the things that really do have some historic or
17 cultural value. Otherwise, no one would be doing it.
18 There would be no point in going down that road and
19 incurring the costs and risks of publication.

20 It could be that you have a photographer
21 and it could be the drafts or early works do have
22 historical and cultural significance. Now, again, to
23 the extent that you are looking at a particular author
24 or photographer if you know who he is, you are
25 probably able to try to deal with the rights or you

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1 would be able to claim a fair use.

2 Let's say it might be an unpublished
3 photograph of a building that no longer exist and
4 maybe the photographer didn't publish it for a reason.
5 Again, assuming you could figure out that it was or
6 was not published you're talking about the cultural
7 heritage of the country. I think it's important to
8 make sure that we are able to access those kinds of
9 works.

10 MR. PERLMAN: Jonathan, I assume you have
11 never talked past the supermarket checkout, the
12 tabloids.

13 MR. BAND: In fact I have.

14 MR. ROSENTHAL: I think we have to keep in
15 mind that the decision to make works at times
16 unpublished is an economic decision, especially again,
17 as it relates to sound recordings, a lousy track, a
18 track where the singer is really off key. When
19 Britney is more off key than she normally would be is
20 not a good thing from an economic standpoint.

21 If the proposition here is that there
22 should be more, let's say, cost to a user if in the
23 subsequent time that you determine, whether this is
24 published or unpublished in the orphan works context,
25 if there is an added cost to that user, if you want to

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1 call it additional damage for an unpublished work as
2 opposed to a published work, I think that is worth
3 looking into.

4 It is, at least in the case of recording
5 artists, a very big -- not publishing something is an
6 economic decision as much as anything else so I agree
7 with that concept.

8 MS. MURRAY: I just wanted to comment on
9 something that I think Jonathan has said twice which
10 I just have to disagree with. This is not just about
11 works that are being used for their educational or
12 cultural heritage.

13 From the standpoint of the recording
14 industry, again, looking at this as users, potential
15 users of orphan works, the examples that we gave in
16 our submission, if someone decided that a particular
17 image or perhaps some piece of text would be helpful
18 in promoting a particular recording and want to
19 include it in the packaging or you want to include it
20 in the descriptive booklet.

21 I mean, it's a commercial use and that's
22 the one we want to make. Of course, we would like to
23 think that every sound recording that is commercially
24 released in the United States is adding to our overall
25 cultural heritage. But, on the other hand, this is an

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1 economic use.

2 I think there are going to be a lot of
3 other examples where people want to make economically
4 -- for whatever reason they think it's going to be
5 economically advantageous to use work whose author
6 can't be identified or located so it's not just a
7 question of cultural heritage here. It ties into what
8 we think the consequences of the use ought to be which
9 is that it should not be a use that is totally
10 uncompensated to the author if and when the author
11 comes forward.

12 MR. HOLLAND: I think an author's right to
13 withhold anything from publication is his exclusive
14 right. It's not necessarily just an economic factor,
15 although it might be. It could be just a matter of
16 quality control as Vic suggested. Before he died
17 Michelangelo was caught burning a pile of sketches.

18 Anyone here would agree those would have
19 historical or even aesthetic value but it was his
20 choice to burn those things because, as he said, he
21 didn't want people to realize how hard he had to work
22 to make it look easy. That was his choice. If I do
23 a drawing in a sketchbook that somehow becomes
24 published, it may preclude my ability to publish it
25 myself because if it gets put out into the public

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1 domain -- I have been corrected on at least two
2 occasions for saying that once a work is on the
3 Internet it's in the public domain.

4 Legally I understand that it might not be
5 if an archive puts up an unpublished work. Illegally
6 it can be infringed. We've heard that archives don't
7 have enough money for lawyers to do proper searches.
8 I can guarantee that artists don't have enough money
9 to sue all the people who infringe their rights. It's
10 a de facto in the public domain. Whether or not it's
11 legal or not is almost irrelevant in this day and age.

12 MS. MURRAY: I just wanted to say this.
13 We were sort of surprised at the results of one of our
14 survey questions which was we thought there would be
15 more unpublished works that were orphaned than
16 published just by definition but, in fact, somewhere
17 around 80 percent of the works that our members
18 couldn't find the authors of had been previously
19 published which is why we actually took no position on
20 whether there should be a distinction made between
21 published and unpublished works.

22 I'll say that the Authors' Guild agrees
23 largely with Allan's comments that most published
24 authors who use other works are not fiction authors
25 who need to use works for nonfiction, biography,

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1 history, and the like.

2 MR. ADLER: I just wanted to clarify. I
3 noticed when you asked the question, Jule, that the
4 relationship between unpublished works and
5 reasonableness standard of search there was a puzzled
6 look on the face of some people here. What we had
7 suggested that, remember, we had proposed a limitation
8 of remedy scheme.

9 The reasonableness of a search comes into
10 play in that scheme, particularly when the copyright
11 owner subsequently emerges and the copyright owners
12 seeks compensation. For that purpose the
13 reasonableness of the scheme is important to determine
14 whether or not the user is going to benefit from the
15 limitation of remedies under the scheme or not.

16 We had suggested that perhaps there might
17 be different factors or standards or criteria
18 regarding the reasonableness of a search between a
19 work that was published and a work that was
20 unpublished. On some of the issues that people have
21 raised here, however, I think that, again, we would
22 look to the limitation of remedy scheme as one
23 possible way of addressing some of these issues.

24 We had recommended that there be no
25 injunctive relief available to an emergent copyright

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1 owner because of the fact that could cause great
2 inequity to a user who has relied upon a good faith
3 reasonable search that failed to locate the copyright
4 owner. I mean, the example is if you publish a run of
5 50,000 books having incorporated somebody's work and
6 now the owner comes forward and wants to conjoin all
7 of those works, we think that would be inequitable.

8 However, with respect to the area of
9 unpublished works, there may be certain areas where
10 the sensitivity is such that perhaps for those areas
11 there might be exceptions made with respect to when
12 injunctive relief possibly could be available.

13 MR. SIGALL: I think we will discuss
14 issues like that when we talk about the consequences
15 of an orphan works designation and the limitations on
16 remedies in that panel.

17
18 I would like to turn now to the question
19 of registries in the whole system and the question of
20 many people have suggested that voluntary registries,
21 copyright owner information, ownership information and
22 contact information, could be developed and could be
23 part of a reasonable search system in the sense that
24 one place you go, a necessary place to search but not
25 a sufficient place to search, might be registries like

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1 the one we maintain at the copyright office or
2 copyright registrations but other either public or
3 private development of registries of information,
4 maybe even on a sector-by-sector basis.

5 The first question I have with respect to
6 the inclusion of registries in a reasonable search
7 type system, what incentives are there? How do we
8 ensure that these registries are developed and that
9 the information in them is accurate and that it is
10 something that will be beneficial?

11 I ask this question based on an experience
12 that we have had in the Copyright Office with respect
13 to Section 108(h) of the law which was passed in 1998
14 and had a provision in it that said that a copyright
15 owner could come and file a notice with us that a work
16 is not being commercially exploited or not available
17 at a reasonable price just to forestall any invocation
18 of that section by a library or an archive who wanted
19 to make use of that work in the last 20 years of its
20 term.

21 In the eight years since that has past we
22 have received let's call it zero notices of
23 information attesting to that fact and making that
24 clear. There is some concern here that, you know, the
25 prospect people say registries will be developed but

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1 it may not actually happen and then the question is
2 how do we make sure that it happens and that that
3 information is accurate and useful.

4 MR. SPRIGMAN: So, again, I think to go
5 back to the first principle, the reason we're here, I
6 think, is because these works that we call orphan
7 works are orphaned because the exclusive rights given
8 by the copyright system to the rights holder or the
9 author are not economically valuable.

10 As a result, the authors of these works
11 see no reason to invest resources in managing these
12 properties. The fact that you've received zero
13 notices aligns with what you would expect given those
14 incentives. People don't have the incentive to notify
15 the Copyright Office and don't allow use under 108(h)
16 because they don't have an incentive that arises from
17 an exclusive rights granted under copyright.

18 The argument in favor of a registry I
19 think is an argument in favor of not a voluntary
20 registry but a different kind of registry. The simple
21 argument is that copyright owners have a preference.
22 Either the system of exclusive rights benefits them
23 economically or benefits them in some other way that
24 actually gives them value or it doesn't.

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1 that we had a coverage system that had a registry that
2 had formalities that had to be complied with to either
3 gain or maintain a copyright, you see that a lot of
4 works didn't produce for their authors the kinds of
5 benefits in the coverage system that would lead the
6 authors to gain or maintain rights.

7 Over the span of the existence of the
8 renewal requirement maybe 85 percent of works that
9 came into the copyright in the first place not
10 renewed. That means that those works after 28 years
11 or so did not yield the kind of economic value to
12 their rights holders that would lead them to conclude
13 that copyright was a useful system for them.

14 These are works that are basically
15 nonrival forms of property. By using it I don't
16 deprive the owner of it and if the owner doesn't have
17 an economic value that exclusive rights protects,
18 economics would say that use would create social
19 welfare. That's why we're here I think, to free up
20 those uses.

21 Now, a registry will work if after a
22 period, and we propose 25 years in our proposal, where
23 rights holders don't have to do anything and during
24 that 25 years they can gain some understanding of the
25 likely value of their works. At the end of that time

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1 if they think that the copyright gain is worth the
2 candle, if they think the copyright benefits them
3 economically or in some other way, maybe a privacy
4 interest, they can register.

5 Registration can be made cheap and
6 efficient and it uncovers the preference of the rights
7 holder. The reasonable efforts approach that we have
8 been talking about this morning we think, Creative
9 Commons and Save the Music, think that a well
10 constructed reasonable efforts approach is better than
11 what we have but the advantage of a registry is it's
12 efficient and it uncovers preferences that the author
13 is in a position to know. That is the kind of
14 registry that we think would be effective and would
15 incentivize authors to provide the information.

16 MR. TRUST: I have to say that I think
17 that comment just really is an indication of a lack of
18 understanding of a fairly substantial class of
19 copyright holder. I'm going to have to speak from our
20 own experience again but, you know, photographers are
21 working 50 hours a week or more on average.

22 They are earning 30,000 a year. They are
23 managing because they are one and two and three-man
24 shops. Mostly one and two-man shops. They are
25 managing a 1,000 images a week from the weddings or

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1 the portraits or whatever that they just shot. It's
2 not that they think that their products doesn't have
3 enough value to warrant registration.

4 It's that they are incapable of managing
5 their business shooting what needs to be shot,
6 handling the marketing and the sales, and taking time
7 to sort through and decide which of their photographs
8 will be published and which ones will be unpublished.
9 Even group registrations, as wonderful as they are,
10 and as grateful as we are to the Copyright Office for
11 working that out, even group registration doesn't work
12 for professional photographers.

13 I think if you lined up a bunch of
14 photographers and you told them that it was because
15 they didn't believe that the work had enough value to
16 warrant the registration that the rest of us would
17 have to come to you aid and protect you. That's not
18 the case. In fact, they do believe that the work has
19 value.

20 It's that the idea of a registry on top of
21 copyright registration, the idea of a registry would
22 never fly in professional photography and the idea
23 that if for some reason it was a mandatory registry
24 that we would be stripping them of their rights as
25 copyright holders is just inconceivable. It could not

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1 happen.

2 They have a right as a creator. Just
3 because they don't take the time to submit in a
4 registry -- by the way, that being said, we do believe
5 that registries are a great idea but they have to be
6 voluntary. You cannot make them mandatory registries.
7 It doesn't work for photographers.

8 MR. COPABIANCO: I would agree entirely
9 with what you just said. It has to be a voluntary
10 registry and there can be no consequences for not
11 being in the registry. Looking at the registry can't
12 be a way of performing due diligence to use an orphan
13 work.

14 As far as whether all authors will
15 participate, I think the answer for most professional
16 authors is yes. The Authors' Guild runs something
17 called the Author's Registry. Kay, do you know?

18 MS. MURRAY: It's about 30,000 individual
19 authors in the registry database.

20 MR. COPABIANCO: Okay. For example, in
21 our group, Science Fiction and Fantasy Writers, we
22 polled our authors and said, "This registry exist. If
23 you want to be included, send us an e-mail." The
24 majority of our members did choose to participate in
25 this registry and they are now incorporated in the

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1 Author's Registry database.

2 I think it's quite feasible to do
3 something like this and I would like to see it done.
4 Whether the author's groups themselves are brought
5 into to do it or whether it's something that would be
6 done under the aegis of the Copyright Office, I don't
7 know, but it's something that should very definitely
8 be looked at.

9 MS. CHAITOVITZ: I'm just going to repeat
10 what you said because I just have to respond to what
11 Chris said because I think that rather than our
12 conversation here which is encouraging exploitation
13 and use of truly orphan works, what you're talking
14 about is stripping the copyright away from people
15 because they didn't have a proper calendar. By
16 accident they forgot to register something on time.

17 That is just untenable for the authors.
18 I think a registry is a great tool to use in a
19 voluntary process. I think there would be an
20 incentive because of you were registered and somebody
21 wanted to use your work, then you wouldn't be an
22 orphan and you would get paid. It's an important tool
23 for that goal but it is wrong and undermines the
24 copyright scheme to use this as a way to put things in
25 the public domain and to strip creators of their

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1 copyright just through accident.

2 MR. ATTAWAY: To continue beating up on
3 Chris, I just think it's a terrible idea to equate the
4 fact that a work is an orphan with worthlessness. The
5 endeavor here is not to attach value to works. The
6 endeavor here to determine when a work should be
7 considered an orphan work so it can be used without
8 the permission of the author.

9 The writer of a screen play may try to
10 market it for 20 years and just give up but if Steven
11 Spielberg finds that screenplay and wants to make a
12 movie of it, that screenplay has great value to the
13 author. He is going to want to be paid for it so the
14 endeavor here is to help formulate standards for
15 identifying an author.

16 If he can't be, or she cannot be
17 identified to permit uses under circumstances and even
18 when a work is used as an orphan work, this isn't the
19 topic for today but there must be some procedures so
20 that if the author at some point is identified, that
21 author is fairly compensated for the use.

22 MR. HOLLAND: I wanted to add to this
23 because one of the underlying assumptions in many of
24 these submissions that we've read is that somehow if
25 the work isn't registered or isn't an active play,

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1 that it's being considered worthless by the author.

2 I think there is -- I mean, here is one
3 letter, for example, or one submission that is two
4 pages with six substantive paragraphs and there are
5 four references in this submission alone saying that
6 the work is essentially worthless. I want to read
7 one. It says, "The vast majority of copyrighted works
8 have little or no economic value soon after their
9 creation or publication."

10 First of all, I would like to have had
11 this attorney when I got divorced a few years ago. If
12 I get divorced again, I'll look him up. But I would
13 also point out names like Picasso and Van Gogh whose
14 work didn't acquire any value until decades after they
15 created the work. Or even Norman Rockwell who was
16 giving his paintings away while he was alive and now
17 are selling for millions.

18 Also, I wonder how often in the
19 marketplace the consumer gets to decide the value of
20 the work that he wants to consume. I would like to go
21 to a camera store and tell the owners of the camera
22 store how much their products are worth.

23 The other thing is that new technologies
24 can open up commercial advantages that were never
25 dreamed of when the work was done. For example, G.

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1 Clay prints right now are offering photographers and
2 illustrators and fine artists opportunities to do
3 prints on demand that would never have been available
4 at the time when much of this work that is being
5 considered for orphan status was being done.

6 Finally, you can never tell which pictures
7 that you've done years ago are going to rise from the
8 dead and become suddenly valuable. I am getting calls
9 all the time for pictures that I did back in the late
10 1960s and '70s that I can't even remember what I did
11 with them but somebody else has remembered them and
12 wants prints of them.

13 The fact that I'm not doing anything with
14 them right now doesn't mean that they are not
15 commercially valuable or that when someone calls me
16 for it that I don't put it back into play for
17 commercial considerations.

18 MS. URBAN: Film makers position as being
19 both copyright holders and users of materials for
20 transformative works put them in the position of
21 really wanting this proceeding to end up in a place
22 where copyright holders have every ability to be
23 found, users have every ability to find them, and if
24 users cannot find the copyright holder, they will have
25 some measure of certainty in using the work.

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1 For that reason what we did was proposed
2 as a multi-pronged approach, one part of which was
3 reasonable efforts and one part of which was a
4 voluntary registry which would allow the copyright
5 holder their ability to be found for the works to not
6 be orphaned if that was their wish.

7 And then that to be backed up with a
8 reasonable effort search on the part of the user if
9 the copyright holder, for example, as David said, you
10 know, wasn't able to use the registry for some reason
11 or hadn't gotten their works registered. Then in the
12 end, of course, having the measure of certainty for
13 the user would be important.

14 MR. GODWIN: I want to explain why the
15 public knowledge comments really didn't talk very much
16 about registration and the reason is that it seems our
17 copyright law has already endorsed the notion that
18 registration is useful and good and there are
19 incentives built into our copyright law for people to
20 register their works.

21 In particular, to get statutory damages.
22 There are other reasons as well. As I listen to
23 comments around the room, I actually hear a consensus
24 that voluntary registration -- nobody disputes that
25 voluntary registries are useful.

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1 On the issue of mandatory registration
2 when we look into that issue, it was very hard for us
3 to figure out a way or figure out a version of
4 mandatory registries that did not at least raise
5 questions about compliance with Berne Convention
6 prohibitions or formalities.

7 Because that seemed to be an attractable
8 problem, it looked like, on the one hand, there was a
9 settled issue that voluntary registries are good and,
10 on the other hand, it seems that mandatory registries
11 create Berne problems.

12 MR. SPRIGMAN: We will get to the Berne
13 problems later. It kind of depends on how you
14 structure the registry. But a related point is that
15 under the registry proposals that we would favor, the
16 failure to register a work after the statutory kind of
17 waiting period of maybe 25 years does not move a work
18 into the public domain.

19 It exposes that work to what I call anyway
20 a default license which basically is a way for these
21 authors to get paid if they identify themselves. This
22 is, in my view, not a Berne Convention problem. This
23 is an opportunity.

24 But I just wanted to respond to some of
25 the comments about registries basically with a polite

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1 reminder that for over 185 years from the founding
2 copyright statute in 1790 up to the Copyright Act of
3 1976 we had a copyright system that premised both the
4 creation of copyright in a work and its maintenance on
5 formalities, registration for a big part of our
6 history, notice upon publication, recordation of
7 transfers although that was not a condition precedent
8 to or subsequent to copyright.

9 It was something you kind of had to do by
10 regulation and also renewal. We moved away from that
11 starting in 1976 and my view of that is that we moved
12 away from it for some very good reasons. At the time
13 it was very difficult to administer a proper registry.
14 We are now living in a different world. In 1976 the
15 world we are living in now was not really glimpsable
16 by the policy makers.

17 I think now if you look at the domain name
18 registration system, we have a system that is shot
19 through with formalities. We require would be
20 property owners to tell people who owns the domain and
21 we do that for a good reason because we want property
22 rights on the Internet to be clear.

23 We require the owners of houses to tell us
24 who they are because we know that by putting burdens
25 on those owners we gain a lot in social welfare. We

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1 make a much more liquid and much more efficient
2 housing market.

3 Similarly, for most of our history we put
4 burdens on copyright owners to identify themselves and
5 to hold up their hand and to say, "I want a copyright
6 on this work," because by claiming copyright in that
7 way it limited the reach of the copyright system to
8 those works for which the exclusive rights granted by
9 copyright actually could provide some good for the
10 authors. It left everything else unregulated.

11 That was the system we had. Now, with
12 respect to a modern registry proposal, we could
13 basically replicate a lot of those benefits without
14 going to a tremendous amount of the trouble. Series
15 registration, I think, could be worked on to take care
16 of creators of large numbers of works. I agree that
17 is something to be talked about but I think that is a
18 tractable problem, not an intractable problem.

19 The alternative is to keep a lot of works
20 locked up and to keep a lot of socially beneficial
21 uses, commercial and noncommercial, that could be made
22 by people like the RIAA and other academic historians
23 from being made.

