

LIBRARY OF CONGRESS

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ORPHAN WORKS AND MASS DIGITIZATION
ROUNDTABLES

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TUESDAY
MARCH 11, 2014

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The Roundtables met in the
Library of Congress, 101 Independence Avenue,
S.E., Washington, D.C., at 9:00 a.m.

PRESENT

JACQUELINE CHARLESWORTH, United States
Copyright Office

KARYN TEMPLE CLAGGETT, United States
Copyright Office

FRANK MULLER, United States Copyright Office

CATIE ROWLAND, United States Copyright Office

SESSION 6: REMEDIES AND PROCEDURES REGARDING
ORPHAN WORKS

PATRICK BOYLE, University of Southern
California Intellectual Property and
Technology Law Clinic-International
Documentary Association and Film
Independent

RICHARD BURGESS, American Association of
Independent Music

GREG CRAM, The New York Public Library

EMILY FELTREN, American Association of Law
Libraries

ELIZABETH TOWNSEND GARD, Tulane University

ANN F. HOFFMAN, National Writers Union

ARIEL KATZ, Faculty of Law, University of

Toronto

LEE KNIFE, Digital Media Association
NANCY KOPANS, ITHAKA/JSTOR
JAMES LOVE, Knowledge Ecology International
MARIA D. MATTHEWS, Professional Photographers
of America
MICKEY OSTERREICHER, National Press
Photographers Association
SALLEY SHANNON, American Society of
Journalists & Authors
CHUCK SLOCUM, Writers Guild of America, West
MICHAEL WEINBERG, Public Knowledge

SESSION 7: MASS DIGITIZATION, GENERALLY
PAUL AIKEN, The Authors Guild
JONATHAN BAND, Library Copyright Alliance
JUNE BESEK, Kernochan Center for Law, Media
and the Arts
RICHARD BURGESS, American Association of
Independent Music
MICHAEL W. CARROLL, American
University/Creative Commons USA
BLANE DESSY, Library of Congress
MELISSA LEVINE, University of Michigan
Library
ANDREW MCDIARMID, Center for Democracy &
Technology
CORYNNE MCSHERRY, Electronic Frontier
Foundation
MICKEY OSTERREICHER, National Press
Photographers Association
BROOKE PENROSE, Museum of Fine Arts, Boston
JANICE T. PILCH, Rutgers University Libraries
LEAH PRESCOTT, Georgetown Law Library
JERKER RYD N, National Library of Sweden
BEN SHEFFNER, Motion Picture Association of
America, Inc.

SESSION 8: EXTENDED COLLECTIVE LICENSING AND
MASS DIGITIZATION
GREGORY BARNES, Digital Media Association
BRANDON BUTLER, American University

Washington College of Law

JAN CONSTANTINE, The Authors Guild

MIKE FURLOUGH, HathiTrust Digital Library

ARIEL KATZ, Faculty of Law, University of
Toronto

DEBRA LAKIND, Museum of Fine Arts, Boston

JIM MAHONEY, American Association of
Independent Music

CORYNNE MCSHERRY, Electronic Frontier
Foundation

CASEY RAE, Future of Music Coalition

LAURI RECHARDT, International Federation of
the Phonographic Industry

COLIN RUSHING, SoundExchange, Inc.

JERKER RYD N, National Library of Sweden

FREDRIC SCHROEDER, National Federation of the
Blind

BEN SHEFFNER, Motion Picture Association of
America, Inc.

CYNTHIA TURNER, American Society of
Illustrators Partnership

MICHAEL WEINBERG, Public Knowledge

SESSION 9: THE STRUCTURE AND MECHANICS OF A
POSSIBLE EXTENDED COLLECTIVE LICENSING SYSTEM
IN THE UNITED STATES

PAUL AIKEN, The Authors Guild

GREGORY BARNES, Digital Media Association

SUSAN CHERTKOF, Recording Industry
Association of America

CARRIE DEVORAH, Center for Copyright
Integrity

FREDERIC HABER, Copyright Clearance Center,
Inc.

DOUGLAS HILL, RightsAssist, LLC

ARIEL KATZ, Faculty of Law, University of
Toronto

BRUCE LEHMAN, Association of Medical
Illustrators

MELISSA LEVINE, University of Michigan
Library

SARAH MICHALAK, HathiTrust Digital Library

VICTOR PERLMAN, American Society of Media

Photographers

JANICE T. PILCH, Rutgers University Libraries

CASEY RAE, Future of Music Coalition

COLIN RUSHING, SoundExchange, Inc.

JERKER RYD N, National Library of Sweden

SALLEY SHANNON, American Society of
Journalists & Authors

GREGORY SCOTT STEIN, Tulane University

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

(9:02 a.m.)

MS. CLAGGETT: Good morning and thank you for attending Day 2 of our Orphans Works and Mass Digitization Roundtables. We really had a very, I think, exciting and informative discussion yesterday and we hope to continue the discussion today.

First, just a couple of quick housekeeping items. One, I apologize in advance again, but because of the number of participants, as we mentioned before, we may need to cut off people. We expect people will have about two to three minutes to answer any of the questions we have from the panelists and then two to three minutes, hopefully, for people to respond from the audience. But we do apologize in advance; we will have to cut people off if it is going on too long because we do want to make sure that we have the opportunity to really hear a variety of views and perspectives.

1 I will also read our standard
2 disclaimer with respect to video performances
3 and broadcasting. The panel discussion is
4 being video recorded by the Library of
5 Congress. There will be a short question and
6 answer period at the end of the session. If
7 you decide to participate in that question and
8 answer period, you are giving us permission to
9 include your question or comments in future
10 webcasts and broadcasts.

11 At this time, I would like to ask
12 you to turn off any cell phones or electronic
13 devices that might interfere with the
14 recording of this event.

15 And then one final housekeeping
16 item. As most of you probably have seen from
17 the program, the session this morning will
18 take place here in the Montpelier Room.
19 Unfortunately, we lose this room in the
20 afternoon. So, after lunch, we will move down
21 to a slightly less accommodating hearing room
22 that we have at the Copyright Office, which is

1 a little bit smaller. So, we do apologize in
2 advance for the intimate nature of the room.
3 But hopefully, we will be able to continue the
4 conversation on in the afternoon down there.

5 I will turn it over to Catie for
6 the first panel.

7 MS. ROWLAND: Thank you for
8 coming today. The first thing I want to do
9 is, like yesterday, go around the room and say
10 our names with our organization. If you could
11 also move your table tents so that I can see
12 them, kind of tilt them towards me and maybe
13 not put other ones in front, that would be
14 great so that I can call on your more
15 appropriately. Thank you very much.

16 So, I will start with Ms.
17 Hoffman.

18 MS. HOFFMAN: Ann Hoffman,
19 National Writers Union.

20 MS. GARD: Elizabeth Townsend
21 Gard, Tulane University.

22 MR. WEINBERG: Michael Weinberg,

1 Public Knowledge.

2 MR. BOYLE: Patrick Boyle, on
3 behalf of International Documentary
4 Association and Film Independent.

5 MR. KNIFE: Lee Knife, from the
6 Digital Media Association.

7 MR. OSTERREICHER: Mickey
8 Osterreicher, National Press Photographers
9 Association.

10 MS. MATTHEWS: Maria Matthews,
11 Professional Photographers of America.

12 MS. KOPANS: Nancy Kopans,
13 ITHAKA, which houses JSTOR, Portico and ITHAKA
14 S&R.

15 MR. BURGESS: Richard Burgess, on
16 behalf of A2IM.

17 MS. FELTREN: Emily Feltren,
18 American Association of Law Libraries.

19 MR. LOVE: Jamie Love, Knowledge
20 Ecology International.

21 MR. CRAM: Greg Cram, The New
22 York Public Library.

1 MS. SHANNON: Salley Shannon,
2 ASJA, the American Society of Journalist and
3 Authors.

4 MR. KATZ: Ariel Katz, University
5 of Toronto, Faculty of Law.

6 MR. SLOCUM: Chuck Slocum,
7 Writers Guild of America.

8 MS. CHARLESWORTH: Jacqueline
9 Charlesworth, U.S. Copyright Office.

10 MS. ROWLAND: I'm Catie Rowland
11 from the Copyright Office, and --

12 MS. CLAGGETT: Karyn Temple
13 Claggett.

14 MR. MULLER: Frank Muller,
15 Copyright Office.

16 MS. ROWLAND: Thank you. So, now
17 we can begin.

18 So this panel is about the
19 different types of remedies that might be
20 available if there was an orphan works scheme
21 enacted into legislation. And as most of you,
22 I assume all of you, know, in the past

1 versions of legislation, there were
2 limitations. So, it was not an exception. It
3 was a limitation where there would be
4 reasonable compensation and injunctive relief.

5 And there have been five, six
6 years that have passed since that last
7 legislation was talked about. So, I thought
8 it would be a good idea to talk about it again
9 now; what has changed, what views might be on
10 the different types of compensation,
11 especially in light of the EU Directive.

12 And I wanted to open it up with
13 more of a broad question. I think we should
14 probably split this into two different things,
15 monetary and injunctive relief, so that we can
16 kind of keep track of what is going on. And
17 I thought we would like to start with monetary
18 relief.

19 And last time, in the last
20 legislation, there was this Reasonable
21 Compensation Model. And I wanted to go around
22 and see if anyone had some general thoughts on

1 that. Do you still think the reasonable
2 compensation model is a good idea; and why and
3 why not?

4 Okay, Mr. Katz and then Mr.
5 Burgess.

6 MR. KATZ: I think I'll just
7 start with this slightly more general
8 observation, which is, it seems to me, that a
9 main reason why it has been so challenging to
10 find a solution to the orphan work problem is
11 because we tend to think about it only as a
12 demand side problem. Users need permission,
13 but they try getting permission, but they
14 don't get permission. They can't seek
15 permission because there is nobody to get
16 permission from.