24 MS. MURRAY: Yeah. Just one other problem
25 with a mandatory registry is that it would in an

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1 unfair way affect individual owners of copyrights as
2 compared to corporate rights holders. Oh, yes.
3 You're shaking your head no but having worked at the
4 Authors' Guild and advised many authors over the last
5 11 years, we have a lot of people who failed to renew
6 because their original publisher registered the
7 copyright.

8 The work went out of print, the rights
9 reverted to the author because they didn't really get
10 it because they are creative people and they didn't
11 get it. They failed to renew -- maybe not because.
12 I mean, it was a rather awkward scheme and an awkward
13 sort of way of looking at the calendar. Even lawyers
14 can't get it right all the time. That's just an
15 obvious point, I think.

16 MR. PERLMAN: As Strother Martin said in
17 Cool Hand Luke, "I have a feeling that, boy, what we
18 have here is a failure to communicate." I think that
19 some of us are talking about registration of authors,
20 some of us are talking about registration of works,
21 some of us are talking about registration of
22 copyrights, and some of us are just talking about
23 registration without thinking about what we're talking
24 about.

25 I think we really need to be clear about

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1 it because I could absolutely endorse a voluntary
2 registry of authors, basically a phone directory.
3 Beyond that I have serious problems.

4 MS. WOLFF: I just wanted to note that,
5 again, looking at the visual arts side that any type
6 of registry that would require a visual deposit of
7 works is extremely burdensome and that was what never
8 worked for visual artists for those 180 years where we
9 had issues.

10 This is a serious problem and you can't
11 -- you know, one size fits most and it has never fit
12 photographers and visual artists in this area. I
13 don't think we can think of a scheme unless there is
14 a way that it fits all the areas of the works.

15 MS. SHAFTEL: First, I want to address the
16 analogy of property ownership. Copyright is about
17 controlling the rights to copy one's work and the work
18 is real property in the sense that the original work
19 is real property, but the right that the property
20 owner is controlling is the right of others to
21 duplicate their work.

22 You don't duplicate your house and you
23 don't sell the right to duplicate your house and you
24 don't sell the rights to duplicate your house. That
25 is really not an accurate analogy here. As far as

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1 registry goes, it has always been completely
2 financially untenable for illustrators, visual
3 artists, and photographers to register individual
4 images.

5 The volume of the work that we create each
6 year is financially absolutely untenable for people to
7 register individual images. Registration as a
8 collection does not afford individual images the same
9 protections in the event of infringement. The Guild
10 proposes a voluntary what I call the big list. In
11 reading the comment letters of organizations
12 representing creative professionals, I see this is a
13 common thought of the creator's organizations that we
14 need the big list, a big contact list.

15 The Guild proposes that artists could be
16 able to register as creators. As Kay mentioned, a
17 name, address, how to contact us and that we could
18 update this as time went on so that potential users
19 could search us by name and contact us.

20 In addition to that, this big list
21 certainly for visual artists could serve the dual
22 purpose of subsequently being used as the beginnings
23 of a database of a licensing agency and graphic
24 royalties agency for visual artists in the United
25 States which is desperately needed. Creating this

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1 list actually has a dual benefit for everyone
2 involved.

3 MR. COPABIANCO: I would just like to
4 point out that doing a database of creator's contact
5 information on the Internet would really be quite
6 simple. It would not cost a lot. It would be
7 voluntary people who could actually register online.
8 The process would be almost transparent in a way.

9 What we would need to have, I think, would
10 be a situation where the author could put contact
11 information decided by them, how close to their home
12 address or whatever, maybe just an e-mail address,
13 something where they can be contacted and no
14 information beyond that necessarily. I do think
15 really there's nothing to stop us from moving forward
16 with that.

17 MR. MacGILIVRAY: I want to address a few
18 of the points that have been brought up so far. First
19 of all, I want to say that Google strongly believes
20 that these orphan works are both worthwhile, useful,
21 and extremely valuable. In fact, I think that's why
22 most of us are here. We do think there is a lot of
23 value in these works. The problem is sometimes these
24 works gets forgotten.

25 One of the reasons why -- those are sort

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1 of one of the reasons why we believe that a voluntary
2 and correctable list is the right way to go. What I
3 say there is there is no -- I can't speak for
4 everybody around the table but I don't think there is
5 a whole lot of people here at this table to believe
6 that not registering a particular list should mean
7 that your work falls into public domain.

8 In fact, I bet there is nobody here who
9 believes that. Instead we believe that a voluntary
10 list that has some sort of limitation on remedies so
11 that if you didn't volunteer to be a part of that list
12 and what the list would entail again is something that
13 could have a whole bunch of other roundtables sector
14 by sector.

15 Assuming that there is such a list there
16 and not voluntarily becoming part of that list would
17 have some sort of remedy result for you. It would
18 encourage people to become part of that list. As I
19 said before, one of the major opportunities here is to
20 make it so that people can, in fact, contact the
21 rights holders so we have this explosion of works that
22 were at one point what we consider orphan but are no
23 longer. They are claimed by their rights holders.

24 Finally, I would say that such a list
25 should be correctable. That just because I forget to,

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1 or just because Steven Spielberg didn't pick up my
2 script for 20 years, doesn't mean that when Steven
3 Spielberg decides, "Hey, there's some value here," I
4 may have even forgotten about that script, I ought to
5 be able to correct my mistake of not registering this
6 voluntary list and actually recoup the huge benefit
7 that I would have that I wouldn't otherwise have until
8 Mr. Spielberg or somebody else decided this is still
9 a worthwhile piece of creative process. This is still
10 something that should be out there and that has a use
11 there and that's what we have to say.

12 MR. SIGALL: Let me ask a question. With
13 respect to voluntary registries of whatever type and
14 I think maybe of the type that Vic described in terms
15 of registries of works or of copyrights, not just
16 registries of author information.

17 In a voluntary system how do you ensure
18 that the information is accurate? One specific
19 example is how do you prevent someone from kind of
20 waiting around and trying to claim ownership of a work
21 that is orphan that is not entirely theirs, fraudulent
22 claims or otherwise? How would you do that in a
23 voluntary system with the privately developed private
24 sector registries?

25 MR. COPABIANCO: Well, first of all, the

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1 information appearing in this list would in no way
2 mean that the person doing the search had conducted
3 due diligence. They would have to check with the
4 author and other sources to make sure that the
5 information was correct and it wasn't somebody who was
6 jumping this claim.

7 MR. SIGALL: I think you would like to
8 avoid the situation where someone would, in fact --
9 where a user could -- you would want the user to
10 reasonably rely on the information and not simply go
11 to that person and start paying them based on that
12 search. You would want to try, I think, filter out
13 people from jumping claims.

14 MR. METALITZ: Just a couple of things.
15 First, we do have the example of the domain name
16 registration system which Chris brought up with is a
17 mandatory system that is no riddled with errors,
18 inaccuracies, and fraud that Congress has on three
19 occasions now had to legislate to try to increase
20 penalties against people who used the domain name
21 registration system as Chris would like us to use this
22 voluntary registration.

23 I'm not going to pile onto Chris on his
24 overall point because I think it has already been
25 stated. There is a lot of history that he is swimming

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1 upstream against so I don't want to add to that
2 burden. Getting to your original question about how
3 do we give people incentives to participate in this
4 voluntary registry. And then your second question,
5 how do we give them incentives to be accurate in what
6 they say.

7 We've heard a lot of interest around the
8 table saying, "Oh, yes. Our folks will participate in
9 this and they would have a good reason to do it." I
10 don't know how much we can carry through on that but
11 I think if we get to the sectoral roundtables that
12 we've been talking about today we will have a chance,
13 first of all, to find out what is the status quo. what
14 databases exist now.

15 I certainly wasn't as aware as I am now
16 about Kay's registry for 30,000 authors. That's
17 obviously a very valuable resource. I think when you
18 get people who want to use those types of works
19 together in the room with people who create those
20 types of works, you will find out where are the gaps,
21 what are the areas where we don't have a really
22 functioning voluntary registry that can be relied
23 upon.

24 The other possible answer to your question
25 about accuracy, I think it was mentioned that the

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1 registry could serve other functions in certain
2 sectors, not just being informational, "Come and put
3 up your information about what works you have
4 authored."

5 It could be the basis for a licensing
6 system or an agency system of some kind. Then, again,
7 that's going to vary from sector to sector. In some
8 sectors it may not be appropriate but where that is
9 appropriate then you have some incentives for whoever
10 is running the registry to make sure that it's
11 accurate.

12 We've had many years of experience in this
13 in the music business and in the performing rights
14 organizations with very large, very extensive, and I
15 think very accurate databases so it may be that there
16 will be some way to incorporate some of the lessons
17 learned from them into this process.

18 Finally, I have to disagree with Alex
19 about the meaning of the word voluntary. I think you
20 suffer some detriment if you don't participate such as
21 you lose some remedy. To me that doesn't fit the
22 definition of voluntary.

23 I think we should be trying to find some
24 incentives for people to participate and participate
25 accurately in these registries but I don't think we

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1 should make it a condition of a remedy because, again,
2 I think you start getting into the Berne questions
3 that his organization so wisely concluded would make
4 this not very enticing.

5 MR. SPRIGMAN: I'm not going to get into
6 the issue of the system. We have a different view of
7 the success of that. Suffice to say mine is more
8 rosy. To get back to the idea of a registry, I mean,
9 what Alex said there is a question of terminology. We
10 also believe in a voluntary registry but we believe in
11 a voluntary registry with liability limitations if you
12 don't come forward and voluntarily register.

13 What's more voluntary than that? Well, we
14 have a voluntary registry now in the Copyright Law
15 where if you come forward and you register, you can
16 get in statutory damages for infringement. That is an
17 inducement to register.

18 It is a good inducement but it does not
19 induce many owners of these works that we refer to as
20 orphan works to come forward and register because they
21 don't see the prospect of statutory damages for
22 infringement being significant enough to motivate them
23 to invest in registration. That is the calculation
24 for many people that underlies this. You can change
25 that calculation by changing the incentives. Our

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1 registry is voluntary.

2 I mean, you don't have to do it but if you
3 don't get on the registry, you get further damages
4 limitations in a default license. The big limitation
5 is you can't get an injunction. You still do get paid
6 if you identify yourself but you can't get an
7 injunction. That would be a way to inexpensively deal
8 with this problem.

9 MR. BAND: And I think a lot of what we're
10 talking about really does get down to terminology. It
11 could very well be that the difference between what
12 Chris is proposing and what everyone else is thinking
13 of is simply that for Chris, and I might be putting
14 words into your mouth, or into your proposal, that if
15 an author doesn't appear on the list and a user checks
16 the list and doesn't see the author on the list, then
17 he has a clear safe harbor and he knows he's done a
18 reasonable search and he's able to go forward and use
19 the work.

20 I think what everyone else is saying let's
21 have a voluntary list. A person can look at it and if
22 the author is not on the list, then there is a
23 reasonable chance that it's an orphan work and maybe
24 he has to do something else. I think really it's
25 almost semantics.

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1 The difference between those two positions
2 is relatively slim because it could very well be as a
3 practical matter if there is a good registry out there
4 and I have a work with no identification on it, I'll
5 go to the registry or try to find some way of figuring
6 out who it is.

7 If that doesn't work, I might do a couple
8 other things. All I'm saying is it could be that
9 really the difference there might be just a couple
10 more steps that a person would need to do between what
11 you're saying and what everyone else is saying.

12 MS. CHAITOVITZ: I would like to follow up
13 on what Victor said about are we talking about a
14 registry of copyright owner, author, or work? I can
15 see them being different. A lot of talk here is about
16 author. I can tell you in the sound recording area
17 you are going to get two people filing for every piece
18 of work because what I would consider the creator, the
19 artist is going to file as will the record label
20 because they both think they are the author.

21 The other thing is you don't necessarily
22 -- the whole point of an orphan work is you probably
23 don't know who the author is so you need it to be by
24 work so that then you can then try to locate the
25 author because if it's all indexed by author, it's not

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1 going to help somebody determine who is the author.

2 MR. MacGILIVRAY: I just wanted to add to
3 what I mean by correctable which is to say that, say,
4 Google has proposed that the correction include
5 injunctive relief so that you would be able to find
6 out that Google is using a particular work that is
7 yours that has been orphaned and if you believe that
8 you would not like that to happen to seek injunctive
9 relief or merely to register with this voluntary
10 database and we would check it and then we would
11 update and no longer make use of that work.

12 MR. ROSENTHAL: Just following on what
13 Anne said about work for hire. Certainly this adds
14 complexity to the registration process as well as
15 every other issue that we are going to be dealing
16 with. I certainly am not so excited about fighting
17 work for hire in this context. Even if we may win, I
18 don't know. It just kind of scares me so I think that
19 is kind of overhanging everything.

20 It also adds another area when you raised
21 the issue of is there a category of abuse that people
22 would come forward erroneously. Well, how does that
23 work with due diligence? Does the user have to
24 presume that there's knowledge of this copyright
25 dispute between recording artists and labels? Just

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1 wanted to add that complexity to it all.

2 MR. SIGALL: I wanted to, again, give my
3 colleagues a chance. We're coming up on close to --
4 we have 10 minutes left in this topic and I wanted to
5 give anyone on our side a chance to ask any questions
6 that didn't get asked and then open up the discussion
7 a little further. Nobody? Okay.

8 MS. PETERS: I was just going to say
9 there's at least three people who still want to talk
10 and I would rather hear from them.

11 MR. CLARK: On the voluntary registries
12 whether it's of works or authors or both, if there's
13 a practical way to work that out and make it useful,
14 it would be very useful in conjunction with the
15 earlier subjects we were talking about whether it's
16 both a database of search efforts that have been made
17 and also the establishments of guidelines or best
18 practices.

19 For those who are going to do a
20 responsible search, voluntary registries become just
21 another major tool for doing that. If all the efforts
22 in the three areas of guidelines, search database, and
23 voluntary registries are properly coordinated in terms
24 of their public accessibility, they could be very
25 useful. We were talking earlier about you are going

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1 to have a lot of suspect searches, things that were
2 done in bad faith or with minimal efforts or just
3 ignorance and lack of skill.

4 In terms of organizations that might put
5 together guidelines which people who would do those
6 kinds of searches would consult, having that
7 cooperation both on the trade and professional
8 organization side where the creators are and on user
9 sides like libraries and universities and colleges, my
10 side of things, to work out guidelines that are best
11 practices suited to different kinds or classes or
12 works could be very useful.

13 In terms of directing individuals who do
14 it on their own, a lot of the resources that would
15 come out of those guidelines from the educational side
16 of things are going to be open to them to consult with
17 in their local communities and being able to direct
18 them to do that rather than just a minimal search
19 engine search or something that they thought was going
20 to satisfy a very basic checklist where you didn't
21 have to go any further than that could work
22 synergistically all the things together but it would
23 take a great deal of coordination and mostly
24 administrative effort.

25 MR. COPABIANCO: I just wanted to say that

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1 in my conception of this big list consulting the big
2 list would just be the first step in a due diligence
3 effort to find or determine that the author is the
4 actual author of the piece. Looking down the road to
5 the future, what I would like to see the Copyright
6 Office do is think about signing a creator ISBN to
7 unambiguously identify individual creators so that
8 they can use a number that was assigned by somebody,
9 by the Copyright Office, that they could put this on
10 their work.

11 This could be part of the whole database
12 process actually. It could be automatically assigned.
13 Then that would in the future prevent some of the
14 problems of inability to identify or locate authors
15 because they would have a number there on their work
16 that would say who did it.

17 MS. PETERS: The more I listened to some
18 of the things I heard, the more I liked our own
19 registration even though I really am not a gung-ho
20 proponent of certainly mandatory registration schemes
21 mainly because it identifies the title of the work,
22 the author, and the owner and you can track by those.

23 One of the things that is a huge issue for
24 us and it would be for anyone that you set up, is
25 current contact information because as of a date

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1 certain somebody comes in and tells you something and
2 then they don't always update it. I think it's an
3 interesting idea where you start talking about unique
4 identifiers. There is a lot of work that is going on
5 with regard to uniquely identifying works. You all
6 have been doing that type of work. But you are
7 suggesting all authors.

8 MR. HOLLAND: If I could comment. I
9 actually think Christopher has a great analogy in
10 comparing copyright to property. I hope you would
11 join me in recommending that copyright ownership be
12 perpetual like ownership in a home to the rights
13 holder and the heirs.

14 The filings that one has to do to own a
15 home is limited to the number of homes one may buy in
16 a lifetime which are so few that the paperwork usually
17 requires a certain concentration of energy. Artists
18 who have to do work or photographers who have to do
19 enormous volumes of work on short deadlines, often 24
20 hours or less, really don't often have time to do all
21 the filings that would be necessary in the kind of
22 registry that you are describing and artists don't
23 have the money to put on the extra staff that it would
24 take, while ironically a lot of the large corporations
25 would be able to staff up to handle maintenance of

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1 copyrights.

2 The object that Creative Comments has been
3 fighting against, the hoarding of copyrights by large
4 corporations, would actually not be affected by this
5 kind of registry but the ownership of copyrights by
6 small rights holders would be. A lot of us think that
7 artists missed the boat in 1978 when copyrights were
8 given back to most of us who were formally had to give
9 our copyrights to clients.

10 Artists missed the boat in not creating an
11 ASCAP-style agency then that would have prevented a
12 lot of the problems. The illustrator's partnership a
13 few years ago made a recommendation to the copyright
14 clearance center that they work with us to create an
15 ASCAP-style registry using fees that are now being
16 either mislaid or not returned to artists as seed
17 money to start that kind of registry. We first
18 contacted CCC about three years ago and have gone
19 through a number of permutations of communications
20 with them.

21 Basically we've gotten no response but we
22 have made a specific proposal that did include
23 persistent object identifiers that would be embedded
24 in the work that would carry not only the contractual
25 -- I mean would not only carry the name of the author

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1 but the contractual information that could then travel
2 with the work and report any usage back to the
3 copyright bank.

4 MR. SPRIGMAN: The point here again about
5 creativity and about copyright property, one bit of
6 research that I've done recently is looking at the
7 period 1790 to 1870 and published works in the U.S.
8 How many of these published works came into the
9 copyright system. You had to register and give notice
10 to get a published work into the copyright system.

11 The best I can tell probably about half of
12 published works didn't so during a significant chunk
13 of the period where we had a formalized copyright
14 system you had commercial publishers marketing large
15 numbers of works outside the copyright system. The
16 nonexistence of copyright for those works was not the
17 death knell for their marketability.

18 Again, I would make the same point but I
19 would expand it a little bit that, yes, copyright is
20 going to be very relevant for the marketability of a
21 number of works and it's not going to be relevant for
22 the marketability of a lot of works. That is to some
23 extent why we have orphan works.

24 Second point is, you know, it's not just
25 small creators who are at stake here in building our

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1 culture. It's people who don't even ordinarily think
2 of themselves as creators or artists. I'm thinking
3 now of the bombings in London recently. All over the
4 Internet now are people's photos taken with cell phone
5 cameras down in the subways.

6 Fifty years from now, or maybe even sooner
7 when we are trying to understand the historical legacy
8 of the fight against terrorism, someone is going to
9 want to use these cell phone camera pictures. Someone
10 is going to want to publish a study of what happened
11 based on the cell phone camera pictures.

12 There's going to be -- under current rules
13 there's going to be a very significant orphan works
14 problem in the waiting. I think in the digital age
15 when copyright affects every image and creativity is
16 distributed, we have to worry more about clear simple
17 rules.

18 MS. WOLFF: Orphan works doesn't replace
19 fair use. If someone is doing an article about what
20 happened because people use cell phones and gave a few
21 examples, that would clearly be an exemption under
22 fair use. I don't think we need to make rules just
23 based on that. There is the Internet now which makes
24 reproduction perfect and easy so I don't think we can
25 historically look at how people treated their

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1 copyrights in the 1700 and 1800 as we do now.