17 But, you know, every demand side
18 problem also has a supply side problem. And
19 the reason why orphan works become orphan is
20 a supply side problem. And the reason is
21 that, rationally for corporate owners, they
22 may just let their work become orphan if they

1 don't expect to have a future stream of
2 revenue that would make it worth their while
3 to maintain their works -- maintain themselves
4 locatable, because it is somewhat costly to do
5 that.

6 So if we think about the problem
7 as a problem that sometimes owners may not
8 have sufficient incentives to maintain
9 themselves locatable, we can also start thinking
10 of the solution from that perspective.

11 And there are many areas of law
12 that we have different sides that may
13 contribute to a problem. For example, in tort
14 law, there is the person who causes injury and
15 there is the victim. But tort law often
16 assigns liability or tweaks the remedies
17 according to whom is the least cost avoider.
18 So, there is a party that is in a better
19 position to avoid a problem or minimize the
20 incidence of the problem or the severity of
21 the problem. The law may either put the
22 entire liability on this party or allocate the

1 liability. So, again, so currently you may be
2 negligent and, therefore, liable. But if the
3 other party could be contributorily liable or
4 comparatively liable and then you would have
5 to pay less, even if you are the injurer.

6 So, I think once we think that
7 copyright owners are often the least cost
8 avoider of the problem, I think that is a
9 reason why thinking solving the problem from
10 the remedy side is appropriate.

11 And in general, I think courts
12 should have, and I would argue they even have
13 it now, a kind of inherent power to tweak the
14 remedies according to the situation -- to take
15 into account the grade to which corporate
16 owners maintain themselves locatable. And if
17 they do not, that should affect the remedy and
18 that can be egregious, the damages, or
19 injunctive relief. It really depends on each
20 particular case which remedy is the
21 appropriate one.

22 MS. ROWLAND: Thank you, Mr.

1 Katz. That reminds me of something that was
2 discussed at our panel yesterday -- where it
3 was kind of the opposite range, where someone
4 suggested that perhaps you would change the
5 statutory damage range. It would be some sort
6 of consideration of whether or not a diligent
7 search had been undertaken or not. So, that
8 I think kind of goes along with that range.

9 Before we get into that
10 specifically, we will come back to that, I
11 wanted to get some more general thoughts as
12 well. I think it was Mr. Burgess, Mr.
13 Osterreicher, and Ms. Gard.

14 MR. BURGESS: The consensus
15 amongst A2IM members is that reasonable
16 compensation is fine and we are in support of
17 the idea of orphan works. But we also are
18 users. We are users and creators. And we
19 know that our members are very diligent in
20 doing their searches to ascertain whether
21 something is -- you know who the owners are,
22 et cetera -- and make sure we get clearances.

1 At the same time, we are very often the
2 victims of people who do not do diligent
3 searches and who basically squat our works and
4 use our works in unauthorized ways.

5 We think that it is very
6 important that we have easy injunctive relief
7 because we are small, independent business
8 owners and if the costs are too great, we
9 simply can't do it. And as far as we are
10 concerned, an unaffordable right is no right
11 at all.

12 So, not only do we want
13 reasonable compensation and easy injunctive
14 relief, but we also believe that legal fees
15 should be reimbursable. We consider that to
16 be absolutely important because for a small
17 business owner, hiring an attorney is a big
18 deal.

19 MS. ROWLAND: Thank you, Mr.
20 Burgess.

21 Mr. Osterreicher.

22 MR. OSTERREICHER: I know

1 yesterday we were talking about a number of
2 things and I expressed the creators' fears
3 about how things would progress. I was really
4 disappointed, later on in the next couple of
5 panels, to constantly hear well, we are going
6 to rely on fair use. And if fair use doesn't
7 work, we get a second bite at the apple.
8 Then, we would like orphan works. And we
9 still don't really want anything to slow us
10 down. So, we really don't want to have much
11 going on with orphan works, except for the
12 fact that we would limit the remedies
13 available to the creators.

14 And one of our proposals, and I
15 don't want to go into, obviously, everything
16 that we have submitted in writing, but we
17 certainly think that part of the orphan works,
18 any orphan works legislation, should be tied
19 to people being willing to participate in this
20 Small Claims Copyright Board, and have that
21 adjudicated that way.

22 And we certainly have a number of

1 other recommendations, but really to level the
2 playing field. This isn't just about speed.
3 It is also about protecting the creator's
4 rights. And I think that is something that we
5 really need to keep in mind here -- that
6 should there be an orphan works legislation,
7 that it has got to come with some safeguards
8 that protect our side as well.

9 Because from our perspective,
10 there are, in terms of addressing it is hard
11 to locate, as I said yesterday, there are many
12 photographers, in particular, who do
13 everything they are supposed to do. They
14 embed the metadata, they do everything. They
15 register. And still, at the end of the day
16 those images, which could have been created
17 five minutes ago, could appear orphaned to
18 somebody trying to locate who that person is.
19 And for them to then suffer some more
20 injustice, in a way, to be still limited in
21 their recovery, I think really does not create
22 a balanced playing field.

1 MS. ROWLAND: Thank you, Mr.
2 Osterreicher. I think Ms. Gard was next.

3 MS. GARD: Talking about -- let's
4 go back to Ariel's comment and sort of a
5 general broad spot. So, Glenn Linney and I
6 ran a class, an orphan works class, where we
7 studied the problem with 12 students pretty
8 intensively and then submitted a reply
9 comment. So, we read everything that has been
10 written on orphan works. And what we ended up
11 coming back to was the copyright law itself.

12 And we thought that the copyright
13 law itself had a lot of mechanisms in place
14 that would, if we look at them, may help this
15 problem. And we saw it as a three-pronged
16 approach.

17 The first one is registration.
18 We saw that the people who were saying there
19 was no orphan work problem had registered
20 their works. Those that thought there was an
21 orphan work problem were not registering their
22 works, were saying they were not registering

1 their works. And so we started to look at
2 what registration was.

3 And registration, in our system,
4 is sort of the key component of the system.
5 So, each system we have had from the beginning
6 had a moment of sort of a triggering effect.
7 So, 1790 title registration, deposit, notice
8 as you go and registration is that for this
9 system. So when you register a work, it tells
10 the world that you actually care about the
11 work and you are going to protect the work
12 against statutory damages, attorneys' fees.

13 We think that, and Kyle Courtney
14 said, well, if it was registered, we wouldn't
15 think it was an orphan work. So, we think
16 starting with registration as the key
17 component of the system would let the world
18 know that it is not orphan. That is the first
19 part.

20 The second is recordation. We
21 heard from the Director's Guild that there
22 were other rights that people didn't know

1 about. And so we think if you have a right,
2 let the Copyright Office know, record it so
3 that the world knows. And that if everyone
4 knows what the rights are and who you are,
5 that it is easier for people to find you and
6 that the Copyright Office is the place to do
7 that.

8 And the third part is relief.
9 So, we are always talking about orphans but
10 oftentimes, I think that they are more lost
11 boys. So, they never grow up. And so one of
12 the problems is that our system is based on a
13 life plus system, and so is most of the world.
14 I work on a project that we look at every
15 copyright law in the world.

16 We need a system that if there is
17 no known authorship, if you don't know who the
18 author is, that then you go to a Berne minimum
19 standard, which is not known, so 50 years from
20 creation. And if there is publication, 50
21 years from publication. That allows you 50
22 years to find the author. And if in that time

1 you find it, it goes to life plus 50, life
2 plus 70, or whatever the system is. It is a
3 very standard system around the world, but it
4 allows the orphans to grow up to be
5 emancipated, to at some point no longer be
6 orphans. And so we think that is an important
7 component of the system.

8 I just wanted to sort of put that
9 out there to start with the copyright law
10 itself. If the metadata is stripped, that we
11 already have stuff in the Copyright Act that
12 tells you there are penalties. If they are
13 too little -- they are very minor penalties --
14 make them really big, but start with what we
15 have and build from there, because it is a
16 good system and there is a lot of thought put
17 into it already.

18 MS. ROWLAND: Thank you, Ms.
19 Gard. I think that that touches on many
20 things that are a little bit beyond the scope
21 of this panel, the copyright law in general --
22 formalities, but, obviously, a lot of people

1 have argued that the lack of formalities are
2 what has caused some of these orphan works
3 problems in the past. But we have seen it in
4 the Berne Convention, so we are a little bit
5 --

6 MS. GARD: Wait. I just want to
7 clarify. I wasn't arguing for formalities at
8 all -- just using the system we actually have.
9 There is no need for going back to a formality
10 system in any way.

11 MS. CLAGGETT: Encouraging
12 voluntary use of the registration system.

13 MS. GARD: Exactly. Exactly.

14 MS. CLAGGETT: Or more voluntary.
15 And perhaps incorporating some of the things
16 that we talked about yesterday, in terms of
17 making that system better and easier and more
18 efficient for photographers and others to be
19 able to use.

20 MS. GARD: Exactly, yes.

21 MS. ROWLAND: Thank you. Now, I
22 think Ms. Kopans was next.

1 MS. KOPANS: Hi. I think while
2 injunctive relief and reasonable compensation
3 without statutory damages feels like a
4 reasonable compromise, I mean, people could
5 disagree about many aspects of that, I want to
6 just point out what that might feel like for
7 a user and ways in which it also still poses
8 problems. I don't have a solution here, but
9 I want to talk about the thought process.

10 If you are a not-for-profit
11 library or museum looking to digitize a
12 collection, that takes time, money, effort --
13 these are precious resources. If there is
14 still a risk of takedown and removal, that is
15 significant. It is not as significant as
16 statutory damages, but it still may weigh in
17 favor of not making that available because
18 there is a lot of other content to get
19 through, too.

20 So, depending on what the goals
21 are here, if there is sort of some sort of
22 public benefit to making certain materials

1 available, even take down and reasonable
2 compensation might weigh against a decision to
3 digitize.

4 MS. ROWLAND: Okay, Mr. Cram.

5 MS. CLAGGETT: And before you
6 begin, I will have a follow-up, I guess, to
7 you and anyone else who wants to respond. We
8 touched on this a little bit yesterday in
9 terms of there were, in previous bills -- in
10 the 2008 bill, specific provisions on the
11 limitation on remedies for nonprofit
12 educational institutions who were operating
13 without a direct or indirect commercial
14 advantage. So, that might be a way to address
15 some of the concerns that you raised, and if
16 anybody wants to respond to that, that would
17 be helpful as well.

18 MS. ROWLAND: That is the type of
19 user question that we started with yesterday
20 but all of you were not on that panel.

21 The next person was Mr. Cram,
22 then Mr. Love, and then Ms. Shannon and Mr.

1 Slocum, and then Mr. Katz again.

2 MR. CRAM: So, I wanted to follow
3 up with what Karyn just said. So, the New
4 York Public Library does not enjoy sovereign
5 immunity. We are subject to monetary damages
6 and that weighs heavily on our decisions to
7 use collections.

8 Let me tell you about a
9 collection that we did digitize that we feel
10 are orphans. This collection is the 1939-1940
11 World's Fair. We have the corporate records
12 that came from the fair and is some 2500 boxes
13 of material, including 12,000 photographs.
14 Looking at the material, it is a heavily-used
15 collection in part because it reflects the
16 time of the '39 and '40 World's Fair. It
17 reflects attitudes at the fair. It reflects
18 what the exhibitions were. It is a really
19 valuable collection. And we realized quickly
20 that our users would benefit from it, from
21 being digitized and being put on line. So,
22 there are about 12,000 promotional photographs

1 in the collection.

2 The good thing about having the
3 corporate records is we were able to conduct
4 a search. I spent two days in our archive
5 looking through the corporate records trying
6 to find any kind of assignments, any kind of
7 copyright transfers, anything before the
8 corporation dissolved, and I found nothing.

9 So, we did a search then on
10 Google and of the Copyright Office's records
11 to try to find a rights holder and we couldn't
12 find a rights holder.

13 So, looking at the worst-case
14 scenario, our digitization of that material
15 and putting it online would result in a
16 maximum statutory damage, in the worst-case
17 scenario, of \$1.8 billion. That would
18 devastate the library; \$1.8 billion would cost
19 us services. It would hurt the public that
20 relies on us. We just couldn't afford it.

21 But we still thought it was a
22 valuable collection and so we ended up

1 digitizing it. We made it part of an
2 application, an app on the iTunes. We made
3 that app available for free and that app ended
4 up being the educational app, or one of the
5 educational apps, of the year for the year
6 that we put it out.

7 So, we thought that use was
8 protected by fair use, but we are also
9 concerned if any orphan works legislation goes
10 forward, which A) we don't think it needs to;
11 but, if it does, we really are concerned about
12 a limitation on remedies. We are
13 conscientious users. We certainly did our
14 homework in this case and we were really
15 concerned about facing statutory damages, even
16 after an orphan's search has been conducted.

17 MS. ROWLAND: So, when we talk
18 about reasonable compensation, you think that
19 would not include the current statutory
20 damages.

21 MR. CRAM: That's right, \$1.8
22 billion would not work for us.

1 MS. ROWLAND: Okay.

2 MS. CLAGGETT: And just to follow
3 up on that as well, so from your perspective,
4 then, reasonable compensation at all might be
5 a problem, not even outside the statutory
6 damages, but you would prefer a provision like
7 we had in the previous bills where, if it was
8 done for nonprofit educational purposes
9 without a direct or indirect commercial
10 advantage, then that provision would be
11 helpful for you guys as well.

12 MR. CRAM: I think so. The
13 language at the end is a little tricky, as I
14 think everyone has identified that language as
15 tricky, but yes. I think that would really be
16 helpful for us. The whole goal here, I think,
17 is to encourage productive uses of orphan
18 works. And having a damages penalty, a
19 monetary damages penalty, hanging over us is
20 not going to encourage us to use this. So,
21 you are not going to get the works out, that
22 maybe the goal of the legislation is to do.

1 MS. ROWLAND: Thank you, Mr.
2 Cram. And I think Mr. Love is next. And then
3 we will go around.

4 MR. LOVE: Thank you very much.
5 In my job, I have to write a lot. And I write
6 book chapters, articles, and things. I
7 remember one time I was trying to get a book
8 chapter that I wrote copied and the place I
9 took it to wouldn't do it because that they
10 thought maybe I didn't have permission to do
11 it. And I said, well, I am the author. And
12 they weren't impressed with that.

13 And so, I had them contact the
14 publisher. The publisher really -- it was
15 kind of an awkward situation because when you
16 can prove that you are owners if you establish
17 -- I mean just being the author, you can't
18 prove that you are the owner because they just
19 assume that there might be some fugitive
20 document that says that you are not the owner.
21 And it is -- kind of -- the burden is on you
22 to prove that it doesn't exist, which is kind

1 of a difficult thing to do.

2 I found that, over a period of
3 time, I have no idea who the right owners on
4 almost everything I have written and I am old
5 enough to have written quite a few things over
6 the years.

7 And so it is just -- as a
8 practical problem, it is one thing to find out
9 who the publisher or who the author is, it is
10 another thing to figure out who the hell owns
11 the rights to the thing. You know for most
12 things that people are not being currently
13 commercially exploited, the reality is nobody
14 has an incentive to keep records to figure it
15 out, to search, to find that stuff. And they
16 are just not very helpful when you ask them to
17 do that. That has been my experience. And I
18 would just put that out there.

19 So, I think that that is part of
20 the problem.

21 Now, I think that the remedies
22 that people have, it is interesting that the

1 Berne, you mentioned the Berne Convention
2 yourself as sort of a reason why we can't talk
3 about formalities. But Berne, I will say,
4 says nothing about remedies or almost nothing
5 about remedies. It says nothing about
6 compensation -- well, except in the exceptions
7 it does, but for infringement, it is really
8 kind of a blank slate. So, I think there is
9 a lot of flexibility there. Usually, the
10 trade agreements are where you really run into
11 the issues about the standards or the norms
12 for both injunctions and for damages.

13 So, it is weird for us. We
14 should be able to, at this meeting, talk about
15 the trade agreements because those are the
16 real contours of public policy that we have to
17 work around and fashion into legislation.

18 And now, in terms of this thing
19 about the formalities about Berne, Berne does
20 not apply to related rights. Now, in the
21 United States, we are not familiar with
22 the related rights concepts. We just call

1 everything copyright. But Berne doesn't apply
2 to everything we call copyright. So, if a
3 singer performs a song, if there are other
4 types of related things that are in Europe
5 would be called related rights in other
6 countries, those things aren't controlled by
7 the Berne anyhow. And, in fact, there is
8 nothing in the Rome Convention, for example,
9 on formalities. That sort of pops up later in
10 some of these later treaties, which are, by
11 the way, not subject to dispute resolution in
12 multilateral treaties at this point, although
13 we are cramming them into dispute resolution
14 and free trade agreements hand over fist as
15 fast as we can.

16 So, I think that, to the extent
17 that you are going to solve the -- are there
18 rights and responsibilities? I think that if
19 a copyrighter wants the government to come in
20 and issue injunctions and big fines and things
21 like that, fine. But then they should have a
22 responsibility to make the system work.

1 So, I think that to the extent
2 that people don't participate or the
3 photographers don't sort of work harder to
4 kind of create like the right kinds of systems
5 and make it easier to verify ownership and
6 other types of publishers and things like
7 that, too, where you can kind of sort things
8 out, it should not be easy to get an
9 injunction if you can't prove that you are the
10 right owner or that it would have been almost
11 impossible for everyone to figure out who the
12 right owner is.

13 And the same thing on really
14 aggressive forms of damages. I think that the
15 -- yesterday I talked a little bit about the
16 fact that the ACTA Agreement and the TPP are
17 changing international norms in a very
18 aggressive way on damages. And that is the
19 problem. And that hasn't happened with the
20 TPP, but once it does it will be subject to
21 dispute resolution by private parties under
22 the investor-state provisions of those

1 agreements.

2 And the state sovereign immunity
3 issue, which is a safeguard for a lot of
4 people, just is not included as a possibility
5 under the TPP agreement. What we are doing is
6 that USTR has basically created a situation
7 where U.S. governments could be fined large
8 amounts of money for having sovereign
9 immunity. I mean, basically, it is illegal
10 under the agreement. It is subject to fines,
11 not by our court system, but by private
12 arbitrators, but very effective, as we are
13 learning with some of the WTO disputes, ways
14 of retaliating through the agreements.

15 And so I think you have got major
16 challenges in dealing with the damages and the
17 formalities issues, not because of the
18 multilateral agreements but because of the
19 trade agreements that you are negotiating
20 which are done in a secretive fashion, behind
21 closed doors, without publishing a text,
22 without these kinds of meetings, without any

1 opportunity to see what the hell is going on.
2 So, I think that it is good that you are
3 having this meeting and you should encourage
4 USTR to open up its process a bit so we can
5 see what they are doing to undermine what you
6 are trying to do here today.

7 MS. ROWLAND: Thank you, Mr.
8 Love. I would like to -- I am going to call
9 on the rest of the people in turn but I would
10 like to really focus on the reasonable
11 compensation part of this, so that we can talk
12 about that a little bit more, being that that
13 is the theme of this panel.

14 I think Ms. Shannon was next.

15 MS. SHANNON: Thank you. I
16 represent the wire walkers, the writers who
17 work without a net, the writers who have no
18 salary, no university salary, particularly, to
19 fall back on. So, we are very different from
20 academic writers. We make our living from
21 what we write. And most of us don't know
22 where the rent will come from in three months.