2 We are faced with issues now and I think
3 we need to address what's happening now and how things
4 have changed and come to a balance where not
5 everything everyone is going to want to use is going
6 to be available. Yet there will be made available
7 works after you have made some effort.

8 Then if you choose to use a work and you
9 have made some effort and someone turns out, there may
10 be some fair compensation that will be paid to the
11 creator. That's what I think we're looking at, a way
12 where things can be used and a balance that still
13 keeps the creator in the mix.

14 MS. CHAITOVITZ: I think what Brad brought
15 up reminded me of an underlying assumption that I've
16 been thinking this whole time, and I don't know
17 because we haven't had an explicit discussion of it,
18 that people can't use an orphan works designation to
19 circumvent paying license fees.

20 For example, orphan works designations
21 would not be available when there is a blanket license
22 offered or a compulsory license offered. For example,
23 a radio station could not stop dealing with the PRO
24 saying, "We're just playing orphan works," and not get
25 their license or not get a compulsory license if they

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1 are streaming online or a CC license.

2 If there are those kind of blanket
3 licenses or compulsory licenses available, the orphan
4 works designation should not be permitted in those
5 areas because that is just a way to circumvent paying
6 the license fee.

7 MR. SIGALL: I think that is actually a
8 good segue to our next panel because we will be
9 talking about those issues about what happens when
10 something is an orphan work and then what happens when
11 the copyright owner does surface.

12 I want to thank everyone for a very good
13 kickoff to this session. I think the discussion is
14 very helpful and productive and cordial so it was a
15 good start for us to get a better sense of some of
16 these issues. We will be back here at 2:00 to start
17 on the second topic, Topic 2. Thank you.

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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2:00 p.m.

1
2
3 MR. SIGALL: Okay. Let's get started with
4 the second roundtable on Topic 2. For the benefit of
5 the new members of this roundtable and anyone who
6 wasn't here in the morning session, I think it would
7 help to go through and introduce all of the
8 participants again just so everyone knows who they
9 represent and where they are coming from. I'll start
10 with myself. I'm Jule Sigall, Associate Register for
11 Policy and International Affairs at the Copyright
12 Office.

13 MS. PETERS: Marybeth Peters, head of the
14 Copyright Office.

15 MR. KASUNIC: Rob Kasunic, Principal Legal
16 Advisor, Copyright Office.

17 MS. WOLFF: Nancy Wolff with the Picture
18 Archive Council of America, PACA.

19 MR. TRUST: And I'm David Trust with
20 Professional Photographers of America.

21 MR. TAFT: Michael Taft, Archive of Folk
22 Culture, American Folk Life, Central Library of
23 Congress.

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

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1 and Save the Music.

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

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

6 MR. SLEVEN: Paul Sleven, Holtzbrinck
7 Publishers.

8 MR. PERLMAN: Vic Perlman, American
9 Society of Media Photographers.

10 MS. MURRAY: Kay Murray, the Authors'
11 Guild.

12 MR. MOILANEN: Phil Moilanen.

13 MR. METALITZ: Steve Metalitz representing
14 the Recording Industry Association of America.

15 MS. URBAN: Jennifer Urban of USC Law
16 School and I'm here on behalf of AIVF, Association of
17 Independent Video and Film Makers.

18 MR. MacGILIVRAY: Alexander MacGilivray of
19 Google.

20 MR. ROZEN: Bobby Rozen. I'm here on
21 behalf of the Director's Guild of America and the
22 Writer's Guild of America West.

23 MR. HOLLAND: Brad Holland. I'm an artist
24 and we are representing a coalition of five groups of
25 illustrators, medical illustrators, architectural

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1 illustrators, and cartoonists.

2 MR. NEWMAN: Brian Newman with National
3 Video Resources.

4 MR. KUPFERSCHMID: Keith Kupferschmid with
5 the Software and Information Industry Association.

6 MS. CHAITOVITZ: Anne Chaitovitz with
7 AFTRA.

8 MS. KIM: Lee Kim with Cohn and Grigsby.

9 MR. BAND: Jonathan Band here for Net
10 Coalition.

11 MR. CUNARD: Jeffrey Cunard representing
12 the College Art Association.

13 MS. SHAFTEL: Lisa Shaftel, Graphic
14 Artists Guild.

15 MR. OAKLEY: Bob Oakley. I'm the Director
16 of the Law Library at Georgetown. I'm here
17 representing the Library Copyright Alliance which is
18 five major library associations.

19 MR. SKELTON: Matt Skelton. I'm an
20 attorney at the Copyright Office.

21 MR. METZGER: Oliver Metzger. I'm an
22 attorney adviser. I work for Jule in the Office of
23 Policy and International Affairs at the Copyright
24 Office.

25 MR. CARSON: David Carson, Copyright

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1 Office, General Counsel.

2 MR. SIGALL: Okay. Topic 2 will be
3 introduced and the first question will be asked by
4 Oliver.

5 MR. METZGER: Welcome to Topic 2. In this
6 roundtable we will be discussing the consequences of
7 an orphan work designation. Therefore, for purposes
8 of this discussion we will assume that a work is an
9 orphan work and we will not be discussing criteria for
10 designation. The written comments suggested a wide
11 range of consequences.

12 At one extreme were the suggestions that
13 orphan works fall into the public domain and at the
14 other extreme are suggestions that there be no
15 consequence at all to the fact that a work is an
16 orphan work. In other words, that no change be made
17 to current law for orphan work use.

18 In the middle were numerous comments that
19 proposed a limitation on remedies approach under which
20 the remedies available to a reappearing owner of an
21 orphan work would be limited in some way. Some of the
22 issues we would like to discuss today are the precise
23 parameters of any limitation on remedies, the measure
24 and timing of payment of any royalties or fees by the
25 orphan work user, the conditions an orphan work user

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1 must satisfy.

2 For example, should the orphan work user
3 be required to post a public notice of use or put some
4 sort of notice on the orphan work itself, and should
5 the user be required to perform additional searches
6 for the owner as time moves forward. Finally,
7 piggybacking.

8 That is, reliance by an orphan work user
9 on the search efforts of a previous orphan work user.
10 On each of these issues we received thoughtful
11 comments on both sides of the issue so we are hoping
12 today that people will be willing to address the
13 weaknesses as well as the strengths of the positions
14 they favor.

15 We'll get started with a question for
16 those who proposed a cap on damages who are proposed
17 a fixed damage amount and a minimal amount. For those
18 people the question is what are the downsides to that
19 approach versus a reasonable royalty approach?

20 MR. BAND: I guess I'll kick it off. I
21 suppose the downside is the scenario that was
22 discussed in the previous session, the Steven
23 Spielberg scenario, or I guess someone else before was
24 talking about where a song was used and then it turns
25 out to -- an orphan song is used and then it turns out

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1 to be a smashing hit or something. There is the
2 possibility of a huge windfall occurring to the user
3 so you could have a serious injustice.

4 I'll hasten to add that I think that those
5 are highly unlikely situations and maybe the way to
6 deal with it is to still have a basic cap that applies
7 generally but then have the Steven Spielberg exception
8 or something, some kind of mechanism where there is
9 some kind of extraordinary windfall that benefits the
10 user and that there is some way for the owner to
11 benefit in some manner.

12 I would think that should be -- it's a
13 very rare exception and given the huge transaction
14 costs involved with figuring out what a reasonable
15 royalty is in every other situation, I think it would
16 be better as a general matter to have a cap but then,
17 again, maybe have an extraordinary circumstances
18 exception.

19 MR. TRUST: It sounds pretty reasonable.
20 I know that what we recommend for those who use our
21 material which is to a great extent orphan works is
22 that they do put money aside in escrow on the chance
23 that a creator will be found. I can see some kind of
24 standard for escrow accounts with this added
25 stipulation that if something becomes a smash hit, of

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1 course, then you are liable to pay out more than that
2 limited amount. Something like that might work.

3 MR. OAKLEY: Looking at the downsides and
4 as opposed to the reasonable royalty, I think the
5 reasonable royalty approach brings back a significant
6 level of uncertainty into the whole area. After all,
7 one of the things we're trying to do here is to create
8 some certainty on the part of users so that they know
9 that they can go forward with at least limited
10 exposure.

11 On the downside of the approach of
12 capping, I think there are two. One is the
13 possibility of what we have come to call the Spielberg
14 situation here, that there could be a windfall for
15 someone if it weren't declared an orphan work. The
16 other may have more to do with large quantities of
17 information that is being dealt with. There are many
18 large library projects underway, for instance, for
19 preservation at the Library of Congress and other
20 places.

21 A small cap of \$100 or \$500 isn't very
22 much for any one item but if large quantities of items
23 were to be brought forward and have a problem, then
24 that amount could be fairly significant and that is,
25 I think, a potential fairly significant downside to

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1 that approach.

2 MS. CHAITOVITZ: As I see a downside, this
3 is all to enable the use of orphan works and to permit
4 people to use them. Not necessarily to permit them to
5 use them for free and take away the creator's right of
6 compensation. I would say that they still have to pay
7 a reasonable rate that is set and it would go into
8 kind of a communal escrow account that could be used
9 for the artist to come forward and collect their fee.

10 If the artist doesn't come forward after
11 a certain time, it should go to copyright archival and
12 preservation purposes because we really want to use
13 this to help people use copyrighted works but not
14 necessarily to take away the value of those works.

15 MS. WOLFF: I think one thing to consider
16 when talking about a minimal rate or no fee if there's
17 a use is that there is many type of works out there
18 and many type of value. Again, one size fits most but
19 not everything. I would hate to have an incentive
20 that pushes commercial users towards orphan works
21 versus trying to use works where they would have to
22 pay the market value for work. I would hate to create
23 an economic imbalance in the commercial area to
24 artists who are making a living being creators.

25 MR. CUNARD: Staying on the topic of what

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1 the defects are, even though we promoted the idea of
2 a cap, is that the amount is set so low essentially
3 it's confiscatory. No one is actually going to bother
4 pursuing \$100 or \$500 and it essentially is like a
5 limitation or exception de facto.

6 But to borrow from Allan Adler this
7 morning, we think that with all of its defects it is
8 the better approach because the other approaches are
9 significantly more flawed. I think from our
10 perspective the principal object of freeing up orphan
11 works is to create an environment in which the risk
12 can be ascertained by the user if the rightful parent
13 comes forward.

14 If the risk is unquantifiable, we can
15 create the most beautiful orphan works regime in the
16 world but realistically people aren't going to be
17 using orphan works because they are not going to be
18 able to determine what their liabilities might be in
19 much the same way as fair use with its grayness and
20 uncertainty also doesn't necessarily create incentives
21 where we would like to create incentives for people to
22 use certain kinds of works.

23 MR. SIGALL: Does anyone have other
24 thoughts on the question of cap on royalties, not just
25 those who are proposing it?

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1 MR. MOILANEN: As those who were here this
2 morning heard it already, there's 27 billion photo
3 images made each year at 78 cents apiece is what we're
4 talking about on average. Certainly there are many
5 photographic works worth far more than that and the
6 vast majority are worth practically nothing except to
7 the people who shot them.

8 If you don't know who they are, they are
9 all orphan works and we have to deal with them. At
10 the time those images that are not marked at all are
11 reproduced and they later turn out to be somebody's
12 valuable image, they never would have been produced in
13 the first place if there had been some kind of marking
14 to identify them and to impose some cap other than 78
15 cents on average would be confiscatory the opposite
16 direction. In some fashion you need to be able to
17 take into account the circumstances that were in place
18 at the time those copies were made.

19 MR. SLEVEN: A couple of points. First of
20 all, I don't think anybody is really going to know how
21 to create a fair schedule of fixed fees. There are
22 too many variables. The scope of the use. My
23 business is a book business. Is it a 100,000 copy
24 printing? Is it a 1,000 copy scholarly work? Is it
25 broadcast across the web? Is it done in one

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1 classroom? Is it the entirety of a motion picture?
2 Is it a page from a book?

3 There are just too many variables to be
4 able to do what I would have, not meaning to
5 prejudice, like to think of as the Soviet-style
6 approach to scheduling fees for this which is why I
7 think the only reasonable alternative is a market
8 approach because there have been market transactions
9 with all these type of uses.

10 I think that is the model we are trying to
11 follow. The theory of orphan works is the user would
12 pay. He just can't find the person to pay so it seems
13 fair to me to emulate the transaction that would occur
14 were the user to be able to find the owner. And as
15 far as the uncertainty, and my clients are as much
16 users as owners, I'm assuming that 99.9 percent of the
17 time the owner will never show up.

18 If the person has done a reasonable
19 search, it's an orphan work. The owner doesn't know
20 or doesn't care. When you are calibrating risk, you
21 can afford a little higher than normal cost if that's
22 the upside of damages on the .1 who shows up because
23 on 99.9 you've ended up paying nothing for the use so
24 you build in sort of a range of potential costs based
25 on that assumption. I don't think it's unmanageable

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1 at all.

2 MR. HOLLAND: I would be happy to let Vic
3 speak for me. In fact, if you speak for me, I'll just
4 second whatever you say. I think that if we allow
5 government -- if we allow any of these archives to set
6 a fee below market value, what you are doing is
7 creating a government-sponsored royalty free archive
8 that is then in competition with every professional
9 and government is, in effect, interfering with free
10 market exchange.

11 MR. SPRIGMAN: So there are a couple of
12 ways to set market value for a license. One is to
13 have the market do it. In the case of orphan works
14 that typically doesn't happen. That's why we have the
15 problem, we don't have the owner.

16 Another way is to let a judge do it and
17 the judge is supposed to try to figure out what the
18 market would do. You know, that's difficult to do.
19 It's doable in some cases and I tend to agree that for
20 most orphan works you are not going to have an owner
21 coming forward so there is a limitation here. There
22 is a limitation on the number of cases we are going to
23 have.

24 But there is a third way to do it which
25 is, again, ask the author to send a signal what is

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1 this worth? If they don't register it, the market
2 value is less than the cost of complying with the
3 formality and that means that you can have a proxy, a
4 very ready proxy for what the expected market return
5 is of this work. You can use that proxy to set your
6 license price. So, again, there's a price signal. A
7 registry would be a way of basically sending a signal
8 to the market of what this work is worth.

9 MR. KUPFERSCHMID: Well, certainly there
10 is evidence in the Copyright Law and elsewhere that a
11 certain level of uncertainty is necessary and
12 appropriate in certain circumstances in order to reach
13 a fair result. I think that is what we've got going
14 here which is why a cap really doesn't work,
15 especially if the values we've seen proposed so far,
16 I think, of \$100 and \$500, I think fair use is a great
17 example of that which is there is a certainty related
18 to fair use but at the end of the day the fair use
19 provision is supposed to come out to a fair result and
20 fair use.

21 There is also ample examples in other
22 laws. Most notably, I think the Patent Law which
23 requires courts on occasion to look at and determine
24 what the reasonable market value of a particular
25 patented invention ought to be in certain

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1 circumstances. It's not like the courts haven't done
2 this before or couldn't do it.

3 Certainly there would be a certain level
4 of uncertainty associated with not having a cap. The
5 flip side of having a cap would be, I think,
6 especially at the level suggested, would be grossly
7 unfair. Certainly whatever number that cap came to
8 would be arbitrary.

9 MR. METALITZ: There are clearly a number
10 of tradeoffs here. The approach that is based upon
11 what we call the market approach in which you would be
12 responsible for the reasonable royalty that would have
13 been paid obviously is less certain than having a cap.
14 Certainty can be a bit overrated. I think perhaps
15 some people who are seeking a lot of certainty here
16 may over estimate the amount of certainty that exist
17 in the typical licensing transaction as well.

18 Everything isn't necessarily nailed down
19 in black and white. You may be dealing with somebody
20 who may not have all the rights that you and that
21 person think they have. Some uncertainty is
22 inevitable but I think there is a value to trying to
23 recreate the market that would have existed if the
24 user could have found the copyright owner.

25 Now, in general terms I guess the uses are

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1 going to fall into two categories. One is uses where
2 there really is a market for that type of use and,
3 therefore, it should be relatively easy to determine
4 what the market rate would have been. Under, for
5 example, the RIAA proposal it would be relatively easy
6 for the user to deposit to escrow that amount so that
7 it would be there if the copyright owner came forward.
8 At some point perhaps that would revert back to the
9 user.

10 There are going to be some instances where
11 perhaps there isn't that much of a market on which to
12 base this. I'm thinking -- I mean, Jonathan, again,
13 I think is working from the assumption that the vast
14 majority of these uses will be noncommercial and just
15 educational and cultural heritage and so forth and he
16 may be right, but there certainly are going to be a
17 number of commercial uses as well.

18 For those instances where there isn't
19 perhaps a ready market, I think in a sense the system
20 is kind of self-correcting. If you think about, let's
21 say, the display of a work in a museum exhibition, and
22 I'm not talking about a Picasso or a Van Gogh here,
23 but perhaps some ephemera or something, perhaps folk
24 life material and so forth, maybe there isn't a market
25 value for that or it's extremely low but, in that

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1 case, the user would have to deposit nothing or a very
2 small amount of money and really doesn't risk that
3 much exposure.

4 Also, if that is all the copyright owner
5 can collect if and when he reemerges, he doesn't have
6 a big incentive necessarily to litigate this case. If
7 the fee for displaying my work of art in the museum
8 for a month is a dollar, then (a) it's not going to be
9 that much of a problem for the museum to put the
10 dollar in escrow, and (b) I probably don't have much
11 incentive to come after them to get that dollar.

12 That's an example of applying the market
13 approach which also works well in the case where I and
14 Van Gogh, but I happen not to be findable, and the fee
15 might be much, much higher. In that case, the user
16 should respond accordingly and I should have the
17 incentive to go collect that once I reemerge.

18 MR. ADLER: If you think of a cap or a
19 fixed fee as analogous to a compulsory license, not
20 only does policy in this area generally disfavor
21 removing from the market the setting of the price or
22 value for the use of the material, but I think it's
23 probably fair to say the compulsory licensing
24 generally is used in situations where one expects that
25 there will be a huge volume of transactions all of

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1 which will involve a relatively small amount of use as
2 well as a small amount of money.

3 That sort of stands what we're talking
4 about here on its head because I think there is
5 general agreement here if we do define orphan works
6 correctly, we would expect that there will be very few
7 cases where a copyright owner would emerge seeking any
8 kind of compensation so you're not talking about
9 anticipating a huge volume where transactional costs
10 are going to be very heavy if you don't come up with
11 some sort of compulsory license scheme to deal with
12 them.

13 Also I would say as often in dealing with
14 many of the issues in this thing, what you think about
15 one element of the approach will work is largely going
16 to depend upon what is decided upon certain other
17 elements.

18 For example, if it turns out that the
19 reasonableness aspect of the reasonable or diligent
20 search has some sort of a good faith element in it,
21 one could easily see that this would paradoxically
22 create an incentive for people to try to gain that
23 good faith elements if they realized that by being
24 able to actually characterize something as an orphan
25 work, when it is not really an orphan work, they might

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1 be able to obtain the benefits of limited remedies on
2 the part of a copyright owner emerging which would not
3 only include the capped or fixed fee but possibly the
4 elimination of injunctive relief as well.

5 You would actually produce situations
6 where unlike the general rule we are dealing with
7 which is that everybody is unhappy with the work being
8 an orphan work. There will be certain circumstances
9 where it might prove to be quite advantageous to
10 create a situation where everyone will believe that a
11 work is an orphan work.

12 That might mean that people would even
13 gain the search so that they don't find or identify
14 the copyright owner. But if they can demonstrate that
15 their efforts look sufficiently reasonable, they might
16 be able to obtain benefits that they shouldn't be
17 entitled to.

18 MR. TRUST: I think it's worth stating
19 again that a work does not -- it's value is not
20 diminished just because it is orphaned. A work
21 doesn't become orphaned because its creator abandoned
22 its child. A work is orphaned because the consumer
23 can't find the child's creator. There is a
24 substantial difference there. Just because a work is
25 orphaned in this circumstance doesn't mean that it

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1 doesn't have value.