1 Any person who lives by their endeavors in one
2 of the arts is in this situation.

3 So, we are very aware when our
4 incomes are threatened and they have been in
5 multiple ways in the last decade or so.

6 One of the things that we see
7 that would be very helpful and would prevent
8 a lot of orphans would be to change Section
9 203 so that rights automatically revert to
10 authors when a publisher goes out of business.
11 Right now, there are a lot of writers who are
12 left in injunctive limbo because you can't
13 determine who actually owns the rights. And
14 it is very difficult. I agree with Mickey on
15 that -- that it is very difficult to determine
16 the rights.

17 One of the three tests confirming
18 who owns the rights is the adjudication
19 process. And we are already out of conformity
20 with Berne, in that we have no easy process
21 for injunctive relief. You can't get any more
22 formal than having to take someone to court,

1 and if you are a person who makes \$50,000 or
2 \$60,000 a year, the prospect of going up
3 against a publisher or a large corporation is
4 just about as formal a formality as you can
5 get. In fact, it is impossible.

6 So, some sort of injunctive
7 relief would be very helpful for us. But I
8 want to say that we are also a little bit
9 alarmed, even as I say that, because when you
10 name an amount for a particular piece of
11 writing, that amount very often becomes the
12 ceiling for which a writer will be paid for
13 that kind of work. And aren't we, in some
14 ways, if that happens, running afoul of rate
15 setting injunctions? I mean, if we set a rate
16 for a particular kind of work for
17 compensation, how is that different from a
18 problem with antitrust? I just throw that out
19 there. Because very often when you do talk
20 about a rate for a particular piece of work,
21 you run into that rate-setting problem.

22 MS. CLAGGETT: I would just

1 follow up and we can have others respond. In
2 terms of the reasonable compensation, it would
3 kind of be a general standard that would be
4 set forth in the statute and then the court
5 would have to assess what would be reasonable
6 compensation under the circumstances of the
7 use in that particular case. And I think in
8 our 2006 report we noted that there might be
9 instances, for example, where reasonable
10 compensation could be high or sometimes
11 actually more reasonable compensation might be
12 considered to be very low or even zero if the
13 court was able to establish that the type of
14 use was the kind of use that someone might
15 have just given on a royalty-free basis. So,
16 it would depend based on the case in front of
17 the court.

18 MS. SHANNON: Thank you. That is
19 helpful. I just want to say one last thing.
20 And that is in response to Elizabeth's very
21 thoughtful comments, if we make registering
22 copyright more difficult, we come very close

1 to blaming the victim when there is an issue.
2 And I worry about that, about tightening up
3 the rules for copyright.

4 MS. CLAGGETT: I could respond
5 probably for what Elizabeth was probably
6 saying. She was saying that she doesn't want
7 to make registration more difficult. She
8 actually wants to make it easier to encourage
9 more people to actually use the process.

10 MS. GARD: That's right. And
11 without registering, you don't get statutory
12 damages, you don't get attorneys' fees, right
13 now. Right now.

14 MS. SHANNON: Then we should have
15 automatic registration.

16 MS. GARD: That's right, that
17 would be easier.

18 MS. SHANNON: A presumption of
19 registration.

20 MS. GARD: That's right. Well,
21 you can't -- you have to actually register the
22 work.

1 MS. SHANNON: Yes, I know what we
2 have now. But I think having to go online and
3 pay that \$35 and go through that is
4 intimidating. It is intimidating. Now, all
5 of you in this room find it a very easy thing
6 to do but I tell you that people who are
7 creators don't find it a very easy thing to
8 do.

9 MS. ROWLAND: Understood. And we
10 have a lot of people. Thank you.

11 MS. SHANNON: That's it.

12 MS. ROWLAND: So, I am going to
13 keep going around. But understood. I think
14 the problems with registration, we are very
15 aware of here at the Copyright Office and we
16 obviously always are looking into that issue.

17 Mr. Slocum.

18 MR. SLOCUM: I think one of the
19 key details that is going to have to be worked
20 out here is the level of granularity of the
21 various policies. I tend to see the solutions
22 more in terms of the uses being made, rather

1 than remedies or whatever being variable based
2 on who the user is. And also, as I mentioned
3 before, there is a lot of granularity to what
4 rights might be orphaned and other rights not
5 orphaned.

6 And then, I think, the other
7 thing is that the type of work or the regime
8 under which works are created is going to be
9 very relevant. Our works are created. They
10 are required to be works for hire, under the
11 law. And in that context, there is a very
12 rich and broad sense of what the right
13 compensation is for the actual creators. In
14 our sense, residuals that are set up that are
15 established for the industry.

16 And, as is contemplated a little
17 bit in the DMCA with regard to people that buy
18 film libraries out of bankruptcy, they have to
19 honor those residuals, if there is a database
20 where they can check out our websites and
21 whatnot. I think what would be a good thing
22 for the policy to do is look for established

1 solutions to the problems that are relevant to
2 the very specific criteria, very specific
3 situation of certain works.

4 So, I think there are going to be
5 a lot of solutions out there in the
6 marketplace that have already solved the
7 problem of what is reasonable compensation.
8 There is no need to reinvent.

9 MS. ROWLAND: Thank you, Mr.
10 Slocum. And Mr. Katz was next.

11 MR. KATZ: Yes, I think a bit
12 related to Mr. Slocum's comment, listening to
13 some of the discussion yesterday, the main
14 difficulty arises because we can't also just
15 think about the orphan works as a status
16 question but we try to define what an orphan
17 work is.

18 Okay, so what are the
19 prerequisites? What qualifies to be an
20 orphan? And then that raises a lot of
21 anxieties. Okay, so authors are anxious about
22 a false positives: what happens if my work is

1 designated as an orphan where it shouldn't be?
2 And they are very concerned about that. And
3 users are also concerned about false
4 negatives: what if I did a lot of diligent
5 search but just the last database that exists
6 somewhere, I did not consult that one. And
7 bam, now I am subject to the whole array of
8 damages.

9 Instead, again, we should think
10 about it not as a status question but as a
11 continuum. So, the question of whether a work
12 is orphaned is not something in abstract. It
13 is with respect to a particular use.

14 What are the requirements for
15 that particular use? And that depends, okay,
16 on what the use is, and what kind of work it
17 is. What are the qualities that are available
18 for registration, for accreditation, for a
19 search, and all those things are very fluid
20 and they now become very content-specific.
21 And that should reflect also on the damages --
22 on the remedies.

1 So, for some type of uses or
2 users, limiting damages and saying all
3 injunctive relief, okay, if you are a
4 nonprofit and all you can get û okay, an order
5 stop doing what you are doing or pull the work
6 out is fine. There isn't big risk in that.

7 And so other types of projects,
8 injunctive relief is a disaster and you would
9 be happy to pay damages but think about there
10 is somewhere here I am sure today, there are
11 debates in the patent setting about injunctive
12 relief in the standard-setting organization
13 and all the problems that arise from
14 injunctive relief.

15 So again, it really has to be
16 very case specific, depending on the use --
17 have you other sunk costs that are very
18 difficult to pull out or could you easily do
19 that? If you could easily do that, injunctive
20 relief is great. Otherwise it is a disaster.

21 MS. ROWLAND: I think I see Ms.
22 Hoffman. I think at this point, we keep

1 veering into the injunctive relief arena. So,
2 if anyone has comments on the injunctive
3 relief issues as well, basically, should there
4 be injunctive relief? Should everybody be
5 subject to injunctive relief? Should it be
6 different for different types of works? For
7 example, a derivative work like a film or
8 maybe there is a clip inserted into a
9 documentary, how does that work? That kind of
10 thing.

11 So, if you have questions about,
12 discussions about the reasonable compensation,
13 that would be great, but also we are going to
14 open it up to injunctive relief as well now.
15 I think I have Ms. Matthews and Mr. Weinberg,
16 then Mr. Knife, Mr. Burgess, Ms. Hoffman, and
17 then Mr. Love.

18 So, Ms. Matthews.

19 MS. MATTHEWS: Thank you. For
20 our members as professional photographers, the
21 vast majority of whom are portrait and
22 wedding, folks say shoot about 1,000 images a

1 week, easily, especially folks who are doing
2 weddings.

3 The burden of going through the
4 registration process, for them, is
5 insurmountable. I mean they are, for the most
6 part, one to three-person studios who are all
7 out shooting what, at the end of a calendar
8 year, could amount to 20,000 images for them
9 to catalogue and put into even one of the
10 informal registries that we create as part of
11 just a diligent search is insurmountable, much
12 less register with the Copyright Office.

13 So for them, making reasonable
14 compensation available if something is
15 orphaned, once that diligent search has been
16 completed, if they are not found, is key.
17 What that reasonable compensation is could be
18 left to the marketplace. Most photographers
19 who are in this direct-to-consumer market,
20 themselves, have licensing fees no different
21 than somebody who is in an advertorial or
22 editorial field. They license images for

1 Facebook and Instagram, for the clients to go
2 off and make their own prints, knowing that
3 they will lose revenue by handing over those
4 image files and, potentially, the prospect
5 that they will be manipulated by the client
6 and inadvertently or orphaned.

7 Secondly, we believe that the
8 creator should be able to obtain that
9 compensation, that for them it shouldn't
10 result in a federal lawsuit, that there should
11 be some alternative process, like the small
12 claims court that you are currently exploring,
13 and that the amount that they receive be a
14 reasonable royalty, some token for that use
15 that they might have otherwise licensed, had
16 they been a legitimate user, copyright owner
17 relationship.

18 MS. ROWLAND: I have a follow-up
19 question for you on that. You seem to be more
20 focused on the monetary damages than
21 injunctive relief. How would you feel about
22 the injunctive relief part of the remedies?

1 MS. MATTHEWS: For us, it really
2 depends on the origin of the image. In some
3 instances, it may be easily removable. It may
4 be something that needs to come off a website
5 or out of circulation. In other instances,
6 that inability to cease use should be directly
7 tied back to monetary compensation.

8 MS. ROWLAND: Okay.

9 MS. CLAGGETT: And I just had one
10 quick follow-up as well. It sounds as if, I
11 guess, and I think this is something that
12 Mickey had mentioned as well, the comfort that
13 you all would have with respect to the
14 limitations on remedies and the monetary
15 damages portion -- limiting it to reasonable
16 compensation -- is directly tied to the small
17 claims aspect because even having that broadly
18 available in federal court is a difficult
19 obstacle for you. So you support it, but
20 support it in conjunction with the small
21 claims-type solution.

22 MS. MATTHEWS: Absolutely,

1 because even that reasonable licensing fee
2 that they worked to negotiate is not
3 necessarily going to outweigh the legal fees
4 that they are going to have to expend.

5 MS. ROWLAND: Thank you, Ms.
6 Matthews.

7 Mr. Weinberg?

8 MR. WEINBERG: I just want to,
9 maybe, go to a larger point about thinking
10 about the role of remedies in this whole
11 debate. I think that when we think about
12 remedies, there is a temptation to bring in a
13 lot of other issues as well. And I would urge
14 you to really focus on structuring a remedy
15 system that is a remedy for the problem that
16 is the focus of this proceeding, which is an
17 orphan work. There is someone who undergoes
18 a search. They cannot find the owner. They
19 make use of it and then the owner appears,
20 however. What is the right way to deal with
21 that?

22 There is a temptation at a

1 roundtable like this or any proceeding --
2 there is a representation of creators who are
3 often not going to be orphans in a correctly
4 structured system. And a temptation to
5 structure the remedies to avoid the false
6 positives, the false negatives that Professor
7 Katz is talking about.

8 If you are worried about the
9 false positives and the false negatives, the
10 remedy isn't necessarily the place to fix
11 that. If you are worried about this being
12 used as a way to set a floor for legitimate
13 market payments by people who are operating in
14 the market in a nefarious way, creating
15 remedies that are so scary to prevent that is
16 not necessarily the most efficient way to deal
17 with that.

18 Instead, think about how we
19 define a diligent search as a way to deal with
20 that. If there are problems with a
21 registration system -- if, by chance, the
22 registration system makes it harder for people

1 to register, creating punishing damages is not
2 necessarily the right solution for that.

3 Because having these orphan works out there
4 does create a real, although very diffuse,
5 cost on society.

6 And so, creating remedies that
7 are so punitive that even the New York Public
8 Library is afraid to use them because of fear
9 of use, creates a massive drag that is hard to
10 represent in a place like that but it
11 actually, hopefully, if you correctly
12 structure this system, will be the vast
13 majority of the users, the kind of unknown
14 users on both sides, both the creators and the
15 users. And so there is this temptation to
16 focus on what will hopefully be extremely
17 fringe cases but allowing that to drive all
18 the balancing will result in a system that may
19 be useless to everyone.

20 MS. ROWLAND: I have a follow-up
21 question for you. So, assume that we have
22 this perfect diligent search requirement and

1 everyone is registering and whatnot. If there
2 was an orphan, under that scenario, what would
3 you think the reasonable compensation or
4 injunctive relief option should be?

5 MR. WEINBERG: I think that turns
6 on the uses because the uses are many and the
7 users are many. And I think we run into
8 problems with copyrights when we try a
9 one-size-fits-all solution. I think that is
10 one of the answers that we have seen with the
11 statutory damages.

12 And so it is important to set up
13 a process that really focuses on the
14 reasonableness of the compensation and that is
15 just going to vary. And there is no way to
16 draft around the fact that the reasonableness
17 of damages for a script that gets turned into
18 a multi-billion dollar movie is different than
19 the reasonableness of someone who uses their
20 wedding photos on Facebook without
21 authorization.

22 MS. CLAGGETT: And I had one kind

1 of follow-up because I think that that was
2 generally how the bill was structured before
3 in 2008. But just following up on something
4 Ariel said before in terms of, I guess,
5 assigning some type of responsibility on both
6 ends -- are you suggesting or were you
7 suggesting that somehow the concept of
8 reasonable compensation should take into
9 account, for example, whether a copyright
10 owner registered, whether they were doing
11 something to ensure that they could be found,
12 as opposed to just the standard that we had in
13 2008, which was really just kind of a willing
14 buyer/willing seller-type standard?

15 MR. WEINBERG: Yes, I mean I
16 thought that was a very attractive idea when
17 I heard it earlier. And I think I appreciate
18 that registration imposes a burden. But we
19 are talking about a commercial market here.
20 Right? Buying a camera or buying a word
21 processing software also imposes a burden.
22 And I don't want to be flippant about that and

1 say that any burden is legitimate because they
2 are commercial operators, but you get a lot of
3 benefits in copyright. And society expecting
4 creators to do some sort of action to take
5 full advantage of that does not strike me as
6 unreasonable, especially because we have seen
7 the cost of not doing that is to create this
8 giant pool of works that are just locked away.

9 MS. CLAGGETT: And this is my
10 last follow-up. Just going on this --

11 MR. WEINBERG: She is following
12 up on everything.

13 MS. CLAGGETT: Just because this
14 is kind of a new concept. I know it is in
15 some comments -- well, one of the things we
16 are focusing on is kind of should we just do
17 the 2008 bill or should we add tweaks to it.
18 And this would certainly be a tweak. So,
19 would this be along the lines of something you
20 know, for example, a provision that said in
21 certain circumstances, the court in its
22 discretion could reduce the reasonable

1 compensation, depending on whether the work
2 was registered, whether it was recorded
3 appropriately in the Copyright Office and/or
4 other factors, or something along that line?

5 MR. WEINBERG: Yes, I think you
6 build that into the reasonableness of the
7 compensation. Part of that calculation,
8 whether explicitly or implicitly, may be how
9 much work the rights holder has done to make
10 themselves findable. If they have done a lot
11 of work to make themselves findable and the
12 user has said oh well, but we couldn't find
13 it, then maybe it is more reasonable to
14 compensate the creator than it is if they have
15 not done that.

16 MS. ROWLAND: I will point out on
17 the flip side, if you are going to have a
18 reduction in damages due to not registering
19 your work or whatnot, it might be fair to have
20 an increase in damages for someone who claims
21 they have done a good faith search, when in
22 fact they just punched into Google and that

1 was their only attempt at finding out.

2 MR. WEINBERG: Yes, and I think
3 that is a great way to protect against a lot
4 of the concerns that people at this table have
5 of this system being abused. Because we
6 don't, we, Public Knowledge, will acknowledge
7 think that it is very important to give people
8 a way to access orphan works. We do not think
9 that we should create an orphan works system
10 that in fact allows people to take advantage
11 of creators and say that it was orphan works.

12 So, like all things in copyright,
13 they balance. But it is a legitimate thing to
14 say that some searches are real and some
15 searches are not. And if you don't do a real
16 search, you don't get all of the advantages of
17 the orphan works system, whatever it may be.

18 MS. ROWLAND: And in fact, if you
19 were kicked out of orphans, you might get a
20 higher statutory range.

21 MR. WEINBERG: But as long as
22 there is an actual, functioning orphan works

1 system for good faith actors.

2 MS. ROWLAND: Thank you, Mr.
3 Weinberg.

4 So, I will go down the list of
5 who we have, so you don't need to keep raising
6 your hands. We have Mr. Knife, Mr. Burgess,
7 Ms. Hoffman, Mr. Boyle, Mr. Love, Ms. Gard,
8 and Ms. Kopans. So, we are going to start
9 with Mr. Knife.

10 MR. KNIFE: I feel like I have
11 been waiting about six days to speak, largely
12 because that exchange kind of presaged exactly
13 what I had been waiting to say for a while.

14 First of all, I want to reflect
15 on what was actually just said there. I think
16 using words like reduce or increase is exactly
17 what we don't want to do, including using
18 words like statutory damages. I think we
19 should continue to focus on the idea of
20 reasonable compensation. And I think it is
21 just -- to the idea of what we are trying to
22 do here, which is, I think, ostensibly

1 something ethical and reasonable to start
2 talking about well, you get less, you get
3 more. I don't think it should be talked about
4 that way.

5 But moving off of that, the point
6 I was going to make was something that was
7 touched on here in the exchange, and this goes
8 to both reasonable compensation and also to
9 the potential of injunctive relief, that we
10 should examine everything. We shouldn't just
11 examine whether not the use was commercial,
12 whether or not it was done by a public or a
13 private entity. We have to look at a whole
14 spectrum of things to the point of it being
15 very, very granular. We should look at the
16 type of user, the type of use, the way the
17 work was created, the behavior of the
18 copyright owner and/or author. You have to
19 look at all of those things to determine what
20 reasonable compensation is or whether not
21 there should be injunctive relief. And that
22 includes, as you talked about, moving into the

1 injunctive relief question, whether or not it
2 is, you know, maybe a small piece of a work
3 that is embodied into larger, either
4 transformative or subsequent, work. All of
5 those things have to be considered and that is
6 a difficult process.

7 And in closing, I would just say,
8 and I apologize if I am touching on something
9 that is going to far afield of what you want
10 to talk about here this morning, but that
11 raises concerns about whether or not all of
12 this can be handled in a very fast-moving,
13 low-cost, small claims type of environment.
14 Everything that we are talking about here --
15 just as copyright is in general -- is very,
16 very nuanced; very, very complicated; very,
17 very important for all the parties involved,
18 and has grown up over hundreds of years of
19 legislation -- very, very considered
20 legislation and judicial process.

21 I am not sure that any of this
22 can be kind of crammed down into an

1 easy-to-get-into, easy-to-get-out-of, low-cost
2 resolution. As attractive as that may seem as
3 a concept on first blush, I think when you
4 think about it and you consider all of the
5 concerns that we really have to address here,
6 it becomes less attractive, the idea of having
7 some kind of fast lane, small claims
8 resolution.