2 In fact, it could have tremendous value.
3 It could be a family now owns a copy of an image, for
4 a work that has suddenly over the last few years taken
5 on tremendous value. It could be something that
6 occurred in the news. It could be something that has
7 occurred in society, in politics, in whatever. Now
8 this work could have tremendous value.

9 We can't say just because we can't find
10 the owner right now that it has no value. It's
11 important that as we look at how this would work out
12 in terms of compensation for an orphan work that we
13 keep that in mind. Just because its orphaned does not
14 mean that it has no value to it.

15 MR. SIGALL: Let me ask this question. A
16 couple of folks have mentioned escrow payments that
17 seem to be before a copyright owner shows up people
18 would make some escrow payments. My question is if
19 your filter or your system for designating when
20 something is an orphan work is good and accurate,
21 let's say your accuracy rate is somewhere 95 to 98
22 percent, the system does identify truly unlocatable
23 copyright owners.

24 If you couple that with a system where you
25 make escrow payments in every case, isn't that going

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1 to be extremely inefficient? That you will never have
2 the owner show up and you will have people making a
3 lot of escrow payments for people who only 2 percent
4 of the time will show up. Anyone who thinks that
5 escrow payments -- they could react to that and
6 correct me if I'm wrong. That would be helpful.

7 MS. CHAITOVITZ: I think it's important
8 that when a user is going to use a work that is truly
9 an orphan work they do make the payments then. The
10 point is you don't want to encourage people to use
11 orphan works because then they can use them free and
12 to search around. Basically what you're doing is
13 permitting them to use this work but then they have to
14 pay whatever the market value is. I don't think we
15 can imply because they failed to register it that the
16 market value is worthless.

17 We have to look at the true market value
18 regardless of whether they used any registry or not.
19 But it's important that those payments be made at the
20 get-go when they are using it so you don't encourage
21 people to use orphan works just because they can do it
22 at a discounted or free rate.

23 MR. METALITZ: Jule, I think that is a
24 very good question. There is an efficiency aspect to
25 this but I think you are making a couple of

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1 assumptions here. You have laid out the assumptions
2 but one of them is accuracy assumption. Accuracy in
3 this context doesn't necessarily equate to the
4 copyright owner not coming forward later. It's one
5 thing to say we have a pretty good system and most
6 people that can't reasonable be located -- in most of
7 these cases the person can't reasonably be located.

8 Still, if a use becomes widespread, comes
9 to the attention of the public, copyright owners may
10 well come forward. Even in a relatively accurate
11 system you may have a fair number of copyright owners
12 who will come forward to claim this escrow amount.

13 Second, that assumption almost by
14 definition we can't really know that in advance. We
15 don't know until we've had some experience with the
16 system whether we have something that is -- whether
17 the due diligence is set at the right level or not.
18 Allan was making this point also. There is obviously
19 a balancing here. To the extent the higher the level
20 of due diligence, the less the concern potentially
21 about protecting the absent copyright owner who then
22 comes forward.

23 But we won't really know that until we've
24 got some experience with it and it could be that
25 RIAA's proposal was that any legislative change in

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1 this area probably should be sunsetted and, therefore,
2 there would be some built-in time to look and see. If
3 we set it at the right level, maybe not very many
4 people have come forward and maybe escrow would be
5 less important.

6 Finally, I think Anne's point is well
7 taken. Granted it may appear inefficient but all
8 we're doing here is asking users to make the payment
9 that we reasonably think they would have made if they
10 had succeeded in locating the copyright owner and if
11 the copyright owner had agreed to license the use.

12 We are not asking them to make any extra
13 payments than they would have made if the market had
14 been working well. Once it's an efficiency on another
15 side, you might say that the failure to have this
16 escrow system is really a windfall for the user who is
17 able to make a totally free use gambling that the
18 copyright owner won't show up in a situation where
19 presumably that person might have been willing to take
20 a license if they could have located the copyright
21 owner.

22 MR. SPRIGMAN: The alternative is not a
23 totally free use. The alternative is a use without
24 the possibility of injunctions, or perhaps with the
25 possibility of injunctions later under certain

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1 circumstances. I don't favor that but that is at
2 least a logical possibility, a use for which you pay.

3 Again, I mean, what is the value, the
4 market value of the work? There is no such thing in
5 most cases as a market value that one can deduce for
6 an orphan work simply because there are no bargains
7 for exchanges that you can look at for this particular
8 work. Unless we think that works are mostly perfect
9 substitutes for one another, or even reasonably good
10 substitutes, it's difficult to analogize from one work
11 to another. People do it but it's inpercise and it's
12 complicated.

13 Now, earlier it was said, well, just
14 because something is registered doesn't mean it has a
15 value. Economics proceeds from the baseline
16 assumption that people act rationally. They sometimes
17 make mistakes. They have imperfect information but on
18 the whole they act rationally. If you have a piece of
19 property, a piece of creative work that you assign an
20 expected value that is higher than the cost of
21 complying with a registration requirement, you will
22 register.

23 People will make mistakes around the edges
24 but people will be properly incentivized to register.
25 On the whole if you see that a work has not been

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1 registered, if you think people are basically
2 rational, that is a signal that works lacks the kind
3 of market value that would make the gain, to repeat
4 myself, of copyright worth a candle.

5 If you look historically at what
6 commercial publishers have done, you see the same
7 commercial publishers registering and noticing some
8 copyrighted works and not others. Even though the
9 cost of copy registration historically has been very
10 low, some works copyright is relevant and some work's
11 publishers think it's not. If that's the case, then
12 we might get a price signal from registration that
13 enables us to set a license fee. In the absence of
14 some price signal we're groping.

15 MR. ROSENTHAL: First of all, registration
16 could be a function of education and a lot of users --
17 excuse me, copyright owners may not know about it and,
18 therefore, that may be why they don't register. As
19 far as the escrow goes, if you have an escrow, you can
20 certainly use the excess that is not used to pay
21 administration cost which in a way would make it more
22 efficient right across the board.

23 Third, I can't contemplate a system that
24 doesn't pay -- at least the user eventually pays the
25 cost to the copyright owner for stepping forward and

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1 claiming either that the value is not -- that the
2 original escrow license payment isn't up to where they
3 think the value is or just to go through the process
4 itself. I think there is -- I don't like to see the
5 burden, the cost put on the copyright owner to step
6 forward.

7 There's got to be some risk on behalf of
8 the user as well. In that sense the user should pay
9 the administrative cost possibly through escrow as
10 well as cost to the copyright owner, especially if
11 it's a recording artist without much means. You don't
12 want them to be disincentivized to step forward to
13 claim their copyright or to somehow say, "Hey, this
14 was used without my permission," or without due
15 diligence or something along those lines. I think all
16 in all it could be more efficient if you have an
17 escrow account.

18 MR. PERLMAN: I try to look at this
19 problem objectively as opposed to from my normal
20 advocacy perspective. It seems to me you have to ask
21 what's the goal here. The goal is to allow people
22 access to works without risk and without disturbing
23 the delegate balance that we like to talk about.

24 Every day everybody in this room deals
25 with business transactions in which they want to avoid

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1 risk and they do it by one simple thing, insurance.
2 It seems to me that paying a reasonable royalty up
3 front is the equivalent of paying an insurance
4 premium.

5 It gives absolute -- under many of the
6 proposals we're talking about it would give absolute
7 protection against any kind of risk that might be
8 involved. As for the uncertainty by paying it up
9 front, you eliminate the uncertainty issue.

10 People have talked about it being
11 difficult to establish these values. I can only speak
12 about the publication photography business where there
13 are lots and lots of models for licensing fees that
14 can be used virtually mechanically to figure out an
15 image is likely to be worth.

16 MR. SLEVEN: I want to start by endorsing
17 the premise of your question. I didn't step earlier
18 because I was entirely in agreement with you. I think
19 requiring an escrow is highly inefficient if we assume
20 that in most cases nobody is going to come forward.

21 If we assume in most of the rest of the
22 cases the user will be good for the money when the
23 owner comes forward, you are requiring 100 percent of
24 users to post an escrow for the few users who might go
25 into bankruptcy in the meanwhile and won't be good for

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1 the money. It is, in effect, a tax on a use which I
2 think the premise we're here for is the use is of
3 value to society but the owner ought to get paid.

4 Taxing the use independent of any payment
5 to the owner is inefficient. Any requirement, I
6 think, of up-front action is going to be a trap for
7 the unwary. In my experience as a publishing lawyer
8 dealing with authors, a lot more authors do the right
9 thing, in fact, than know the technicalities of the
10 copyright law so they will make a diligent search for
11 the owner but they may not know that they've got
12 escrow money.

13 Let me add the model in my business, in
14 book publishing, is the author is responsible for
15 doing the copyright clearance and for paying for
16 permission for a lot of nonfiction works. These are
17 not high remuneration projects. They are labors of
18 love for authors. They have spent an incredible
19 amount of time researching.

20 On top of that, having gone into an
21 archive and done the research to dig out the documents
22 that they want to include in their work and then to
23 have to pay a tax on each use when the great grandson
24 of the writer of that anonymous letter is never going
25 to come forward or whatever, it doesn't make sense to

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1 me. Lastly, it's not a free use. A lot of time and
2 resources go into a search for a rights holder.
3 Whether it's in time or money it's fair to put a value
4 on that and not just call it free and taking
5 advantage.

6 MR. MacGILIVRAY: A few more on that
7 topic. One, escrow will be very difficult to deal
8 with for individual users, people in their homes
9 trying to make use of a work. Two, you have the
10 problem of -- you always have this problem. Nancy was
11 good to bring it up but you always have this problem
12 of competition with the free.

13 The question is if you make the use of
14 orphan works too expensive either in terms of risk or
15 in terms of some sort of inefficient escrow
16 requirement, you will end up forcing people toward the
17 public domain and not towards this category of works
18 where the copyright owner actually could be
19 remunerated.

20 The other thing in there is that it's
21 sometimes difficult to tell the difference between
22 public domain work and an orphan work so you will end
23 up having people escrow when they think something is
24 an orphan work or maybe an orphan work when it is, in
25 fact, a public domain work. You will end up having

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1 people to start paying for the use of public domain
2 works.

3 The final thing I would say is we are as
4 a company probably different from a lot of people
5 around this table in that we expect that our use of
6 these orphan works will likely be in the 1 million
7 works range and some sort of escrow of an amount of
8 money for each of those works when we know that many
9 of them will be in the public domain, that most of
10 their authors won't care. But there are a few that
11 really will care and they will come forward and it
12 will be extremely inefficient for us.

13 MR. HOLLAND: I just wanted to -- I don't
14 understand the principle of trying to devalue a
15 diverse body of work as a class. In our business we
16 set value according to usage. The same drawing that
17 I do for a regional magazine may be set at a different
18 price than if it's done for the New York Times or if
19 done internationally or for the number of times that
20 the client intends to use it.

21 The idea that you would just say orphan
22 works have a certain value and that value ought to be
23 determined by that seems to me to be misrepresenting
24 the nature of these transactions and works against
25 those who have to make their living producing this

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1 work in the first place.

2 As for escrow accounts, they may be
3 inefficient. I actually would have a question here.
4 I'm sure you at the copyright office could answer this
5 better -- could answer the questions I would have
6 about this. I know from a little bit that we've done
7 that in Denmark there are escrow accounts for
8 unclaimed accounts. Let me see if I can say that
9 better.

10 There is an escrow fund for unclaimed
11 rights that they use as their golden heritage fund if
12 that work is used to advance copyright and sits there
13 until it's claimed. I don't know but you may know
14 more about that than I do but I think it's something
15 I would look into if I were creating an escrow
16 account.

17 MR. NEWMAN: As an artist and someone who
18 represents artists this escrow system is very
19 inefficient and burdensome on the creator of future
20 works. We don't find this to be a free use. We find
21 this to be something that we are paying and doing
22 reasonable searches for. We feel there should be a
23 limit to it. We feel there are enough problems with
24 the escrow system being inefficient and burdensome.
25 Who determines that market value? An example is

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1 Spielberg.

2 Is the market value determined on if
3 Spielberg happens to use that work or if Morgan
4 Spurlock happens to use that work who you don't know
5 and his work won't get seen as much? Who is going to
6 hold that fund, for how long? What about when it
7 comes into the public domain and how am I going to get
8 it back if no one ever surfaces? These are problems
9 we do not want to address that seem to be very
10 burdensome as a result of such a system.

11 MR. KUPFERSCHMID: Before I get to the
12 main point, I just want to address something Chris
13 said which is the assumption that a copyright owner
14 measures the value of their work against how much it
15 would actually cost to register their work and that's
16 how they make a determination whether to register the
17 work or not. I wish that were actually the case.

18 I'm embarrassed to say I represent too
19 many members that don't register their works for one
20 reason or another and clearly the value of those works
21 well exceeds the registration fee of the Copyright
22 Office. That is just not an accurate statement. As
23 far as the escrow account itself, I think your initial
24 question brings out the main point.

25 It all depends on how many authors or how

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1 many copyright owners actually step up and say, "Hey,
2 wait a minute. You're using my work. I want to get
3 paid for this." I think we are, at least from the
4 first session this morning, it seemed there was a
5 general assumption that this wasn't going to be used
6 very much.

7 There weren't going to be that many
8 authors, or owners rather, of orphan works that are
9 going to step up and claim their works and say, "Hey,
10 you're using my work. I want to be compensated for
11 that." I think we were all pretty much assuming the
12 fact it wouldn't come up very much at all.

13 If, in fact, that is the case, then I
14 think the premise in Jules question is exactly right.
15 People are paying money into escrow account and it's
16 just sitting there and sitting there and creating
17 problems for all of our CFOs and a whole much of other
18 different issues here. Then we create a whole host of
19 other issues. How long does it have to stay in the
20 escrow account? How do we determine how much to put
21 in the escrow account?

22 It makes a system that would otherwise, I
23 think, be relatively uncomplicated a lot more
24 complicated than it really needs to be. So I just
25 don't think that there needs to be this escrow account

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1 if we are going forward with the assumption that not
2 too many copyright owners are going to step up and
3 demand to be paid.

4 If we're wrong and all of a sudden this
5 system is being used gang busters, then we could
6 always -- certainly folks can go back and create
7 escrow accounts but if it's done at the outset, then
8 all of a sudden you've got all these escrow accounts
9 and monies that are just sitting around and not being
10 used and being held for a rainy day sometime if
11 somebody steps up.

12 MS. WOLFF: We all have a lot to say
13 today. Well, you know, I want creators to be paid for
14 uses. I do see a lot of practical hurdles in having
15 an escrow account. I have been trying to get money
16 from a Swedish collecting society for many years and
17 can't even get them to respond to my letters these
18 days. It's just having counterparts over in Europe.
19 They say there's a reason they are called collecting
20 societies and not disbursement societies.

21 My concern is we are trying to make
22 transactions work smoothly and efficiently but also
23 maintain balance and fairness. Where I see the
24 problem where there is too much burden on the artist
25 is if the artist does come up in these percent of

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1 occasions the ability to collect the fee in an
2 efficient way because my experience with trying to
3 collect actual damages because in 99 percent of the
4 case the burden, not the expense, of registering
5 photographs is too great.

6 You are limited to actual damages. That,
7 in essence, is in many ways a deprivation of rights
8 because to go to federal court to pay \$200 for the fee
9 just to go to court to hire an attorney and you are in
10 front of a federal judge who has many issues going on
11 that day.

12 That is where the inefficiency and the
13 unfairness lays, I think, on the side of the artist
14 trying to collect if, in fact, the work really is not
15 orphan. I think we have to look at that aspect and
16 the system that makes payment efficient and for
17 someone to refuse to pay a reasonable royalty could be
18 so much greater for the artist to collect than the
19 actual fee.

20 MR. BAND: I would like to offer an
21 example that I think exemplifies a lot of what people
22 have been talking about, the problems with an escrow
23 system. The Cornell Library has an archive of 300,000
24 photographs relating to labor relations. These are
25 photographs of workers and working conditions and

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1 strikes and so forth. A lot of it is old and of
2 indeterminate age.

3 If Cornell wanted to digitize those works
4 and make them available to the public for all kinds of
5 historic and research and so forth uses, I don't
6 understand the mechanics that would be involved.
7 Again, there's 300,000 works. Some of them are
8 probably in the public domain.

9 Some of them are old enough that they
10 would have ventured into the public domain but others
11 haven't and it is very hard to tell because, again,
12 it's a photographic image. It doesn't have a date on
13 it. There might be some visual clues but, again, it's
14 not enough. It's indeterminate so it's hard to
15 determine which of those are in the public domain and
16 which aren't.

17 Again, because we're talking about a huge
18 quantity of works, even a relatively small escrow fee
19 could be prohibitive. And on top of the fact of how
20 you even start to begin to determine what would be a
21 reasonable license fee that you can anticipate for a
22 work of this sort, a photograph of a strike breaker in
23 1931. So, as a result, it's a completely unworkable
24 system, at least in certain instances.

25 It might be different if you are just

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1 going to be doing -- again, in the Spielberg situation
2 you could imagine an escrow could work but certainly
3 when you are dealing with large scale archival type
4 digitation projects which is what a lot of libraries
5 and the Library of Congress is interested in. An
6 escrow system is completely unworkable.

7 MR. OAKLEY: Jonathan raised some of the
8 points that I wanted to raise. I guess I would put it
9 in a slightly different way, though. From the library
10 perspective one of the issues that is of concern to us
11 here is the whole issue of preservation.

12 The letters that we filed indicated many,
13 many projects that essentially have come to a halt
14 because we can't determine the status of certain
15 works. Someone around the table made mention that the
16 standard is we are just asking for payment to be made,
17 the same payment to be made in a free market we would
18 be expected to pay.

19 Well, for library preservation purposes
20 the photographs that Jonathan is talking about most
21 libraries are really not in a position to pay
22 anything. The value would be essentially zero or some
23 nominal amount, a very nominal amount. With regard to
24 the escrow, I wanted to echo Paul's comments across
25 the table about the inefficiency of such a system.

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1 To my mind that makes this kind of
2 unworkable as a statutory change. One of the things
3 I think we need to do here if we are going to have a
4 successful system is keep it simple. If we start
5 setting up new bureaucracies and new requirements, I
6 think we fail that test and the escrow is an example
7 of that.

8 I think we heard that the Library of
9 Congress has done a voluntary, I take it, kind of
10 escrow system and some institutions might want to be
11 self-insurers in that same kind of way but, to my
12 mind, that is a better way to do it rather than
13 setting up some kind of centralized escrow and
14 centralized bureaucracy kind of system.

15 MS. KIM: Yes, I was thinking that with
16 regard to orphan works and the fact that a lot of
17 copyright owners don't get around to actually
18 registering their works, I was wondering what some of
19 you thought regarding the idea of actually registering
20 a work as an orphan work just so that (a) people would
21 be on notice that this kind of work is out there as an
22 orphan work, and (b) so that the number of people they
23 are trying to identify and go through the workload of
24 trying to determine whether something is an orphan
25 work would actually have some kind of online access or

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1 record of the fact that this work is indeed an orphan
2 work and get that kind of information.

3 MR. SIGALL: That is the subject of some
4 of my questions after this round. In this topic but
5 probably at a later point I have some questions, as we
6 discussed a little bit this morning, about registering
7 your intent to use or the fact that you're using an
8 orphan work. One of the questions was -- one of the
9 questions I have, a serious question along those
10 lines.

11 MR. PERLMAN: The author or the rights
12 holder would actually register it as an orphan work.
13 Is that right?

14 MS. KIM: Actually, no. I was referring
15 to more like the user would.

16 MR. SIGALL: Hold that for just a little
17 bit later and then let's finish out the discussion of
18 escrow and the type of payment obligation or amount of
19 payment obligation that can be incurred by a user. I
20 have on my list Jeff and then I have Lisa and Jennifer
21 and then Phil and then Steve and Vic.

22 MR. BAND: I'll be brief other than to say
23 two things. First, I sort of agree that the notion of
24 paying amounts into escrow essentially resembles a
25 kind of confiscatory tax given that virtually all of

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1 the monies paid into escrow are likely to go to people
2 who are, in fact, not copyright owners.

3 More importantly, I think the concept of
4 a reasonable license fee and an escrow begin as we
5 have heard from the proposition that what we are
6 trying to do is mimic the market and create
7 marketplace license fees and the like. I think we
8 shouldn't be seduced into that illusion because a
9 characteristic of the market, and I think Christopher
10 alluded to this, is that people actually enter into a
11 negotiation before the use, not after the use occurs.

12 Before the use the copyright owner is free
13 to withhold use or charge a million dollars for use or
14 license it for free. Similarly the user is free to
15 make a decision whether to pay the license fee being
16 asked or use another work. In an era of limited
17 budgets, which many of us are laboring under including
18 many of Allan's own members, there's a certain amount
19 that is set aside for permissions for rights
20 clearance.

21 If you know that the copyright owner's
22 reasonable license fee is going to be \$5,000, that
23 exhaust your budget and you will choose almost
24 inevitably another work. The comments in this
25 proceeding are replete with examples of that.

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1 After the fact there is no mimicry of a
2 marketplace mechanism because the work has been used
3 and a user, to use John's phrase, is faced with a
4 copyright owners who is coming out of the weeds who
5 says, "Well, it turns out that you used my work. I am
6 Picasso and the amount [or I am a famous photographer]
7 and the amount that I typically charge is \$10,000,"
8 which essentially will make the work entirely
9 unprofitable and expose the user to very substantial
10 risks.

11 Hence, the idea that perhaps some sort of
12 known amount, some sort of cap replicated essentially
13 in our proposal on the innocent infringement approach
14 that is already found in the Copyright Office, the
15 Copyright Law makes some sense.

16 MS. SHAFTEL: The value of licensing fees
17 for illustration has always been determined by market
18 use and how the client uses it and the extent of use
19 and the budget of the client of that project. The
20 Graphic Artist Guild has published a book for over 20
21 years now called "The Pricing and Ethical Guidelines"
22 which contains a wide range of prices that
23 illustrators, graphic artists, and various sorts of
24 designers working in all sorts of fields charge for
25 licensing of their works.

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1 These rates are determined by bi-annual
2 surveys. The information already exist and has been
3 out there for over 20 years for what the fair market
4 value is of illustrations in different usages. It is
5 completely unacceptable for a potential user to be
6 permitted to use an orphan work without having to pay
7 for it.

8 That will create an economic advantage
9 incentive for users to use orphan works because they
10 will be free if they don't have to pay a usage fee,
11 overpaying a work where the existing creator is known,
12 or commissioning a new work from an existing creator.
13 At that point creators will be in competition with
14 unlocatable creators with work that will, in essence,
15 be free if the user is not required to pay usage fees
16 up front.

17 What the guild supports as an escrow idea
18 is what the Canadian copyright board does which is the
19 escrow account is one escrow account, in their case
20 managed by the Canadian Copyright Board, where the
21 money is paid into that one account that is managed by
22 a governmental organization that is not only held to
23 a high standard of financial transparency but is also
24 not subject to bankruptcy.

25 Therefore, the creators know that there is

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1 one location, one escrow account that they can look
2 for with one clear record, not a buckshot of different
3 escrow accounts held by users all over the place of
4 different amounts of monies.

5 Going back to different rates for
6 different usage, the issue is whether the usage is of
7 a commercial purpose or of a noncommercial purpose and
8 there ought to be a sliding scale as would any creator
9 agree for a one-time noncommercial use such as for a
10 archive or a library or a commercial purpose.

11 For example, what if somebody find an
12 illustration that seems to be an orphan work and they
13 decide to use it in an ad campaign and they use it on
14 product packaging and they use it on shopping bags.
15 That's a huge commercial use. That's very different
16 than finding an illustration that depicts an event, a
17 battle in War World II, and exhibiting it in a museum
18 within the context of an exhibition about World War
19 II.

20 MS. URBAN: Thanks. I actually got messed
21 up when we were talking about the limitation of
22 liability caps. I hope I can fold them both together.
23 I want to bring back to the discussion the gatekeeper
24 issue because I think it's very important here as
25 well. Whether there is an escrow fee or there is a

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1 cap on liability, one is more efficient and one is
2 less efficient.

3 We can talk about that. But for the
4 person who is trying to make use of the work in many
5 instances, the clarity is going to be very important
6 not just because they would like to know for their
7 sanity what their liability might be but because they
8 are dealing with a bunch of gatekeepers.

9 Film makers deal with just funders. They
10 deal with distributors. They deal with insurance
11 companies all of whom tend to be extremely
12 conservative when it comes to the risk that their film
13 maker is taking by making a film.

14 As we are discussing this I'm thinking
15 about whether or not in escrow a fee would be more
16 inefficient or if a cap is too much of a one-size-
17 fits-most option, I would like to have people remember
18 that if we are not careful, if we don't provide some
19 kind of certainty to the user, then we'll be in the
20 same situation that we've been in all along and that
21 we have some kind of a system in theory, but because
22 the risk is so unknowable, people won't be able to
23 make use of it.

24 MR. METALITZ: Thank you. I just want to
25 come to the defense of my battered orphan, the escrow

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1 idea. Again, just to put this back in context, and I
2 think Jennifer's comments I could react to that, too.
3 This is not escrow versus a cap. Escrow could apply
4 whether the measure is a cap or the measure is
5 reasonable royalty.

6 To my mind the issue is cap versus
7 reasonable royalty. I think the escrow is really a
8 feature to try to ensure that a reasonable royalty
9 system or a cap system actually works and there is
10 some money there that the copyright owner can reclaim
11 once he or she emerges. I think the important point
12 is that all the cap systems that have been proposed,
13 except possibly in a very high volume situation,
14 really amount to no recovery whatsoever in practical
15 terms.

16 Therefore, to the extent we do want to
17 try, obviously as Jeff pointed out, we can't recreate
18 the market because the copyright owner's right to say
19 no has already disappeared. He has never been asked
20 about this use because the user couldn't locate him.
21 That's gone. We're not really in a pure market
22 situation but I think a reasonable royalty approach is
23 probably the best way to approximate it.

24 Again, I think, although Oliver asked us
25 at the beginning, or Jule mentioned that we shouldn't

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1 go back to the due diligence standard, I do think this
2 is kind of linked with the due diligence standard. If
3 we are going to indulge in the assumption that the
4 vast majority or only a tiny handful of copyright
5 owners will come forward, let's make sure we have a
6 due diligence standard that makes it more likely that
7 prediction will come true.

8 Have a meaningful due diligence standard,
9 not extremely low lax abusable due diligent standard
10 because if we have a very lax standard, then there is,
11 I think, a greater need for something like an escrow
12 system.

13 MR. PERLMAN: I want to say two things.
14 First, it makes me totally insane when people say we
15 can't afford to pay this fee. If you can't afford the
16 building, you don't build it. If you can't afford the
17 computer system, you don't replace the computer
18 system. If you can't afford to license the copyright
19 work you just don't license it. I guess that harks
20 back to what I was talking about earlier about the
21 wired mindset. If it exist I can use it no matter
22 what.

23 Second, I think calling the thing an
24 escrow fund is putting a rabbit in the hat that
25 doesn't belong there. An escrow fund sort of suggest

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1 that it's going to go in there temporarily and then
2 it's going to come back out maybe, or even probably,
3 to the person who put it in there. The way I see the
4 thing working it's going in there. If it's coming
5 out, it's going to authors or some author's
6 representatives. I think if you get away from using
7 the word escrow, it may help.

8 MR. SIGALL: I skipped Phil. I'm sorry,
9 Phil. I skipped you. I had you on the list but
10 crossed you off too early.

11 MR. MOILANEN: That is all right. The
12 discussion points out the enormous difference between
13 various types of organizations and users. David's
14 members of PP of A take a portrait of a person and
15 maybe they charge them \$50 for it. It could be any
16 number. It could be \$500. The customer scans it and
17 asks for a reproduction on a four by six sheet for
18 which the photo processor charges 12 cents.

19 They do that 27 billion times in the
20 course of a year. They are all not David's photos.
21 Some of them might be. But if you just had a 1 penny-
22 per-shot royalty you've got \$210 million to fund
23 everybody else's royalties so maybe that's the
24 solution to the problem. That's per year so it would
25 be self perpetuating. But the problems you run into

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1 the user, the homeowner, the consumer is the one who
2 really owes the royalty.

3 They are the ones that removed the
4 markings if they did remove them when they purchased
5 it. They are the ones that get the benefit of the
6 substitute of a 12-cent print for a \$5 print or \$50
7 print. They are really out of the system and it's the
8 poor guy that gets caught in the middle who can't find
9 out who owns the photo he has just reproduced and may
10 never see it if it comes in online, which is another
11 billion photos that come in that way.

12 Whatever system you end up with has got to
13 be really diverse in how it's applied. Your museum
14 use might be different than someone who is going to
15 run an advertising campaign using the same image so it
16 gets very difficult to come up with what your schedule
17 of royalties is going to be. That complicates it and
18 makes your job very difficult.

19 I would think that there should not be an
20 automatic escrow just because of the volume of use
21 that may go in there. There shouldn't be an automatic
22 fee because you don't know whether any of those people
23 may or may not be the owners of the images that they
24 ask photo processors to reproduce.

25 MR. SIGALL: Let me ask a question about

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1 the reasonable royalty standard. I think Jeff is
2 right to point out that you are engaging in something
3 of a fiction or, at least, a hypothetical exercise in
4 trying to determine what a marketplace rate would have
5 been after use has been made because you don't have
6 the ability to -- the user and the owner don't have
7 the ability to either deal or not deal and set a price
8 that way.

9 The way that the courts have typically
10 tried to answer that question and the CRT and CARP
11 proceedings have done it is to look at comparable
12 transactions. You try to get a value from actual
13 marketplace transactions that might be comparable to
14 the one you are trying to value and then you adjust
15 upwards or downwards based on differences and
16 similarities between the transaction you are trying to
17 value, the hypothetical one and the comparable actual
18 transactions.

19 Another question, and correct me if I'm
20 wrong on this, but it would seem in many cases -- not
21 all but in many cases of orphan work use, the user,
22 for example, someone who is putting together a
23 documentary film or a nonfiction book, or a museum
24 exhibition, has a pretty good set of comparables at
25 their disposal, mainly the other transactions they

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1 might have actually consummated in the marketplace
2 where they found an owner or they found the author and
3 they have engaged in a transaction.

4 They may have the best set of comparables
5 of anyone, even better than the owner might have in
6 terms of trying to argue what the value of that
7 transaction is. Does that give users more certainty
8 over what a reasonable royalty would be and what their
9 liability might be down the road if the owner surfaces
10 than you might at first initially think given that
11 reasonable royalty is somewhat undefined in the
12 statute?

13 MR. TRUST: I think the short answer for
14 us on that, anyway, is yes. The problem with that is,
15 and I think Nancy said this so eloquently earlier, is
16 that we are talking about works that may have a value
17 of \$100, \$200, \$300, \$400. Our members are not going
18 to pursue any of this in federal court which basically
19 means that if a work was orphaned and then suddenly
20 was no longer orphaned, that is, they found the owner,
21 which is exactly what we want to have happen in all of
22 this, that nothing will happen because if they can't
23 come to an agreement because a photographer is not
24 going to take that to federal court.

25 We think that a reasonable royalty, we

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1 think that negotiating a reasonable license is the
2 answer. I mean, we do think that is the answer.
3 Hopefully in most cases they'll be able to work with
4 each other to negotiate with each other and come to
5 what is an honest and a reasonable fee. We can
6 understand how a consumer in a situation like that
7 could be at a real disadvantage.

8 I mean, suddenly if I'm the consumer and
9 Michael is the photographer and I find him all of a
10 sudden, I'm using it in my brochures or my fliers and
11 my marketing, he knows he's got me over a barrel. He
12 is going to say, "I normally charge \$30,000 for that
13 work," when, in fact, I don't.

14
15 The point is I think that something
16 besides federal court has got to be the solution which
17 is why in our comments we had suggested the
18 possibility of some sort of an arbitration, some sort
19 of a federal copyright arbitration, something besides
20 federal court which just puts a situation like this
21 out of the reach of photographers. I think there is
22 something besides escrow and besides just a reasonable
23 license.

24 MR. SIGALL: Apart from the mechanism of
25 how it's going to be determined, I want to get back to

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1 anyone, especially those in favor of a cap, how they
2 would react to my point about access to information
3 about comparables and whether that reduces the
4 uncertainty or not.

5 MR. NEWMAN: Not necessarily that idea.
6 The problem as a film maker is that often those
7 comparables, those benchmarks, are nonexistent and it
8 depends on the type of work. If you are getting a
9 work that is owned by Warner Brothers, it's very
10 different than what you are going to pay to get a work
11 that is owned by an individual film maker.

12 And it's very different than what you are
13 going to pay for an amateur piece of photography.
14 It's very different depending on a variety of factors
15 so there are no benchmarks to put up against within
16 our field that you could say are always reasonable.
17 Then you get into a case-by-case approach which we
18 feel is just too cumbersome as a system.

19 MR. BAND: I agree with those comments.
20 I think for many of the kinds of works, probably the
21 vast majority of the kinds of works that most of the
22 people who want to use works will encounter, there
23 really are no benchmarks. Sort of the thought of an
24 arbitration proceeding is sort of like you just
25 imagine endless CARP proceedings. Again, it would be

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1 great for attorneys in private practice so I
2 appreciate that suggestion.

3 I just think it would be a nightmare for
4 users and, frankly, for the copyright owners as well.
5 What I guess I don't quite understand is if for a lot
6 of these photographs the fee anyway is \$100, \$200,
7 \$300, then why is a cap of \$100 not unreasonable
8 especially if it's certain they would get it? That
9 seems to me to be much more preferable than an
10 arbitration proceeding.

11 MR. SLEVEN: The short answer to the
12 question you posed is that I agree with you. I think
13 in a lot of cases there are benchmarks that if not
14 precisely on point are analogous enough to give one a
15 range in which one can likely expect to come out if an
16 owner comes forward.

17 I want to respond to a comment that
18 Jennifer made earlier about gatekeepers because my
19 job, or one of my jobs, is as a gatekeeper and lawyer
20 for a publisher who tells authors, "No you can't use
21 that. Too risky. Yeah, okay." I am perfectly
22 comfortable with a reasonable royalty rate. I have a
23 reasonable license fee.

24 I have an idea, a range of what it's going
25 to be. I don't need to avoid risk to the penny. I

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1 need to avoid risk to the \$10,000 value or more.
2 Given over the course of the number of our books,
3 yeah, I may have one or two bad results but that will
4 even out over the course of many uses. I would not
5 have a problem. I am here advocating an orphan work
6 statute because that would make me much more
7 comfortable in opening the gates wider to authors who
8 want to make use of orphan copyrighted works.

9 Let me make one more point in response to
10 something Nancy said about federal court. AAP made a
11 proposal which I think, of the comments I read, it's
12 unique. One exception to the no attorney's fee as a
13 remedy rule, which was if a copyright owner comes
14 forward and the user fails to offer a reasonable
15 license fee, the user simply says, "Yeah, this is only
16 worth \$500. You can't sue me for \$500. I'm not
17 paying you anything."

18 In that case we would advocate an
19 exception and allow attorney's fees to be recovered by
20 the owner in a lawsuit to disincentivize users who
21 refuse to pay even a reasonable amount.

22 MR. HOLLAND: I was somewhat confused by
23 Jeffrey. Maybe I misunderstood it but I was confused
24 by what it appeared to sound like, the concept that
25 you would determine a fee after the work has been

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1 used. Is that what you were talking about?

2 MR. CUNARD: I think that's the proposal
3 of those who are advocates of a reasonable license fee
4 are advocating that view.

5 MR. HOLLAND: Because when we negotiate
6 prices we usually negotiate before the sale. I mean,
7 that's done in most business that I know. I don't
8 know very many situations where I go and get a camera
9 and take it home and then somebody tells me how much
10 it's going to cost. I would think the same thing
11 would apply in a business situation here.

12 As to where standards can be found, I
13 think photographers have a service called PhotoQuote
14 where they can go online and determine what the going
15 rate is among professionals for certain type of usage.
16 Again, I'm somewhat confused by a paradigm in which
17 the consumer gets to set the value on the supplier's
18 services or product.

19 MR. CUNARD: I think what we have here,
20 other than a failure to communicate, is a fundamental
21 structural problem with the way that you've set this
22 up. If you look around the table what you have are
23 users and you have people who are creators of
24 traditional copyrighted works who are in the market
25 for exploiting their copyrighted works and it's great.

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1 It's fantastic.

2 I mean, those people are extraordinarily
3 important to the country and, of course, the work that
4 they do is extremely important themselves and their
5 families. They all do have standard market rates that
6 they negotiate in advance. Sometimes they are
7 individuals like Brad and Lisa's membership.

8 Sometimes they are large corporate
9 enterprises such as those that are members of the
10 RIAA. What we don't have here are the people made
11 postcard messages or who took Boy Scout photographs.
12 Or we don't have the Vietnamese who are recording
13 their thoughts and drawings during the Vietnam War.

14 We don't have people who are in internment
15 camps. We don't the people who were writing diaries
16 during World War II or during the Korean War. We
17 don't have people who are making Nigerian folk
18 sculpture and Indonesian batik. We don't actually
19 have standard market prices for all of those different
20 kinds of works because typically people haven't
21 engaged in ordinary marketplace negotiations for many
22 of those types of works.

23 Of course, there are exceptions here and
24 there. I think again it is a false hope that we think
25 that there will be sort of a schedule of marketplace

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1 rates that trade associations will promulgate for
2 every kind of work that possibly could qualify as an
3 orphan work.

4 MS. WOLFF: A couple of points. The idea
5 that if you could get attorney's fees as an exception
6 would be a way to assist the problem with being forced
7 to go to federal court to get actual damages. I think
8 the situation of looking for the market value is not
9 the situation of the Nigerian folk singer.

10 It's going to be those situations where it
11 didn't work where you didn't find the real artist.
12 For those situations courts have been for years
13 looking at what the value of actual damages and the
14 market value and trade associations have been setting
15 rates. As a trade association that is one issue that
16 we butt up against. We do surveys all the time and
17 the question is I'm always, "No, no, no, anti-trust."

18 I can't ask about rates. I can say a
19 range of license fees but we are so afraid to use the
20 word, "What do you charge?" because of anti-trust
21 problems. Maybe if trade associations were given a
22 directive to try to collect some data for this
23 purpose, that would be helpful as well.

24 If you want to know a commercial use, you
25 can go to any number -- if you are talking about

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1 professional photographer, there is any number of
2 sites and any number of commercial large photo
3 libraries where you have the price calculator. It's
4 not that hard to do. I don't even think that it's
5 anything comparable to a CARP proceeding if you want
6 to determine a license fee for many types of
7 commercial uses.

8 Now, of course, there could be exceptions
9 or a range of things when you're talking about museums
10 or archives or libraries that want to display or make
11 public on the Internet a collection of historical
12 material which is mostly for educational reference
13 purposes. I think we don't have to skew everything
14 for those uses.

15 MR. SPRIGMAN: So one of my clients is
16 Save the Music and this is an organization that
17 collects and offers for distribution Jewish cultural
18 music from the last 100 or so years and other
19 materials as well documenting Jewish culture and
20 Yiddish culture here in America and abroad.

21 I mean, Jeff's comments are, I think,
22 right on in that there is no organization of, say,
23 Yiddish folk singers who have a manual of prices.
24 Even if there were, I think there is a pretty sharp
25 limitation regarding the usefulness of those prices.

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1 One thing contracts do when they are negotiated before
2 a transaction is they allocate risk.

3 There are some would be uses that are much
4 more risky but potentially much more rewarding than
5 others. We all know that prices in a lot of different
6 transactions vary depending on what the potential
7 market for that usage is. it's very difficult to
8 allocate risk ex-post because, you know, the
9 possibilities have kind of collapsed into an actual
10 event. It's then possible for the creator to come
11 along and make demands which will, I think, tend to
12 increase uncertainty and decrease use.