9 MS. ROWLAND: Thank you, Mr.
10 Knife. And I will continue to go around to
11 people who have already requested to speak, to
12 talk about things we are talking about.

13 But the issue of small claims
14 keeps popping up. I was going to address it
15 towards the end, but if you have something you
16 want to say before I move along to that
17 aspect, that is fine, too. As you know, the
18 Copyright Office has issued a report on small
19 claims, recommending a small claims tribunal
20 within the Copyright Office. We are big
21 proponents of that and we were hoping that we
22 could talk about that. It got its genesis in

1 the orphan works discussions back in the early
2 2000s and we revisited it more broadly. So,
3 not just for orphan works, but for other works
4 with a smaller economic value and we believe
5 that it would be a good place to do some of
6 this work, which would also make it easier for
7 everyone to get an easy, fast, less-expensive
8 resolution.

9 So, I definitely intend to talk
10 about that towards the end, but if you wanted
11 to say something now, that would be great,
12 too.

13 Mr. Burgess.

14 MR. BURGESS: I want to say that
15 A2IM members are certainly not in favor of
16 creating any system that is onerous for
17 anybody and we are actually not in favor of
18 punitive statutory damages, unless somebody is
19 a mass, continual infringer or somebody
20 encourages other people to infringe, other
21 users to infringe.

22 And we said that I think the idea

1 is shifting any level of responsibility off
2 onto the creator would be incredibly
3 counter-productive because, certainly from the
4 individual creators, freelance writers and
5 musicians and so on and so forth, that would
6 be absolutely impossible because they have
7 difficulty with the registration process as it
8 is. And frankly, even at the modest price
9 that registration is right now, that is more
10 than a lot of artists can afford --likewise
11 with our small business community.

12 So, although registration in many
13 ways makes sense, I know that we have been
14 hearing rumors, talk of the price going up,
15 perhaps doubling. I think any move in that
16 direction would be bad. If there is anyway to
17 improve, to streamline the process, make it
18 easier, make it simpler for creators and,
19 also, if there is any way to reduce the price,
20 I think that would be a good thing.

21 But I do think, and I think
22 several people have said this already, that

1 you can't consider any of these in isolation.
2 The way I see it is, there are rules, tools,
3 and remedies. And I think we were opposed,
4 A2IM was very opposed, to the idea of just
5 extending fair use because already there is
6 utter confusion out there in terms of what is
7 fair use and what defines fair use.

8 So, it seems like having
9 extremely clear rules as to what is a
10 reasonably diligent search is really
11 important. And then the tools with which to
12 do it. So, databases, approved databases,
13 whatever, in order to be able to do it. And
14 then the remedies because, unfortunately,
15 there are bad actors out there. And we are
16 subject to this all the time. This is not
17 just some fantasy. People are just using our
18 works without authorization, without even
19 bothering to contact anybody.

20 And I also have to say, in terms
21 of shifting responsibility back onto the
22 creators, in the world we live in today, with

1 Google and all of the search tools we have, it
2 is not that difficult to find people. And I
3 think registration, if everything was
4 registered by the Copyright Office, that would
5 be a wonderful thing as long as we could make
6 it do-able for independent artists and small
7 labels like A2IM represents. Thank you.

8 MS. ROWLAND: Thank you, Mr.
9 Burgess.

10 Ms. Hoffman.

11 MS. HOFFMAN: I think the whole
12 tone is putting the burden on the wrong party,
13 blaming the victim plus.

14 Somebody wants to use an orphan
15 work. They know who they are. They should be
16 the party required to register and to say here
17 is what we -- we want to use this work. Does
18 anybody claim it? And they ought to be
19 required to publish that for a period of time
20 and give people an opportunity to come
21 forward. And the HathiTrust, again, a very
22 responsible group doing what they thought was

1 a very responsible job and they had to stop it
2 because it was totally irresponsible. But the
3 way they found that out was by publishing it,
4 by publishing this is what we intend to call
5 orphan. And I think if that became the way
6 things operated, a lot of these problems would
7 be eliminated.

8 MS. ROWLAND: Would you fold that
9 into the remedies or would you fold that into
10 just the orphan works? What is an orphan
11 work?

12 MS. HOFFMAN: General orphan
13 works. We are creating, in effect, a new
14 category of work. Let's require people who
15 say they are using it to register it.

16 MS. CLAGGETT: Like an intent to
17 use, as we considered in the past.

18 MS. HOFFMAN: Yes.

19 MS. ROWLAND: Thank you, Ms.
20 Hoffman. Mr. Boyle?

21 MR. BOYLE: Okay, back to
22 remedies. From the perspective of creators,

1 we believe that the rights holder should be
2 allowed to recover reasonable royalties. We
3 support a legislative solution that limits
4 injunctions and statutory damages if it
5 appears they have done a reasonably diligent
6 search.

7 If we don't limit those type of
8 remedies for people who have done a reasonably
9 diligent search, no one is going to use this
10 solution. It won't work because people will
11 still be subject to an injunction that can
12 destroy an entire project at any stage of the
13 project, no matter how much money and time
14 they have put into it. And no one is going to
15 sign up for that kind of solution.

16 A safe harbor for those who
17 perform a reasonably diligent search
18 encourages people to do such searches.
19 Reasonably diligent searches will lead to the
20 discovery of owners, increase licensing
21 opportunities, and reduce the amount of orphan
22 works, all of which are goals of pretty much

1 everyone here, as far as I can tell.

2 Injunctions and statutory damages
3 are a powerful stick, but they don't always
4 work. We are trying to provide a carrot to
5 get people to do a search who are otherwise
6 too afraid to do so because of the penalties
7 associated with a failed search or
8 consequences as such.

9 There are many filmmakers who
10 want to use material, would pay to use that
11 material but they are too afraid to begin the
12 search to get that material.

13 Something I wanted to say is that
14 I agree with what Mr. Weinberg said. And it
15 is important to remember what we are actually
16 talking about here. We are not talking about
17 infringers. Infringers are still subject to
18 the full weight of traditional copyright
19 remedies. We are talking about people who
20 want to use orphan works. And we want to
21 enable people who want to do the right thing
22 to do the right thing. And the way to do that

1 is by limiting remedies, so people can do
2 reasonably diligent searches.

3 MS. ROWLAND: Thank you, Mr.
4 Boyle. I had a follow-up question for you.

5 You were saying you work with
6 films. How do you feel about injunctive
7 relief for films? For example, a sound
8 recording is in the film or something else
9 that might be incorporated into film, how
10 would you think injunctive relief would work
11 with that?

12 MR. BOYLE: Yes, so that is the
13 problem right there. A film can be composed
14 of a thousand different copyright works or
15 more than that. But an injunction can stop an
16 entire project for one potentially infringing
17 copyright work. And it is even more important
18 to remember that it is not the injunction
19 itself that is really the problem. It is the
20 threat of injunction. As we have seen, the
21 patent people can threaten injunctions and
22 stop things before they even get started

1 because it is too hard to fight those
2 litigation costs. It is easier to settle
3 outside of court. And that hold of power is
4 something that we have to caution against.

5 MS. CLAGGETT: And then one
6 follow-up, just to tweak that a little bit or
7 follow-up with a question on that a little
8 bit. So, I understand that you do want to
9 prevent injunctions for kind of transformative
10 works, or works that have been created or
11 derivative works that have been created,
12 rather. But what about injunctive relief for
13 works that have not kind of been turned into
14 a new work, just allowing injunctive relief,
15 if you just took a photograph, for example,
16 and have posted that photograph but not used
17 it in any other type of work?

18 MR. BOYLE: Something that we
19 think -- and it was in the 2008 bill is --
20 judicial discretion is very important in this
21 regard. Reasonable compensation is something
22 that is important.

1 So you balance the hardships.
2 That is the case in all injunctions after
3 eBay. So, something shutting down an entire
4 film is very different than somebody taking a
5 picture off the internet.

6 MS. ROWLAND: Thank you. And to
7 follow up with that, and this is really more
8 for the content owners, all the content
9 owners, which is it seems that there is more
10 of an interest in the reasonable compensation
11 than the injunctive relief in most cases, at
12 least from what we are hearing around the
13 table.

14 And I just wanted to kind of do
15 a quick aside and poll the panel on that.
16 Does anyone have anything very quick to say
17 about their preference for injunctive relief
18 versus monetary relief? Yes, Mr. Slocum.

19 MR. SLOCUM: I think when it
20 comes to sort of the actual distribution of a
21 whole work, especially if it is a substantial
22 work like republishing a book or putting a

1 movie out on a DVD, in those situations,
2 injunctive relief might be much more
3 appropriate because it is the entire economic
4 viability of the original product, if it was
5 incorrectly identified as an orphan work.
6 That would be much more significant than a
7 clip that is incorporated into a two-hour
8 movie.

9 MS. ROWLAND: So, it would
10 depend, to you, on the type of work -- if it
11 was the screenplay versus just a sound
12 recording that was in the background of one
13 scene or something.

14 MR. SLOCUM: Unfortunately, there
15 are a lot of factors. It's how much does the
16 use under the orphan permission overtake the
17 market viability of the product? Was it
18 easily findable as an orphan work? How much
19 of a diligent search? All the factors need to
20 come into play, I think.

21 MS. ROWLAND: Does anyone else
22 have -- Ms. Gard and then --

1 MS. GARD: I think also 512(c) is
2 a really great model. You see that I am a
3 copyright holder. That is my work. Take it
4 down. It happens quick. It doesn't cost a
5 lot. I think it is a really good solution.
6 It is injunctive-like but you are not having
7 to go to the courts. You are not having to
8 register. You are not having to do anything
9 of those sorts of things. And that should be
10 something to consider, in terms of orphan
11 works. It is a quick, fast, easy way to get
12 some relief.

13 MS. ROWLAND: Does anyone else
14 want to speak to the injunctive relief versus
15 reasonable -- Ms. Shannon.

16 MS. SHANNON: In our case, it
17 would be some of both. But I think it would
18 depend on the magnitude of the project. If we
19 had to choose, I think it would be injunctive
20 relief over monetary relief.

21 MS. ROWLAND: Can you explain
22 that?

1 MS. SHANNON: I'm sorry?

2 MS. ROWLAND: Can you expound on
3 that, explain it?

4 MS. SHANNON: Yes. If, for
5 example, there was a dispute about the rights
6 for an entire book and an author wanted to --
7 a book that was out of print and there was a
8 dispute with the publisher about who owned the
9 rights. And the author wants to take a
10 chapter of that book and turn it into a
11 pamphlet and sell it on the internet. And
12 that was what was in play here, a dollar sale
13 pamphlet, then I think a small claim might be
14 appropriate.

15 If it was a much bigger project
16 that was at stake, then injunctive relief, I
17 think, would be more appropriate.

18 MS. ROWLAND: Thank you, Ms.
19 Shannon.

20 Going back to my preexisting list
21 of people who wanted to speak, I think Mr.
22 Love was next.

1 MR. LOVE: Thank you. I mean,
2 one thing on damages, I assume that if a work
3 remains the orphan work, the damages are zero
4 for use. And so you are really talking about
5 a work that starts out being perceived as an
6 orphan and somebody shows up and says hey,
7 wait a second, that is mine. Right, that is
8 the kind of case you are talking about?

9 I think that in the patent area,
10 a couple lessons you might kind of look at to
11 see how things are playing out. You have got
12 the people mentioned about the problem of
13 wordsmithing on the criteria. The
14 Georgia-Pacific, you know, the 15-factor
15 Georgia-Pacific standard for patent things is,
16 just an example, probably where you don't want
17 to go. It has got like a whole wide range of
18 things that you have to consider when you look
19 at a patent and almost nobody can really do a
20 real good expert's job of actually following
21 everything. And because it says everything,
22 it says almost nothing in a way. So, I think

1 that, in some ways, keeping it fairly simple
2 is probably a good idea and trying to figure
3 out what you are trying to accomplish, and
4 leaving it up to some discretion.

5 I would suggest some language
6 because we are interested in expanding access
7 to works, orphan works, and we don't want to
8 discourage people from exploiting and creating
9 more opportunities. Because we think that we
10 are losing a whole huge amount of our culture
11 right now because people are afraid to do
12 anything with the orphan works.

13 And I would say in determining
14 damages, the court may take into consideration
15 the extent to which the work was earlier
16 exploited commercially and the period of time
17 since the work was exploited commercial û I've
18 got too many ands in here -- and the public
19 interest in inducing investments and
20 activities that expand access to orphaned
21 works.

22 So, I had these three issues.

1 One, was the work ever perceived to be a
2 commercial work? Because I think a lot of
3 people around the table here, they have
4 represented people that are professionals.
5 You know, they have got things that they are
6 trying to make money on. I think those things
7 deserve a little bit different status than
8 things where people, it is the family wedding
9 pictures or something like that. That is sort
10 of, in my mind, those are different equities.

11 Secondly, the period of time. I
12 mean if something has been -- it is like two
13 or three years, I can understand why you would
14 be pretty angry if you are still trying to do
15 it. If something is like 40 or 50 years down
16 the road, I think it is a completely different
17 thing. If no one has made a nickel off
18 something for decades, I don't really think it
19 has the same urgency and claim that people
20 around the table have kind of think --

21 So, I think things like that
22 would be, and I don't think they should be,

1 mandatory, but I think by putting it in there,
2 you could say they could take those things
3 into consideration. I think that would
4 helpful.

5 I would point out a few other
6 things, from the patent side, in TRIPS also.
7 TRIPS allows you to eliminate injunctions
8 altogether in Article 42 in cases where you
9 provide either adequate or reasonable
10 compensation in different ways. The U.S. has
11 done this as it relates to federal government
12 use of copyright and patented works through 28
13 USC § 1498 where there is no injunctive relief
14 available and everything is sort of handled
15 this way.

16 We also then, more recently, in
17 the Affordable Care Act, where an infringement
18 of a patent on a biologic drug is limited but
19 there is no injunction available if it is not
20 disclosed. It is sort of similar to orphan
21 works. If you do not disclose your patents to
22 the generic maker of the biologic drug in a

1 timely fashion, you cannot get an injunction.
2 That is just taken off the table. And then
3 they have two different standards for
4 compensation. One is reasonable, the other
5 one is nothing if you are really late.

6 So, they have kind of a graduated
7 response taking away your rights to
8 enforcement, depending on how nondiligent you
9 are in pursuing it. And I think that is --
10 pursuit -- is kind of an interesting model for
11 this. So, I kind of like the idea of, like,
12 the worse you are about pursuing your rights,
13 the fewer rights you have.

14 Your first opportunity is a
15 person has to approach you, if you don't
16 disclose that. And then you lose some rights
17 and if you continue to be a bad actor, you
18 lose more.

19 MS. ROWLAND: Thank you, Mr.
20 Love. I am going to move along because we
21 have a lot of other people who want to make a
22 point. And at this point I also wanted to

1 check in about the small claims issue, because
2 people had talked about the importance of the
3 formalities and how hard it is to go to court.
4 We at the Copyright Office totally agree that
5 there is a very large burden on going to
6 federal court.

7 And I am not sure how familiar
8 everyone is with our small claims report, but
9 one of the aspects of it was that we took the
10 position that it would be an application at
11 the time of bringing the suit within the small
12 claims tribunal versus our normal position
13 that you should have a registration before
14 going to court, which obviously is a position
15 of a circuit court split. But something that
16 would make it a little bit easier for an
17 orphan work owner who, we assume, would be
18 more of a small entity versus a large entity.
19 Although, who knows? It could be both.

20 With that in mind I think I have
21 Ms. Kopans, Mr. Weinberg, and Mr.
22 Osterreicher, and then Mr. Katz, if we have

1 time.

2 Actually, let me give the floor
3 to Ms. Feltren, who has not had the
4 opportunity to speak first and then I will
5 move on.

6 MS. FELTREN: Okay, thanks very
7 much. I just wanted to bring it back to a
8 point earlier that Mr. Cram made and also in
9 the context of the roundtable, in terms of
10 mass digitization. Because I think that a lot
11 of the issues that we are discussing today, at
12 least some of them were also brought up in the
13 2005-2006 discussion, but not so much on the
14 issues of mass digitization. So, I just
15 thought Mr. Cram made some very important
16 points in the context of libraries, because
17 mass digitization projects are going on and
18 the costs, potentially the costs are huge.

19 So, I just wanted to also support
20 the notion of noncommercial actors engaging in
21 noncommercial uses for libraries. I think
22 that would be very important, particularly

1 with mass digitization projects.

2 MS. ROWLAND: Well thank you, Ms.
3 Feltren. And we will have -- our next panel
4 is on mass digitization and we have a couple
5 on extended collective licensing for those who
6 are interested in it.

7 So, Ms. Kopans. And I apologize,
8 but I am going to ask people to be a little
9 more brief because we are running out of time.

10 MS. KOPANS: So another real
11 world example where injunctive relief might
12 not be ideal -- and again, this is in a
13 nonprofit context, we digitize periodicals.
14 There are some wonderful journals that are
15 defunct. And we have searched out, we have
16 found editors. They don't seem to think it is
17 owned by anyone. We would like to digitize
18 these. And at times, we have. It is a pretty
19 big investment because this is not a one odd
20 document. This is a run of a journal.

21 So, in that case, injunctive
22 relief might be less than ideal because we

1 have invested a lot of time. We have sought
2 out editors, others. We have done what we
3 would consider a diligent search. We do
4 publishers and we would be happy to compensate
5 that publisher like we do others for the right
6 to use the content.

7 MS. ROWLAND: Thank you, Ms.
8 Kopans. And I think I am going to call on Mr.
9 Osterreicher next.

10 Before I do, I wanted to point
11 out something that was raised in our small
12 claims roundtables that I think some of you
13 were at, which was that sometimes going to
14 federal court is just out of the question if
15 it costs \$50,000 to litigate in federal court,
16 to try to get a couple of hundred dollars in
17 royalties or reasonable compensation. So, if
18 you wanted to touch on that as well in your
19 comments, that would be nice.

20 MR. OSTERREICHER: I think the
21 practicalities here are that when someone who
22 has created a work realizes that it is being

1 used or misappropriated in some way, I mean we
2 have heard the parade of horrors, the \$1.8
3 billion cost. I mean normally -- and I advise
4 at least all of our members that if you have
5 found that somebody has infringed on your
6 work, don't think you have won the lottery.
7 I mean, you need to obviously -- everybody
8 needs to be reasonable on both sides.

9 And the first approach is not to
10 go to court. It is to either make a phone
11 call and send a letter and say hi, I am so and
12 so and this is my work and I believe you have
13 used it. And let's talk about it.

14 Now, there are some people that
15 say, gee, we are sorry. Let's talk about it.
16 And they have a meeting of the minds and we
17 are done. There are other people that assert
18 fair use and believe that fair use is
19 something that they can rely on. I have,
20 unfortunately, found that it is the "F you"
21 defense. That is what it has become and it is
22 something that people just assert and go on

1 their way, rather than well, wait a minute,
2 that is for the court to decide down the road.
3 So, do you want to go there? That is
4 something to think about.

5 So, what we are trying to figure
6 out here is when everything else has failed,
7 rather than dealing fairly with one another,
8 where do we go in this whole scheme of things?
9 And that is, I think, we need to realize here
10 in terms of keeping that reasonableness in
11 mind, whether it is reasonable compensation.
12 I think all of this can be avoided when
13 somebody realizes that they have used the work
14 inadvertently. They have done the best they
15 could. I mean, HathiTrust is a perfect
16 example. Okay, we thought we were doing the
17 right thing but we are not. So, how do we fix
18 it? Well, in that case they stopped doing it.
19 In another case, when they found out somebody
20 is using a work, okay, let's compensate you
21 fairly and go on from here.