13 The other thing about the market
14 transaction is that to the extent there is any
15 uncertainty to what the market rate is going to be,
16 and I think the uncertainties are intractable, all the
17 noncommercial uses, and Jeff went, again, through a
18 list of the kinds of culture that we can now
19 distribute, the kinds of culture that we can now have
20 access to, uses of those kind of materials that are
21 not expected to produce revenues are going to be
22 chilled to the extent that there is any uncertainty.
23 If there is a fixed idea of what liability would be,
24 you can account for that liability in your plans and
25 proceed accordingly. Otherwise, you can't. You have

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1 too much exposure.

2 MR. SIGALL: I was requested after the
3 first session that it might be a good idea to break up
4 some of these sessions because they do go for three
5 hours so I'm going to suggest that we take a short 10-
6 minute break and get back at 1:30 and -- I'm sorry,
7 3:30. The clock doesn't have numbers on it. Get back
8 at 3:30 and then finish up this discussion and then
9 move on to some other topics related to the
10 consequences of an orphan work identification.

11 (Whereupon, at 3:19 p.m. off the record
12 until 3:35 p.m.)

13 MR. SIGALL: Okay. Let's have a closing
14 round on this issue, just last comments people have on
15 the issue of reasonable royalty versus cap on payments
16 and the escrow issue. Jay has requested -- Jay
17 Rosenthal and Brian Newman have requested comments and
18 Steve. Anyone else for this last -- John and Anne.
19 Jay, it's yours.

20 MR. ROSENTHAL: First of all, I do agree
21 that your concept of reasonable royalty rate based on
22 some kind of benchmark of what the industry has been
23 paying on similar things is a viable way to go. I
24 certainly agree that we should differentiate
25 commercial from more historical and archival works.

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1 I really do understand that position but
2 for commercial use. I think as a fundamental issue
3 here certainly from the creator's standpoint and that
4 is that it is certainly simple and easy and efficient
5 not to pay into an escrow account. No doubt about it.
6 But it also takes a lot of incentive away from a
7 copyright owner to step up to the plate at the end of
8 the day to be able to really go down that road to
9 contest anything and to claim anything.

10 The simple, easy, and efficient argument,
11 that is the grokster argument. That was there reason
12 for having it. It was real simple and efficient and
13 easy not to pay. I don't want to see this turn into
14 one big sharing exercise. I think that we just have
15 to keep that in mind.

16 MR. NEWMAN: On that weighed note, I think
17 that as artists we want to be paid for our work and we
18 want to pay people who exist who want to be paid for
19 their work. But a reasonable royalty to me is one
20 that is negotiated in the marketplace with an actual
21 rights holder or creator that I can take into account
22 that the realities of what a marketplace would be and
23 there are not those benchmarks in the absence of that
24 rights holder.

25 I think if we get back to what we started

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1 about the beginning, we're talking about the
2 presumption of an absent owner, of an orphan work.
3 That is what you said as the guidelines at the
4 beginning of this session. When you don't have that
5 person and you are setting reasonable royalty on a
6 nonexistent market, you are creating a fiction that is
7 not a market-based system.

8 I agree it should not be called an escrow.
9 It should be called a tax and a burden on the creator.
10 I also feel that we are presuming, of course, that we
11 want to find -- that the majority of us want to find
12 the rights holders and that we are doing a reasonable
13 effort search and all these things that have been
14 talked about earlier. Presuming it's an orphan, we
15 should try to make a system.

16 Right now the system is not working and we
17 should create a system that is not as erroneous on
18 artists who want to use these works and want to create
19 new works. So far the proposals about the types of
20 ways to determine an escrow account have been more
21 erroneous and burdensome than the current system we
22 have. That is why we have called for something else.

23 MR. METALITZ: I think the answer to your
24 question about comparables, we have heard a lot of
25 information about comparables, about benchmarks that

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1 depend on variables of how it is being used and by
2 whom. At the time that this issue would come up after
3 the work has been used and the right holder has come
4 forward, most of those variables are no longer
5 variable. We know who used it, what they used it for,
6 how many copies they made, whether it was hanging on
7 the wall or on a tote bag. It would seem to be in
8 some senses easier to apply the benchmarks at that
9 point.

10 Having said that, I think we also heard
11 that there is a lot of variation from one sector to
12 another here. There certainly are some areas where it
13 might be very difficult to establish benchmarks. Even
14 in the area of archival collections, a collection of
15 300,000 labor relations photographs does have a value
16 for many purposes. The value may already have been
17 ascertained and that may be the basis on which you
18 could calculate some type of royalty rate.

19 Given that there is a lot of sectoral
20 variation, I think this is another reason why
21 addressing some of these issues on a sectoral basis
22 through roundtables of people who create these kinds
23 of works and people who are interested in using them
24 might be a good way to go.

25 MR. BAND: Couple of points. One is, just

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1 building on Jeff's point from before the break, there
2 really does seem to be a bit of an asymmetry here
3 between the kinds of owners and the kinds of users.
4 I think a lot of the users who are in the room really
5 aren't interested in making use of the kinds of
6 materials that the owners here are currently
7 representing.

8 There is that asymmetry and we need to
9 recognize that. I think that leads to a second point
10 that actually Nancy Wolff was making which was talking
11 about how sort of the noncommercial uses are the
12 exception. It started to make me think what is the
13 exception and what is going to be the norm.

14 In many respects I think as a practical
15 matter the vast majority of uses of orphan works will
16 probably be either noncommercial or quasi-
17 noncommercial, a library, a museum, or let's say an
18 institute. A company like Google working with a
19 library or a museum, something of that sort. That
20 will be the normal.

21 The kinds of commercial uses of orphan
22 works that people have been talking about, that will
23 be the exception. If I'm doing an add campaign, it's
24 hard to imagine why any person doing an ad campaign in
25 their right mind would use an orphan work.

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1 The risk to me of having to hope that if
2 the owner pops out that I would be able to prove to a
3 court that I did a reasonable search, it would be so
4 much -- again, if I'm doing a big ad campaign, why
5 wouldn't I just hire an artists or go to a stockhouse
6 or just do something where the rights are clear.

7 I just can't imagine why anyone, or even
8 Spielberg. I think we can come up with those
9 hypotheticals but I think that is exactly what they
10 are. Those are hypotheticals. They are exceptions.
11 The office when it's sort of coming up with its
12 proposal should be focusing on what is the norm. I
13 think the norm is sort of either noncommercial or
14 quasi-noncommercial uses.

15 People are probably talking about archival
16 uses and the commercial uses. Even though they may
17 occur, I think those can be the exception so the basis
18 framework makes more sense to have a cap and then
19 maybe have the reasonable royalty for the exception as
20 opposed to the other way around.

21 MS. CHAITOVITZ: I keep hearing and it
22 just keeps sounding to me like the users are wanting
23 not the ability to use the work but the ability to use
24 the work free. I mean, they keep talking about,
25 "We're concerned about certainty and damages and the

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1 gatekeepers."

2 Yet, if there was -- if they conducted
3 their research and found out that something was truly
4 working, and then they could contribute a market rate
5 into let's call it a license fund, not an escrow fund,
6 because they are paying the license fee, and you could
7 get a comparable market rate. We've heard all kind of
8 people talk about comparable benchmarks.

9 It would depend on the type of work and
10 the type of use so that noncomms would be different
11 from -- I mean, I beg to differ with you. I would
12 consider Google, which sells advertising not really
13 the same as the library. I would think that would be
14 more of a commercial rate. So you could get that.

15 You could contribute it into a fund. Then
16 it would be easy for the artist or the creator later
17 to come forward. They should have to go federal
18 court. They wouldn't have to do anything like that.
19 No fees, no cost. They just make their claim to the
20 fund. There is certainty. If they've done it right,
21 they have made their contribution and they are not
22 liable for damages, they have all the certainty and
23 the artist doesn't, you know, have any cost to go
24 forward. It seems to me that there's a fix. The fix
25 isn't free though.

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1 MR. OAKLEY: I appreciate that Steve is
2 reminding us of the opportunity to look at this on a
3 sectoral basis because I just wanted to mention that
4 universities and libraries are far more risk adverse
5 than Paul's situation which he described to us before
6 the break where he has a fairly significant budget for
7 doing the permissions and making decisions along these
8 lines.

9 If we go to university counsel and ask
10 about something like this and find out what the risk
11 is and there's some undefined market value risk, then
12 the answer is going to be no and it's going to be as
13 simple as that. A lot of the projects that
14 universities and libraries would want to undertake
15 will be shut down because of the risk adverse
16 situation there.

17 MR. SIGALL: Okay. Let's move on to the
18 next section because I want to get to this question
19 because it's an important one. It goes back to a
20 comment, I think, Lee made before the break. I would
21 like to now turn the focus away from payment
22 obligations that a user of an orphan work might have
23 to any other obligations that they might have to
24 undertake in order to make use of the work.

25 I see this as sort of the terms and

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1 conditions of their use. Among the suggestions we've
2 gotten in the written comments and things that were
3 discussed this morning were they are obligated to file
4 a notice or some affidavit or some affirmation of the
5 fact that they have made a search, for example, and
6 maybe turn over the contents of that search or a
7 description of that search.

8 There was a suggestion, at least in some
9 comments, about putting a notice on the work that
10 they've created and the use that they're making of the
11 orphan work, that they are, in fact, invoking the
12 orphan works system or that they are making use of
13 orphan works within the work that they've just
14 created.

15 What other conditions or steps does the
16 user have to take separate and apart from any payment
17 or liability that they are incurring to make use of
18 the orphan works provision, specifically notice to the
19 others that they are using it in the form of
20 registration, of their intent to use or their use, or
21 marking the work in some respects. Comments on that
22 approach.

23 MR. OAKLEY: Consistent with the principle
24 I mentioned earlier of keeping it simple, I would
25 prefer to see us avoid too many requirements that have

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1 to be met before you can take advantage of this. On
2 the other hand, it does seem to me that one of the
3 things that could come out of a study of best
4 practices in different sectors is that it might turn
5 out that in some sectors that's a good idea of
6 reaching it.

7 But then it's done on a targeted basis
8 directed in the area where it really would make a
9 difference. Again, I think I would do it on the
10 sectoral basis and looking on a voluntary basis that
11 would meet the needs of that particular segment of the
12 community.

13 MR. ROZEN: Speaking on behalf of screen
14 writers and movie directors, we have come at this from
15 a little bit different perspective. We believe, and
16 we filed our comments, that in the case of orphan
17 motion pictures that there ought to be an extra step
18 involved, that the user would have to contact one of
19 the credited directors.

20 Well, there's only one credited director,
21 or one of the credited writers to the film. When I
22 say credited, it's something that's put right in the
23 motion picture, but to seek license to use the film to
24 exploit it for whatever purposes it may want to
25 exploit it.

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1 The reason we have that different
2 perspective, of course, is that while we are the
3 creators of the film, the authors of the film, we
4 don't hold the copyright and it's of tremendous
5 concern within the industry among screen writers and
6 directors that if there is a case of a copyright
7 holder, perhaps not a member of NPAA, not one of the
8 major studios, maybe an independent producer, if there
9 is a case where that independent producer cannot be
10 tracked down, or maybe the copyright holder,
11 independent producer is out of business, maybe there's
12 been mergers and they can't be located.

13 Tremendous concern among screen writers
14 and directors as the creators of that work that
15 somebody will use that work and exploit it in some way
16 in a process that they don't approve. We base this
17 desire to be part of this process and to make sure
18 that we have control over the use of so-called orphan
19 works.

20 It really emanates from the contractual
21 rights that we have that are established through
22 collective bargaining and through direct contracts
23 that screen writers and directors have in addition to
24 the collective bargaining rights with the copyright
25 holder that established creative rights and economic

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1 rights in the film, as well as broader rights, moral
2 rights established by the Berne Convention.

3 I'll just throw that out there as
4 something that is a bit of a diversion from what the
5 discussion has gone -- I guess the interest that other
6 participants have here but something that is very
7 important for us.

8 Let me also add to that that the system
9 that we have -- the process we've devised or
10 recommended in the comments recognizing that there is
11 a great interest in making this process as easy as
12 possible. We suggest that you contract either the
13 screenwriter or the director, the Writer's Guild of
14 America West and the Director's Guild of America can
15 be conduits for helping to identify and locate the
16 screenwriter and the director. The ability to claim
17 that license only last for the lifetime of the
18 screenwriter or the director.

19 MR. SLEVEN: I would like to agree with
20 Bob's comment that there should be no prerequisites to
21 orphan use assuming, as I said, we do a due diligent
22 search to qualify for orphan use. I think a notice of
23 use does not serve any purpose. You can put a notice
24 of use into a registry of these notices and that does
25 nothing unless the owners undertake the burden of

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1 searching that registry of notice of use to see if any
2 of their works are listed.

3 The vast majority of the works that are
4 posted there no owner is going to be listed because if
5 you knew the owner, it would be much less likely that
6 it was an orphan work in the first place. In many
7 cases no title is going to be listed because many
8 orphan works are not the kinds of things that have
9 titles.

10 They are letters, they are photographs,
11 they are things that were created not for commercial
12 exploitation as titled movies or books or songs. I
13 think it's a formality that will not serve any
14 purpose. I think the better approach there would be
15 -- this could be done either by the copyright office
16 or on a voluntary basis -- voluntary registries of
17 owners.

18 I don't believe owners should be required
19 to register or file anything but those who think their
20 works may be orphaned and want to be found can create
21 through their industry organizations writers or
22 photographers or whomever to create registries that
23 would be part of a good reasonable search under
24 appropriate circumstances.

25 As far as the second possible

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1 prerequisite, notice on the work, I also think that is
2 problematic because often you don't know you are
3 making an orphan use. You have something, you do a
4 search and you cannot find the owner. It may be PD.
5 You're not sure because you don't have enough data.

6 You may even think it's borderline fair
7 use. Maybe yes and maybe no. You are comforted by
8 the fact that you made a due diligent search so even
9 if it's not PD and even if a court would find it's not
10 fair use, it's an orphan work. Now you are stuck with
11 what do you put on the book or on the movie or on the
12 website, whatever you're using.

13 You don't know what status you're using it
14 in. What you know is you have tried your best to find
15 the owner and you couldn't and you have an obligation
16 to pay the owner when the owner comes forward. I
17 don't prerequisites beyond that serve any purpose.

18 MR. TAFT: I would like to reiterate
19 something I said this morning in terms of those orphan
20 works which can be associated with a particular group
21 which are part of, to use UNESCO's term, the
22 intangible cultural heritage of a particular group,
23 especially indigenous groups.

24 I think it is incumbent upon users to
25 notify those groups and get permission from the

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1 community or constituency. Again, this is going to
2 come up perhaps later on tomorrow in terms of
3 international issues, but certainly the WIPO world,
4 intellectual property organizations looking at this
5 kind of question.

6 To an extent how can we use these
7 essentially orphan works that are tied very closely to
8 a particular culture or group? I would say to keep on
9 the ethical side, if not the legal side, is worth
10 maintaining touch and keeping contact with those
11 groups that have an interest, a cultural interest in
12 a particular creative work.

13 MR. MacGILIVRAY: I think one of the
14 things that is important, to us at least, is that we
15 want to be able to contact the copyright holder and to
16 contract with that copyright holder for whatever value
17 the copyright holder in particular would like to place
18 on the work.

19 One of the things I would suggest as a
20 requirement on the users of works is that they check
21 with this voluntary correctable registry every so
22 often, some reasonable number of days, and if they
23 cease using a work and instead contact the copyright
24 holder for the permission to use that work if, in
25 fact, the copyright holder has declared that they are

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1 findable, that this work is no longer an orphan.

2 MR. PERLMAN: I'm not a fan of the filing
3 of intent to use but I think that when a use is
4 actually being made, there needs to be some kind of a
5 recordation in a central registry of the fact of the
6 use, the user, and a copy of the work that is actually
7 being used because, for instance, in photography Nancy
8 was talking about Text Scout and other companies where
9 image recognition software is now becoming a viable
10 technology.

11 Otherwise, if you don't do that kind of a
12 recordation, any owner of a copyrighted work that has
13 fallen into the orphan work category has to go out and
14 sort of search the world to see whether every single
15 one of his or her works is being used somewhere.

16 MR. BAND: I agree with Paul and Bob with
17 respect to the unnecessary formality of any intent to
18 use a formal statement. I think the likelihood that
19 any of the millions, if not billions, of possible
20 orphan works that will be searched regularly on a six-
21 month basis by people who may not know that they have
22 any relationship to the work is so low as to be not
23 worth the trouble.

24 Furthermore, I think it is much more
25 likely that when the work is actually used in a film,

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1 in a book, it will then come to the attention of the
2 rightful copyright owner who may be the heir of the
3 original author or artist. That is a much more
4 realistic way, I think, in which people will be
5 apprised of the rights that they have.

6 A further problem with the formal intent
7 to use approach is that inevitably there would have to
8 be some period of time that you would set aside for
9 people to have this work appear on a registry before
10 it could be used.

11 It is certainly true in journal publishing
12 and I think even to an extent in book publishing that
13 sometimes rights clearance by authors doesn't actually
14 happen until very close to the publication deadline.
15 If, in fact, you end up having to wait sort of a six-
16 month period before you publish the journal article or
17 publish the book, that is, I think, a substantial
18 disincentive.

19 This, though is tied to the idea that
20 appears in the CCI comments which was that perhaps
21 there should be some sort of notice on the work that
22 the work was orphan. I am sympathetic to the views
23 expressed by Paul and also by the AAP in the reply
24 comments that perhaps this kind of a requirement is a
25 deviation from current practice and is really

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1 inconsistent with the kinds of obligations publishers
2 would like to undertake.

3 I hear that point. I think our purpose in
4 suggesting it was to create a sort of more openness,
5 more transparency as to actually who does own the
6 rights and the work, that there, in fact, has been
7 some sort of search made so that subsequent users
8 could come to the publisher and see what the status of
9 the work is and then from that decide what kind of
10 search they themselves need to make.

11 Paul raises a much larger and more
12 interesting and provocative question for publishers
13 which is when works are used that are used under the
14 fair use rubric or in the public domain, what should
15 their sort of captions be? That is a subject that we
16 should leave for another day.

17 MS. CHAITOVITZ: Our comments requested
18 that before you make use of an orphan work you have to
19 file an intent to use. I think this serves a variety
20 of purposes. One is users can check them to find out
21 if their work is being used. Not every -- I'm sorry.
22 The copyright owners can check them.

23 In the last century there have been a lot
24 of mergers and acquisitions so what started out, you
25 know, you could say was in a record catalog or was in

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1 a publishing catalog now may be orphan just because
2 the trail runs dry. You can no longer find out who
3 owns it when, in fact, it's a huge multi-national that
4 might have the resources to check the intent-to-use
5 list.

6 The other thing is that it would permit
7 the negotiation before the use. I mean, the same
8 people who complained about the potential damages
9 after the use because of a switch in the bargaining
10 power once something is already used are the same
11 people who are now saying, "Wait and they will find
12 out after it's used." Well, if it's after it's used,
13 then your bargaining power has already switched and by
14 posting an intent to use you would then have the
15 opportunity to engage in market place negotiations
16 before the use.

17 MR. BAND: I agree with what Bob and Jeff
18 and Paul were saying about these sort of empty
19 formalities and bureaucratic burdens. Victor said
20 something that actually intrigued me. I'm not I agree
21 with the notion of a registry, sort of after-the-fact
22 registry.

23 I'm not sure that would be very useful but
24 I could imagine maybe a requirement even that any use
25 that is being made that on that use or in conjunction

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1 with that use you do have contact information so that
2 the author or the owner can contact the user and make
3 it easier for that author to contact the user to say,
4 "Hey, this is my work."

5 Then we get into whatever the remedy phase
6 is but at least to lower that barrier to make it easy
7 for the owner to find the user. I'm sort of thinking
8 along the lines of what is required in the DMCA with
9 respect to -- you don't necessarily have to have
10 something that detailed in terms of an agent for
11 service of process and all that kind of thing but it
12 might be -- the contact information might be a useful
13 idea.

14 MR. METALITZ: I wanted to rise to the
15 defense to the concept of the notice of intent to use
16 which, by the way, had a lot of support throughout
17 this -- in many of the filings here. Jamie Boyle had
18 a filing on this from the Center for Support of the
19 Public Domain at Duke which I thought was worth a good
20 look.

21 I think we are making a lot of --
22 indulging a lot of assumptions here about how this
23 system, which does not exist at the moment except in
24 our fevered imaginations, would actually work. I
25 agree that there would be many cases in which having

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1 the user post a notice of intent to use is not going
2 to make any different in terms of alerting the
3 copyright owner. I think there may well be some
4 situations which it would be useful.

5 Jeff said that this involves copyright
6 owners who have no knowledge of their relationship to
7 a work. Sometimes that will be true but there will
8 also be many copyright owners who know damn well that
9 they own a work. They just don't know that other
10 people can't reach them or can't find them in order to
11 obtain a license.

12 They may have a different idea, for
13 example, if the ability of people to search
14 inheritance records and they know that Dad created a
15 lot of valuable copyrighted works but they don't know
16 that they can't find the son or daughter. This may be
17 a way for them to find out if somebody wants to use
18 their work. There could be a lot of other examples
19 along that line.

20 I think what Bob said right at the outset
21 of this section is also worth coming back to. Such a
22 requirement for a notice of intent to use is going to
23 be more useful in some sectors than others. It may be
24 more useful, for example, when the duly diligent
25 search turns up the name of the copyright owner but

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1 the user is not able to contact that person.

2 That is kind of a subset of orphan works.
3 Perhaps a notice of intent to use will be confined to
4 or directed to that subset. I think the bottom line
5 is since we don't know how this system is going to
6 work.

7 We should be kind of taking the extra mild
8 to avoid the kinds of problems that Jeff and Jonathan
9 were talking about earlier, the problem of having to
10 post hoc figure out how this deal would have worked
11 out if the parties had been able to reach each other.
12 let's give them another chance to reach each other.
13 Even if it only helps in a few cases, I think it's
14 probably worthwhile.

15 It would also have some value after the
16 use commences as was previously stated. It seems to
17 me this would have some value. I don't want to
18 overstate it. Perhaps it shouldn't be a universal
19 requirement but I think it certainly has a role to
20 play in this system.

21 MR. ADLER: I can't imagine anytime where
22 I would ever say that Steve has overstated a case but
23 I think that in this instance the informational value
24 and the benefit of these types of devices I think is
25 clearly disputed if not discredited. I would just

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1 again want to suggest that what also should be weighed
2 against that and discounted further in terms of the
3 value here is the fact that in the case of a notice of
4 orphan works the likelihood of that being
5 misconstrued.

6
7 It's nearly 30 years since Congress
8 determined that basically for work to be protected
9 under copyright it doesn't have to go through some
10 form of process of being stamped by some official in
11 order for it to obtain protection. Yet, the general
12 public today I think is still largely unaware of that
13 fact and still generally has questions about whether
14 or not unless they see a little c in a circle or
15 unless they see the word copyright and something on it
16 a work, in fact, is copyright protected.

17 I think that given the risk that we are
18 going to have in this area, that people not as close
19 to this process as we are will despite all warnings,
20 all explanations, believe that a work designated as we
21 use that phrase as an orphan work creates a permanent
22 status for that work that follows that work in
23 whichever way it's used that many people will likely
24 misconstrue as being related to that work no longer
25 being protected by copyright.

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1 I think that risk given the very limited
2 or at least disputed informational value of such a
3 notice would argue against it. Again, I would say
4 with respect to a notice of intent to use, I did read
5 most of the proposals that people have made where they
6 suggested an advocated for that and most of them came
7 attached with a time frame.

8 Notice of intent to use and then wait for
9 six months or wait for four months or something like
10 that. Again, I just want to point out that under
11 copyright law there is no requirement that anybody
12 inform anyone else of their intent to use a
13 copyrighted work outside of the issue of obtaining
14 permission to do so.

15 I think that in this environment given
16 again the expectation that in the vast majority of
17 cases you will not see a copyright owner emerge. The
18 issue of having to give several months of public
19 notice of your intention to use a particular kind of
20 work with your identity and with some degree of
21 information about how you intend to use it can be very
22 detrimental to the creative ability of the people
23 intending to use it and again in the competitive
24 process of those people who are attempting to use it.

25 I just wonder whether if we establish that

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1 as a rule here, even if we were to argue that it's
2 only for this very limited orphan works process
3 whether we would be then taking a first step on a
4 slippery slope in some other context of copyright law
5 is going to establish a precedent to argue that there
6 needs to be a notice of intent published when someone
7 intends to use a copyrighted work explaining who they
8 are and what they intend to do with that work. I
9 think it would be a great mistake to go down that
10 road.

11 MR. MOILANEN: Thank you. The notice of
12 intent particular reemphasizes the wide diversity of
13 the different kinds of users that are out there.
14 Photoprocessors generally turn the stuff over within
15 24 hours. Most of them are not known and only a few
16 of them are probably ones that people are actually
17 interested in but if you are going to try to comply
18 with the law, you've got to do it with all of them
19 because you don't know who the owner is on hardly any
20 of them.

21 MR. KUPFERSCHMID: As far as the intent to
22 use and some type of registry for, I guess, use, if
23 you will, I think it seems to be that we have gotten
24 past the hurdle of -- I don't hear anybody suggesting
25 that, at least, if there is such a database or list of

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1 intent to use or users, I guess, that it wouldn't be
2 mandatory that the copyright owners search that
3 because that would be a TRIPS violation.

4 It would be a tremendous burden on
5 copyright owners, especially small copyright owners.
6 It would be very difficult to figure out some works
7 what they are being called, what their title is, what
8 the author's name is, a whole bunch of different
9 reasons.

10 I haven't heard anybody suggest that it
11 would be mandatory that the owners actually search so
12 I think what we're talking about is a voluntary
13 database or possibly mandatory for users to file some
14 intent to use but not mandatory for the copyright
15 owners to actually look at that.

16 Given that it wouldn't be mandatory for
17 the copyright owners to look at it, I just don't know
18 how -- forgetting about legalities but in the
19 practical world how or whether that's going to be used
20 at all. Despite all of this I think there's an
21 inkling in me to see what the foundation is here, what
22 the rest of some kind of limitation on remedies
23 approach or whatever approach is taken here looks like
24 before we decide an intent to use is a good approach
25 or not.

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1 Generally we think it's not a good
2 approach whatsoever for the reasons I just outlined.
3 In addition to those reasons there's also the push and
4 pull you have between the burden you're placing on
5 copyright owners and the frequency by which you are
6 going to publish these intent to use statements or
7 notices or whatever they are.

8 If you are publishing an intent to use
9 statement, let's say, every quarter or so, presumably
10 then there is going to be some waiting period. It
11 might be six months and it might be even a year which
12 is really unworkable, I think, for users of this
13 system to wait that long as other people have
14 mentioned here.

15 If you take the opposite approach, which
16 is to say that you have the intent to use publication,
17 let's say it's published on a continuous running basis
18 for maybe a week or so and the waiting period isn't
19 very long, let's say it's a week or maybe even a
20 month, you've got a tremendous burden on copyright
21 owners to actually look at this.

22 In any respect they are likely not to do
23 it anyway. At the end of the day, I think the
24 practical application of an intent to use just isn't
25 going to work. I think there are also issues that

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1 have to be considered that hadn't been mentioned here
2 like statute of limitations issues like if you file an
3 intent to use what does that mean?

4 That is just an intent to use. That
5 doesn't mean you are actually using it. Does that put
6 the copyright owner on notice of some sort? That is
7 an issue, I think, that at least has to be talked
8 about and considered before something like this is
9 adopted.

10 The one teeny benefit I can see here is
11 that it's possible that -- we've mentioned this in our
12 comments, that where you have state entities who are
13 using orphan works and they file these intent to use,
14 perhaps that filing of an intent to use might be a
15 waiver of their immunity or might be used as a waiver
16 of immunity -- I'm going to try every opportunity I
17 can to get this in -- a waiver of their immunity
18 perhaps because I know there were some issues doing
19 that on a registration form.

20 Maybe that is the only possible benefit I
21 can see at this point. Like I said, after we get an
22 idea of what the parameters of some type of limitation
23 here we might have a better idea whether there are any
24 benefits whatsoever of an intent to use system.

25 MR. SIGALL: I want to put a little bit

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1 more because both Keith and Steve have mentioned we
2 don't really know what the system will be so it's hard
3 to comment on it. I'm going to throw this out there
4 and I'm going to put it out there with the caveat that
5 it's been in my brain for about five hours.

6 I don't think everyone from the Copyright
7 Office on this panel has even heard it. Some people
8 have and some people haven't but I just want to throw
9 out a potential way that a notice of use could be
10 implemented and then just to get comment and reaction
11 to it because I think it will help us get a sense of
12 what potential benefits might be from the system.

13 It plays, I think, off of a suggestion
14 made by the Author's Guild in their comments that it
15 would help keep the honest reasonably diligent
16 searcher honest. I think the concept would be that if
17 you did a reasonable search, after you complete that
18 search you file something that certifies that you have
19 done a reasonable search.

20 One thing that we didn't get to in the
21 morning session that I think may be beneficial in the
22 sense that it fixes a point in time at which the
23 person did the search. When we are going back later
24 when the copyright owner might show up and you are
25 trying to determine whether the person made a

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1 reasonable search or not, you can look back and have
2 some frame of reference to assess that reasonableness
3 because one question might be when was the search
4 done. Was it done before the use or after the use?

5 It may get difficult to assess the
6 reasonableness of a particular search without a fixed
7 time frame. You would file that notice at the point
8 after saying that you have made this reasonable search
9 and that you intend to use this work. I think like
10 many people have mentioned, you would have some
11 waiting period, 90 days, 45 days, 30 days, 6 months,
12 something like that. Let's say it's just 90 days.

13 From the point of filing it to the point
14 of the 90 days, I think the user would receive
15 essentially almost all the benefits of a limitations
16 of remedy scheme. For any reproduction or
17 distribution that they made within that time frame
18 that would be subject to limitations of the remedies.

19 The one thing they may not get from that
20 point, and we will get into this tomorrow a little
21 bit, is the ability to make ongoing use of the work if
22 the owner shows up within that 90-day period. That
23 doesn't happen until that waiting period is over.

24 You have some time there for an owner to
25 come up and say, "Wait a second. That's my work. I

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1 don't want you to use it anymore. I want an
2 injunction." That owner cannot come up and say, "I
3 want statutory damages." They probably have them
4 registered so they couldn't say that but, "I want
5 actual damages," and the like.

6 They would only be entitled to whatever
7 limitations on remedies might be available like a
8 reasonable royalty or cap damages or the like. If the
9 waiting period elapses, then at that point the user
10 gets the benefit of both the limitations on remedies
11 and whatever would appear to be from the written
12 comments a fair amount of support for an ongoing use,
13 a prevention against injunctions for their ongoing use
14 within the ambit of the use that they are currently
15 making.

16 It would kind of allow -- I think, at
17 least, one benefit of this system potentially, maybe
18 not, is to maybe help address the unpublished work
19 situation in the sense that someone who files this
20 notice in the 90-day period if it turns out that it's
21 an unpublished work where the author does care about
22 it coming out for creative reasons, for privacy
23 reasons, they could come in and get a full injunction
24 against the use and stop the use and the ongoing use.

25 But if they wait too long then they lose

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1 that ability if they wait through the statutory
2 waiting period that might be set up. This would give
3 some chance for the owner to come in and essentially
4 have almost full rights with respect to the user. But
5 if they wait too long, then they are back in what I
6 think most people are talking about with respect to
7 limitations and remedies and some sort of provision to
8 protect reliance, interest, and ongoing use.

9 The other thought behind this which,
10 again, I'm not sure if it makes any sense, is that it
11 would give the publisher who is about to go to market
12 with a work, it would give them the ability to go
13 forward with the work after filing the notice of use
14 before the period ends comfortable that if the owner
15 shows up on the last period they are not going to get
16 hit with statutory damage or some big damage award for
17 that. But it would give them that ability to get
18 started on their production of the work and
19 dissemination of the work.

20 Then if the period elapses as it might in
21 almost every case -- in 99 percent of the cases, then
22 they get the full benefit. That is one potential way
23 to do it. Like I said, it has in theory entirely only
24 and I'm open to all kinds of suggestions and
25 discussions about whether that would work or whether

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1 that would fail.

2 MR. SPRIGMAN: So in our proposal we
3 thought that the notice of intent to use had a limited
4 role and it basically aligns with what I heard you say
5 which is in the case of unpublished works where we
6 thought for various reasons a registry was going to be
7 difficult, we set up some time limits and then we
8 suggested a notice of intent to use being a kind of
9 key there.

10 I think that is a possibility. Now, I
11 just want to make one note, though. On an abstract
12 level what is a notice of intent to use? It's, in
13 fact, a registry so you are registering something that
14 is in itself potentially going to be a separately
15 copyrightable work in many cases.

16 This is a use of a registry and the
17 interesting thing about this particular registry is it
18 basically imposes about the same burden as a registry
19 on the original creator but it does much less useful
20 work. I'm not saying it doesn't do any useful work.

21 I think it does and that's why in the case
22 of unpublished works I was in favor of it. But the
23 fact is once you've accepted this kind of ex post
24 registry the ex anti-registry, the merits of that,
25 again, jump out at you because it uncovers more

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1 information about the value of the original work in
2 question.

3 If we are going to burden someone, best
4 burden the person upon whom the burden produces
5 tremendous benefits. Again, I agree with your kind of
6 limited use of what you just articulated of the notice
7 of intent to use. I think it's mildly beneficial, at
8 least in the realm of unpublished works. But, you
9 know, given if you have a categorical approach, if you
10 define orphan works, at least for published works
11 based on registry information, you don't need it.

12 MR. MOILANEN: I think it's time to debunk
13 one of the myths that has been kind of floating around
14 this entire process. With rare exceptions individual
15 creators cannot afford to file a copyright
16 infringement suit. Even where they are eligible for
17 statutory damages and attorney's fees, they can't
18 afford to bankroll the out-of-pocket costs.

19 So if you are talking about filing an
20 infringement suit or any kind of a suit where the
21 relief is going to be an injunction, there is
22 absolutely zero possibility that at least unless you
23 are Corbis or Getty or somebody like that, you are
24 going to be able to afford to actually achieve the
25 illusory relief that would be built into the system.

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1 MR. METALITZ: I have to think more about
2 what you have proposed, of course, and the specifics
3 but I think it touches on one way to approach this.
4 As I said before, it may be that this notice of intent
5 to use is going to be more useful in some sectors than
6 in others and maybe more useful in certain kinds of
7 works than with others.

8 Another way to approach it is that our
9 proposal was that it should be a requirement in order
10 for someone to claim orphan work status to show that
11 they had filed a timely notice of intent to use.
12 Another approach would be to provide incentives for
13 doing that without making it a binary "you're in or
14 you're out" type of determination.

15 As I understand it, this would be an
16 incentive for someone to file a notice of intent to
17 use but it wouldn't determined whether or not they
18 otherwise -- there's a lot of ways in which that could
19 be structured. We haven't gotten into questions such
20 as you has the burden of proving that your search was
21 duly diligent and so forth.

22 There are certainly ways that we can think
23 about encouraging or giving users strong incentives to
24 file a notice of intent to use without necessarily
25 making it a mandatory requirement in all cases if they

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1 wanted to claim orphan works status.

2 MR. BAND: Would you consider as part of
3 this idea that -- what I heard is that the notice of
4 intent would not only say intend but it would also
5 include some description of the search and the belief,
6 under penalty of perjury or something perhaps, that it
7 was a diligent search and so forth. This goes maybe
8 to Steve's point.

9 Would there then maybe be a presumption of
10 not validity but a presumption that it was, in fact,
11 a good faith search that would then -- again, this
12 gets to the point that Steve was making about
13 incentives. Maybe it could be a voluntary system but
14 then you give the user the incentive to do it by
15 giving him this benefit of saying, "Well, if you do
16 this filing, then there would be a presumption that it
17 was a reasonable search."

18 Then the burden would shift in litigation
19 if that ever happens. I agree with Victor it will be
20 very rare but if there is litigation, then the burden
21 would shift and it would be the owner's burden to
22 prove that was not a reasonable search.

23 MR. SIGALL: I haven't thought it through
24 enough to answer that question but that is the kind of
25 thing that I think may be more the subject for the

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1 panel for Topic 3. That's the kind of thing that you
2 could do, and you may have to do. If you don't make
3 it mandatory you may have to do that to encourage
4 people to do that.

5 One of the other thoughts behind this was
6 related to the question of let's say you do a
7 reasonable search and then two months later before you
8 started the use you discover while searching for
9 another work the owner. Not that the owner comes up
10 and tells you who it is but you discover the owner.

11 You encourage some reliance efforts and
12 reliance interest based on your original search. One
13 of the questions that we had talked about within the
14 Copyright Office was what do you do in that kind of
15 situation, which isn't really a subject for this topic
16 but that is the other maybe beneficial use of this
17 type of system to maybe create a presumption like that
18 and cut off your obligation to do the search from that
19 point forward in those cases.

20 MR. OAKLEY: I see where this idea has a
21 certain appeal, particularly after the 90-day period
22 and you get ongoing permission. On the other hand,
23 I'm thinking back to Jonathan's issue that he raised
24 of the \$300,000 item repository.

25 I think about having to file such a

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1 document on each of 300,000 items and the burden seems
2 pretty significant, particularly if we anticipate that
3 no one or one person might come forward out of the
4 group. On a cost benefit basis I'm not sure it's
5 worth it. Therefore, I have some pretty serious
6 reservations about the notice registry ahead of time
7 again.

8 MS. WOLFF: In thinking of the notice of
9 intent to use, I see that either there will be a big
10 burden on the millions or hundreds of thousands of
11 small creators and artists and then I see a whole
12 industry where they all have to pay someone like if
13 you own a trademark where you have to pay someone to
14 start searching to see if anyone is using something.
15 I don't know if that is an added expense and burden
16 yet again on a smaller creator that may not make it
17 that workable.

18 MR. SLEVEN: My reaction to your
19 suggestion is it might have some benefit, and I'll
20 talk about the potential benefit in a minute but I
21 think the harms that I mentioned earlier outweigh any
22 small benefit.

23 I think about a 90-day period as somebody
24 said before, and it's often true, that rights
25 clearance issues often start later in a process after

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1 a work has been close enough to fix that the author
2 knows what material he or she wants to include in a
3 work.

4 Then you start searching rights. You have
5 to undergo your diligent search before you do the
6 filing that you're hypothesizing. So you've taken
7 that time and then you have another 90-day period
8 after that. That is quite a long stretch before you
9 can practicably make use of the orphan work and take
10 advantage of the statute.

11 Now, different people, different
12 industries will have different reactions to having
13 limited damages but still being subject to an
14 injunction. As a book publisher I'm not going to take
15 a risk of -- I'm not going to put it between the
16 covers if the book has a likelihood of being enjoined
17 50 days later just as we are starting to sell copies
18 and after we've printed X thousand copies.

19 I don't mind if the owner comes forward
20 and pays them but if there's a risk of an injunction,
21 I'm going to say, "No, I've got to wait until after
22 that period." So for I don't think a lot of benefit
23 you're really imposing a time burden on uses. As far
24 as the benefit, you mentioned it might remedy the
25 unpublished.

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1 Only, I think, in a small number of cases
2 because the model that I see often on unpublished uses
3 is I don't know anything about it. Somebody is doing
4 a history of some town and the local library has a box
5 of photos.

6 It's a photo of a soldier marching off to
7 World War II. It doesn't list the photographer on the
8 back. I have no clue who the person is. What's the
9 search? What does the notice look like? Who is it
10 going to benefit?

11 Maybe I don't use it and maybe I do use it
12 because it shows the pride the town had in the soldier
13 or whatever it is, but I don't think -- that's one
14 example but that replicates over and over in my
15 experience a "we've got no clue where it's from"
16 archival historical document or image that has
17 editorial value.

18 MS. MURRAY: Yes. I guess a distinction
19 should be made between what we had proposed which was
20 really a database just setting forth affirmations of
21 diligent search and the steps taken in which to find
22 the owner of an orphan work and this idea of filing
23 notices of intent to use.

24 I mean, I think Allan makes a very good
25 point that you don't want -- anybody who is in a

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1 competitive industry doesn't necessarily want to have
2 to publish what they are doing. I think there is a
3 distinction there. I do think there is a lot of
4 benefit to having this perhaps voluntary database
5 setting forth the steps taken in doing a diligent
6 search.

7 I say now perhaps voluntary because I see
8 that 300,000 documents or items where you don't
9 necessarily know the title or the owner would be a
10 little bit onerous but at least in some sectors I
11 still think it would be very beneficial in doing
12 things like creating industry standards or, at least,
13 publishing industry standards within various sectors
14 of how a diligent search ought to be -- a duly
15 diligent search ought to be done.

16 You know, I think we also have some
17 problems with this notion of forever foregoing
18 injunctive relief, particularly in the idea that you
19 were describing, Jule, because, again, I think
20 somebody pointed out rightly that users -- I mean,
21 owners, particularly individual owners, are not going
22 to be searching this database on a constant basis,
23 particularly if they are owners who are obscure and
24 may be difficult to find, or owners of works that are
25 obscure.

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1 MR. BAND: Following on Bob's point, maybe
2 -- and, again, just sort of thinking off the top of my
3 head. Maybe the way to make a system work for a
4 voluntary system and you would have not only the
5 benefit of no injunctive relief after a certain point
6 but maybe also no damages. Then that would really
7 create a safe harbor. You are doing this notice of
8 intent to use and then there is a reasonable quid pro
9 quo that goes along with that.

10 MR. ROZEN: Following along those
11 comments, maybe we could see it as a continuum of
12 responsibilities that you would have to give you a
13 continuum of rights or protections or protections from
14 liability, I guess. The more you do, for example,
15 signing up for registry, giving a notice of intent
16 would give you greater protection and you can design
17 it that way based on that.

18 The other thing is I think it makes a lot
19 of sense to separate -- in all this discussion it
20 seems like we keep coming back to 300,000 photographs
21 and to the World War II picture that somebody has
22 found in some library somewhere. I think it makes a
23 lot of sense to separate and have different standards
24 or different requirements by sector, by the type of
25 copyrighted product that you're using.

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1 MS. KIM: With regard to your thought
2 regarding filing a notice of intent to use as to an
3 unpublished work, I feel very strongly being that my
4 father was a writer, very prolific, and he had over 50
5 publications. He wrote every single day, you know,
6 pretty much until the day he died and he has many
7 unpublished works.

8 I can't help but wonder that if there is
9 this kind of mechanism put into place, will that erode
10 at all the strength the author's or copyright owner's
11 copyright protection with regard to unpublished works
12 in view of the safe harbor or limitation of remedies
13 when someone actually files such notice?

14 MS. MURRAY: Right. I was just going to
15 say that I do think if you do set up this notice of
16 intent there could be a lot of abuse of the system,
17 particularly somebody was at least suggesting that
18 alone would constitute the diligent search or lead to
19 a work being designated orphan if somebody didn't come
20 forward after the notice was filed so that's another
21 thing.

22 MR. METALITZ: I would agree we have to
23 make sure the notice of intent to use tail doesn't wag
24 the orphan works dog here. As the discussion on this
25 has progressed, it sounds like all you have to do is

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1 file this notice and then in effect, as our colleague
2 from this morning was saying, the work almost seems to
3 be in the public domain at that point.

4 I think we need to step back and I think
5 the idea that in some sectors for some types of uses
6 this would be very useful. I think in Lee's example
7 perhaps it may well be that having a notice of intent
8 to use would be very helpful to her in ensuring that
9 her father's works were not used under the claim that
10 they were orphan works.

11 I think there is still some marginal
12 benefit to this and I think it should be a tool that
13 should be used where appropriate but I don't think it
14 should take the place of the due diligence that really
15 all of this comes back to. I would be very concerned
16 if, in fact, it kind of has a way of circumventing
17 that.

18 MR. SIGALL: Let me ask a further question
19 related to that, the question of another obligation
20 that might be imposed on a user. The question is is
21 there a continuing obligation on their part to search,
22 to do a reasonable search and get back to the question
23 of what happens when after doing a reasonable search
24 they might get information that identifies the owner,
25 not necessarily from the owner coming up.

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1 One of the suggestions, I think, from the
2 museum written comments was a fixed term for this
3 orphan works -- they proposed an exemption but this
4 orphan works limitation, if you will, given to the
5 owner, five years, seven years, so that you do a
6 reasonable search and then after five years you have
7 to do it again. What are the thoughts related to
8 essentially a term provision for this limitation that
9 will be granted to someone who completes a reasonably
10 diligent search and you can't find the owner. Let's
11 go to Jeff, Anne, Chris, Alex.

12 MR. CUNARD: Although I understand the
13 merits of that approach from a museum in mass
14 digitation perspective, I think it's a completely
15 unworkable approach with respect to people who publish
16 in hard copy. If you publish a journal or you publish
17 a book, it is out there and is going to be published
18 for a long period of time.

19 If you publish a journal in hard 'copy
20 today and it's now being made available
21 electronically, for example, through JSTORE, it is
22 just infeasible to think that either JSTORE or the
23 journal publisher is every five years going to be
24 doing a search of all of the works that were contained
25 in all of the issues for that period of time.

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1 It would be an impossible burden and I
2 think it's a nonstarter approach as far as I'm
3 concerned except maybe with respect to a particular
4 subset of works that are available on the web where
5 it's very easy to do these searches and it's easy to
6 take them down.

7 MS. CHAITOVITZ: Well, again, representing
8 both the original creators and the creators who want
9 to use it and to use these works and looking for a
10 balance, one of the things that I would be concerned
11 with if that were to happen would be the new creation.
12 I mean, all of a sudden if it's a record that had a
13 sample in it, you're then perhaps limiting its
14 copyright term to seven years.

15 I mean, you're destroying -- because they
16 are using in a derivative work. They are sampling it
17 through their new creation or it's something that
18 appears in a movie, they have to go back and reedit
19 the whole movie. That just wouldn't be feasible to
20 require such a burden every seven years and it would
21 impose upon the new creator's ability to exploit their
22 copyright.

23 MR. SPRIGMAN: I would agree with that and
24 expand it a little bit more. Works that have
25 significant commercial value now are largely

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1 registered so the orphan works that we're talking
2 about, the ones at the moment, don't. If a user uses
3 an orphan work and transforms it in a way or sets it
4 in another context that gives it significant value, I
5 don't see why the original owner couldn't then claim
6 rights in the work by registering it. Okay?

7 He may not have rights against that
8 particular user but he may have rights respectively
9 against everybody else. That create the opportunity
10 for both the original creator and the follow-on
11 creator to profit because the follow-on creator may
12 create a market for something that the original
13 creator can then continue to exploit.

14 I do think that, again, the use of orphan
15 works will sometimes, if we're lucky, create our
16 opportunities, if we do this correctly, for original
17 creators to actually profit in the future from their
18 folks even if they are not profiting from them now.

19 MR. MacGILIVRAY: I guess the big question
20 there depends on what the diligence is. If the
21 diligence is something that can be done automatically,
22 it can be done by as machine at a set of times, then
23 something like that wouldn't be the biggest problem in
24 the world such as checking some sort of voluntary
25 registry.

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1 This will be different for different types
2 of work. It may be much harder to do it for
3 photographs absent some sort of way of understand what
4 a photograph is. Certainly if something like that
5 could happen, I do think there is a way you could do
6 these types of checks. Then the question is just what
7 happens when you do your second diligence check and
8 you find that the work is there.

9 For a user like us, we are the minority as
10 Jeff said. We would be willing to then contact the
11 copyright holder and talk with them about whether we
12 should be able to still make use of that work for
13 other users like the one Anne suggested. Maybe that's
14 not feasible.

15 MR. ADLER: I just can't imagine why you
16 would want to build in a periodic uncertainty into
17 this process because what it would mean is whatever
18 term you picked, if you said five years, three years
19 into the process people who are considering any kind
20 of a deal with the orphan user -- the user of the
21 orphan work would now, of course, have certain worries
22 and concerns about what their deal is going to mean
23 two years down the road. It just seems to me that in
24 the interest of trying to settle rights and settle
25 permissions that that type of an approach would be

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1 very unwise.

2 MS. WOLFF: I think for works that are
3 used transformative, for example, a song that is
4 sampled or a clip or an image that is put into a
5 documentary or film, that the reasonable license fees
6 should satisfy that problem. I think maybe I was
7 misunderstood earlier. I think there are lots of not-
8 for-profit and noncommercial uses that are very big of
9 orphan works.

10 I think the situations where you are
11 actually going to find a user will be more frequent in
12 more the commercial type uses. I think in those
13 situations paying a market value licensee solves the
14 problem of both. You get paid for your actual use in
15 the song, and that's historically very easy to figure
16 out what you get paid for a sample.

17 The use of a film clip or a still in a
18 documentary or movie is very easy to figure out. And
19 then you haven't prevented the movie from continuing.
20 You haven't prevented a song. You haven't prevented
21 a documentary and we haven't built in a lot of
22 complications.

23 MR. METALITZ: I think this leads to a
24 discussion of an issue that we have talked a little
25 bit about, but not very much, which is should orphan

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1 work status apply equally to all uses. We've talked
2 about different types of works and different types of
3 users.

4 You can see a scenario, for example, in
5 which somebody does their duly diligent search and
6 finds that they can't identify the owner of a piece of
7 audio visual material. They include a 10-second clip
8 in their documentary.

9 A few years later they say, "Maybe we
10 should just do a remake of that movie. Let's just
11 create a derivative work based on that movie. We only
12 used 10 seconds in our original one but let's just do
13 a remake. We've already determined that we can't
14 through due diligence locate the copyright owner or
15 communicate with him or her."

16 The problem is, of course, that the stakes
17 are then much higher for the absent copyright owner
18 and it really leads to the question of whether --
19 first of all, having a notice of intent to use would
20 help in the situation because it would define what use
21 was intended to be made and might guard against the
22 abuse of getting your toe under the door and then
23 taking over the whole house.

24 But it also raises the question of are
25 there certain uses that shouldn't be eligible for

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1 orphan works treatment. Are there certain uses that
2 so totally occupy the field and take the entire value
3 of a work that perhaps we shouldn't following this
4 procedure at all. I don't know what the answer to
5 that is but I think your question kind of raises this.

6 We thought about this problem first in
7 terms of piggybacking. User A does a search. Five
8 years later should User B have to do his own search.
9 I think the answer is yes. Here you're saying User A
10 did the search. Can they rely on that five years
11 later or five months later to do a totally different
12 use than what they originally intended. I think that
13 raises some troublesome questions.

14 MR. BAND: I guess I'm going to go in the
15 same direction as Steve and then flip it and go in the
16 opposite direction which is, you're right, there are
17 very different kinds of uses and conceivably different
18 remedies perhaps should flow from those depending on
19 the circumstances so I could see a situation, let's
20 say, if the use is purely digital.

21 Again, let's say going back to the Cornell
22 example where you digitized the 300,000 works and they
23 are all up on the web and then one person shows up and
24 says, "My father took that picture," and they are able
25 to show it. Maybe if you almost like a notice and

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1 take down, going back to the DMCA, you take it down
2 and that should be the end of that. There should be
3 no remedies because you have, in essence given the
4 person an injunctive. They have gotten injunctive
5 relief but you shouldn't be liable for any damages in
6 that situation.

7 In other situations where you can't do a
8 notice and take down but let's say a book has been
9 published, then again injunctive relief wouldn't be
10 appropriate because you have relied on it reasonably
11 but then maybe you should pay some nominal damages.
12 It seems again different kinds of uses might lead to
13 different kinds of remedies that would be fair for
14 everyone.

15 MR. SLEVEN: Steve raised what I think
16 might be one of your hardest questions. I'm not sure
17 whether you wanted to address it now or within the
18 rubric of tomorrow morning, consequences of owner
19 reappearance. Namely, for the original use following
20 a diligent search, what constitutes that use? What
21 permutations? Do you want to do that now or tomorrow?

22 MR. SIGALL: We are running out of time.
23 You can give me some thoughts tomorrow maybe as a
24 preview to what you might think and we can pick up the
25 discussion tomorrow. I think it does bleed over

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1 between the two issues.

2 MR. SLEVEN: from our standpoint, one
3 possible solution would be when rights are in ordinary
4 practice recleared. For instance, using again -- I
5 hate to be parochial but using the book business which
6 I know, when we do a hardcover of a book and due
7 whatever diligent search under an orphan work statute,
8 do whatever rights clearance, whatever we do, we then
9 will include that in the paperback book and in the
10 audio book and in the e-book without reclearing it
11 being understood that the rights that we've cleared
12 the first time are supposed to cover that.

13 We will also license foreign licensees,
14 etc., without a reclearance process. However, if we
15 sell rights or the author sells rights for, I'll give
16 an example, a movie version, the movie producers would
17 typically reclear. I think that is the correct line.
18 You can't have -- you have to have a research every
19 printing or every paperback or trade paper and mass
20 market and audio. That's a preview of a difficult
21 issue.

22 MR. SIGALL: I was told by Beth it sounds
23 like Section 201(c) of the Copyright Act. As that
24 caused any controversy? I don't know.

25 MS. MURRAY: Just adding onto what Paul

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1 said, you know, he works for a great publisher that is
2 very responsible and he is a gatekeeper. However, it
3 is in pretty much every trade book contract that I've
4 seen and probably most other kinds of publishing
5 contracts I've seen the onus is on the author to
6 indemnify the publisher for liability of any sort and
7 to warrant that they've gotten all the permissions.

8 They have the right to publish what they
9 deliver to the publisher and also to actually pay for
10 and get the permissions so I think that would be very
11 onerous for individual authors to have to look again
12 later once the book's been published for an owner of
13 an orphan work.

14 MR. HOLLAND: This may be a subject for
15 tomorrow, too, but I have been thinking -- it keeps
16 sticking out as something that is not resolved in all
17 this. We keep talking about positive incentives for
18 users and how can we make it easier for users and what
19 incentives can we give them to use more work and so
20 on.

21 Most of the people who are copyright
22 protected right now don't really understand much about
23 copyright. All they know is that they know they will
24 have copyright for the rest of their lives. If we
25 change this law so that orphan works are available, a

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1 lot of people will still think their work is protected
2 and they don't have to do anything.

3 How you go about notifying an entire
4 community that the law has changed and that their work
5 may be available? It seems to me that whatever system
6 you build in you need to build in some positive
7 incentives for creators to start monitoring their
8 copyrights on an ongoing basis.

9 MR. NEWMAN: It's been touched upon but I
10 would just like to reiterate from the film maker's
11 perspective that any secondary follow-up like that
12 would ruin the system for me as a film maker because
13 my work can be pulled off the shelf. As a distributor
14 I wouldn't want to purchase that work either to take
15 out so there is no -- I mean, it doesn't seem workable
16 at all.

17 Now, I do think if a right's holder does
18 surface, they should, of course, be able in the future
19 to profit from their work but that shouldn't in the
20 life of the work that it has gone through whatever
21 processes and whatever system you've put in place. If
22 it's possible that it's going to be able to be pulled
23 off the shelf or stopped from distribution in some
24 way, then it's not going through this whole process to
25 begin with as a film maker.

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1 Of course, I don't know if this is for
2 today or tomorrow but there should be some look at the
3 piggybacking issue. Our feeling is that they should
4 be some kind of secondary -- you know, that work is
5 not orphaned forever and never claimable again.
6 People should still have to do some reasonable effort
7 search and all that can be addressed but it should
8 definitely not be hanging over your head after you
9 have created a work that might have used an orphan
10 work in perpetuity.

11 MR. SIGALL: Paul.

12 MR. SLEVEN: Just one more complication.
13 I don't know if this is the right rubric but to bring
14 to your attention in response to piggybacking the
15 litany of uses that I just mentioned may well be by
16 different users. Kay is exactly right. It is the
17 author who does the search and the publisher and the
18 paperback publisher and the audio book publisher and
19 the electronic book publisher who then rely on it.

20 When we talk about piggybacking, I feel
21 strongly that an unrelated use should not be able to
22 per se piggyback on what the author did. But if the
23 author's publisher and the publisher's licensee cannot
24 piggyback, then the system breaks down for any
25 industry, any type of use where there is -- on the web

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1 you've got the ISPs and everything. All of them need
2 to rely on the individual diligent search for each use
3 which is why I think at AAP we like to call this
4 orphan use, not orphan work.

5 MR. BAND: I think the notion of a search
6 needs to be reasonable under the circumstances. I
7 think that goes to piggybacking so it would seem to me
8 that if you are doing -- you have the hardcover
9 version and then the paperback version and then the
10 audio version. For the same publisher to rely on his
11 previous search from a month ago or two months ago,
12 that seems completely reasonable under the
13 circumstances.

14 On the other hand, if I'm a film company
15 coming two years later, for me to rely on your search
16 I don't think that's -- I don't think that's
17 reasonable. I think at that point I should have to do
18 my own search or see what you did and maybe rely on it
19 to a limited extent and then do at the very least
20 update your search. It seems to me it would be per se
21 unreasonable for me to be able to rely on your search
22 from doing something completely different.

23 MR. CUNARD: I am going to say that we
24 agree completely and the whole scheme of art
25 publishing, a scholarship in many other areas would

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1 break down entirely if you had to reclear rights every
2 time there was sort of a new edition of a book.
3 Frankly, the use is the use of the work in the book.

4 It isn't a separate copyrighted work just
5 because it goes into paperwork or just because it goes
6 into trade. I feel very strongly similarly that there
7 shouldn't be piggybacking per se and that basically
8 each subsequent new user if it wants to rely on this
9 orphan works provision needs to do a sort of
10 reasonable due diligent search itself.

11 What we said is, of course, if there is
12 sort of openness and transparency with respect to the
13 first user's use, a national place for the subsequent
14 user to go would be to go to the first user and see
15 what they've done and then build on that search as the
16 search tools improve over time.

17 MR. METALITZ: There is a difficult
18 balance to be struck here because if this whole
19 process is successful, I think one definition of
20 success for this whole process would be increasing
21 skill of searching for -- increasing the general level
22 of skill searching for copyright owners.

23 Also, as several people have said, Jeff
24 most recently, the tools are always improving so that
25 you can't assume that someone who is not findable and

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1 locatable now will be not findable and locatable a
2 couple of years from now. At the same time you
3 obviously have some stability issues in the chain of
4 distribution and so forth. Perhaps the way to deal
5 with this is not that this would affect orphan work
6 status but in terms of the remedies.

7 Again, we both talk about this but the
8 available of injunctive relief you don't want to have
9 a situation where you could enjoin the paperback
10 because six months later the search tools have
11 improved after the hardback came out.

12 But that doesn't necessarily mean
13 certainly not going forward but there may be other
14 elements of relief that would become applicable then
15 because now with improved tools it's easier to find
16 this person.

17 MR. SIGALL: Okay. We are almost out of
18 time. I think most people have had a chance to speak
19 their mind on these issues. I know I'm out of
20 questions, for today anyway. Why don't we wrap it up
21 and the continue again tomorrow for those who are
22 going to be here tomorrow on the third question of
23 what we do when the owner resurfaces.

24 Thanks again for another good panel. A
25 lot of good discussion. Very helpful to us in trying

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1 to at least identify the issues that deal with if not
2 resolving them, at least at this point so thank you.

3 (Whereupon, at 4:54 p.m. off the record to
4 reconvene the next day.)

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