22 So, I think that is something

1 that is really important to keep in mind. And
2 we are like looking at worst-case situations,
3 rather than what we could do at the beginning
4 to avoid all of this.

5 MS. ROWLAND: And I think we
6 talked about earlier, I am not sure if it was
7 you or someone else at the table, who
8 mentioned perhaps trying -- taking advantage
9 of orphan works, the legislation or
10 limitations to having to go to a small claims
11 tribunal, if it was created. How do you feel
12 about that?

13 MR. OSTERREICHER: Absolutely.
14 I mean I think that that is part of it. If
15 you then are going to assert an orphan works
16 defense, in another word, in order to
17 participate in that and avail yourself of it,
18 on the other side of the coin, you are going
19 to have to then be willing to buy into
20 adjudicating this in a small claims venue.

21 MS. ROWLAND: Thank you. And the
22 reason I bring that up, for those who are not

1 familiar with the small claims issue, is that
2 there are many constitutional protections that
3 we need to make sure that we pay attention to
4 and give due consideration to that make it
5 very difficult to try to make it a mandatory
6 small claims court.

7 So, I think we have time for
8 maybe one or two very brief comments. I have
9 Mr. Weinberg, and Mr. Burgess, and Mr. Boyle,
10 if you could leave it very, very briefly, that
11 would be nice.

12 So, Mr. Weinberg.

13 MR. WEINBERG: First, I just want
14 to remind when you are thinking about
15 injunctions and their role, I mean these
16 remedies are not punishments. If you did
17 something actually wrong, you are probably
18 going to be outside the scope of orphan works.

19 And so especially in the context
20 of copyright, we are talking about
21 disseminating information. I don't want to
22 rule out injunctions but I think they should

1 be used especially warily, especially in these
2 commercial contexts, where there often is a
3 number that can remedy the solution, in terms
4 of a monetary penalty.

5 Quickly, I think that it is
6 problematic if we call the registration system
7 broken but then propose the solution for
8 orphan works a registration system on people
9 who want to make use of orphan works. Just
10 conceptually, I have some problems with that
11 that I won't go into for time purposes.

12 The small claims court, I think,
13 is an interesting idea, making it mandatory
14 for orphan works. I do have concerns about
15 those protections and whether or not small
16 claims is kind of a one-size-fits-all for all
17 orphan works systems.

18 And then finally, I guess my role
19 as a public interest person to say that, while
20 sometimes people do assert fair use in
21 problematic ways, I don't know that it is
22 always the "F you" defense. And I think it

1 points to the role of education and the great
2 best practices guides that some of my
3 colleagues have put together at American
4 University to help educate people about the
5 proper role of fair use. Because I expect
6 that in many cases, fair use is a legitimate
7 response to those complaints.

8 MS. ROWLAND: Thank you. Mr.
9 Burgess, some brief comments.

10 MR. BURGESS: Yes, two things,
11 quickly. First is I know our members are
12 somewhat sensitive to the idea of
13 not-for-profit institutions and that it may be
14 possible to have some exceptions in that area.
15 But they would need to be extremely narrowly
16 defined. And then the second thing is with
17 respect to Mr. Love's comment with this
18 declining remedy, based on how quickly you
19 act, that is an impossible situation for a
20 small business. So for an independent, very
21 often you don't even know these usages have
22 happened. It takes you years sometimes to

1 find out and it is often pure luck that you
2 actually do find out.

3 So, the idea that this should be
4 any time out on your remedy would not be
5 acceptable to us.

6 MS. ROWLAND: Thank you, Mr.
7 Burgess. And Mr. Boyle, you get the last word
8 but briefly.

9 MR. BOYLE: All right, also
10 really quick.

11 In regards to fair use, we also
12 think it is important to differentiate between
13 large-scale digitization efforts and
14 case-by-case uses. We have fair use rights
15 that are used but they don't cover all uses,
16 especially when people want a license. And we
17 believe limiting liability will encourage
18 licensing.

19 MS. ROWLAND: Thank you, Mr.
20 Boyle. At this point, I think that concludes
21 our panel. We are not going to have time, I
22 think, to do our audience participation

1 questions but I would like to point out that
2 we are having an entire session at four
3 o'clock today in the hearing room for anyone
4 who has things that they want to say, both
5 from the audience and from the panelists,
6 after the audience members have their
7 opportunity.

8 So, if you have some burning
9 questions about remedies or the small claims
10 court, we would love to hear from you at four
11 o'clock. There will be a sign-up sheet at
12 lunchtime right outside of the room. Thank
13 you.

14 (Whereupon, the foregoing matter went off the
15 record at 10:17 a.m. and went back on the
16 record at 10:30 a.m.)

17 MS. CLAGGETT: We are going to
18 now to turn to a related but slightly separate
19 topic. We have had, as I mentioned earlier,
20 really informative and lively discussion of
21 orphan works, but primarily looking at orphan
22 works from the context of a case-by-case

1 basis. And so now we wanted to touch base
2 with you more broadly about the concept of
3 mass digitization.

4 As many of you may know, in our
5 2011 report on legal issues and mass
6 digitization, we discussed the landscape at
7 that time of mass digitization projects and
8 raised a series of questions that should be
9 considered any policy discussion about mass
10 digitization, including whether mass
11 digitization is something worthy of
12 congressional support, due to either
13 historical or cultural significance.

14 Of course, since that time, the
15 HathiTrust and Google Books cases were decided
16 by the Southern District of New York, which
17 have permitted mass digitization under current
18 law of fair use, at least for certain reasons
19 and in certain contexts. Those cases,
20 however, as most of you know, are on appeal
21 and neither involved large-scale public access
22 to the works at issue or the type of

1 institutional subscription database considered
2 in the Google Books settlement.

3 So, our legal issues and mass
4 digitization analysis document also considered
5 various licensing models that might facilitate
6 mass digitization projects, including direct
7 licensing, statutory licensing, and extended
8 collective licensing.

9 ECL is, as most of you know, a
10 form of collective management where the
11 government allows a collective management
12 organization to license all works within a
13 category, such as all literary works for
14 particular limited uses, regardless of whether
15 the copyright owners belong to the collective
16 management organization or not.

17 While it is not currently a part
18 of the United States framework, it has been
19 adopted for many years, ECL, in several Nordic
20 countries and the United Kingdom recently has
21 also adopted an ECL mechanism in its law for
22 certain uses.

1 And while ECL, as I mentioned,
2 has not really been part of the United States
3 framework, many academics and others referred
4 to the previous Google Books settlement as a
5 form of ECL or a books rights registry that
6 would have facilitated certain uses of out of
7 print books on an opt-out basis and created an
8 unclaimed works fiduciary to search for
9 locatable authors.

10 So at least some groups within
11 the United States and this industry, such as
12 certain publishers, authors, and those
13 libraries that would have participated in this
14 subscription database under the Google Books
15 Settlement were at least willing to consider
16 or accept a framework for ECL under certain
17 instances.

18 So, we wanted to first start off
19 with the consideration of mass digitization
20 generally. And then later we will focus in
21 more detail about the concept of ECL and
22 whether it is an appropriate framework for the

1 United States to consider on a legal basis
2 now.

3 And I will turn it over to Frank
4 for the mass digitization side.

5 MR. MULLER: Thank you. Frank
6 Muller, Attorney-Advisor for Policy and
7 International Affairs at the Copyright Office.

8 Again, we have been instructed by
9 our videographers to read the following
10 statement. For those of you in the audience
11 who have patiently listened to us repeat this
12 statement for the six previous sessions, feel
13 free to tune me out, strain your ears westward
14 and listen for the faint hum of scanning
15 machines currently copying books in Ann Arbor,
16 Michigan en masse.

17 This panel discussion is being
18 video recorded by the Library of Congress.
19 Time permitting, there will be a short
20 question and answer period at the end of the
21 session. If you decide to participate in that
22 question and answer period, you are giving us

1 the permission to include your question or
2 comments in future webcasts and broadcasts.

3 At this time, I would like to ask
4 you to turn off any cell phones or electronic
5 devices that might interfere with the
6 recording of the event.

7 And before we begin, if we could
8 go around the table and if each of the
9 panelists could introduce yourselves, your
10 name and affiliation. And if I could ask you,
11 kindly, to turn your name tent toward me so I
12 can see them. Thank you very much.

13 If we could start with you.

14 MR. DESSY: Blane Dessy, Library
15 of Congress, Library Services Unit.

16 MS. PRESCOTT: Leah Prescott,
17 Associate Law Librarian for Digital
18 Initiatives and Special Collections at
19 Georgetown Law Library.

20 MS. MCSHERRY: Corynne McSherry,
21 Intellectual Property Director, Electronic
22 Frontier Foundation.

1 MR. McDIARMID: Andrew McDiarmid
2 at the Center for Democracy and Technology.

3 MS. PILCH: Janice Pilch,
4 Copyright and Licensing Librarian, Rutgers
5 University Libraries.

6 MR. OSTERREICHER: Mickey
7 Osterreicher, National Press Photographers
8 Association.

9 MS. BESEK: June Besek, Executive
10 Director of the Kernochan Center for Law,
11 Media, and the Arts at Columbia Law School.

12 MS. CONSTANTINE: Jan
13 Constantine, General Counsel, Authors Guild.

14 MR. BURGESS: Richard Burgess,
15 representing A2IM and not Smithsonian or
16 Smithsonian Folkways.

17 MR. BAND: Jonathan Band, for
18 Library Copyright Alliance.

19 MR. SHEFFNER: Ben Sheffner, Vice
20 President, Legal Affairs, Motion Picture
21 Association of America.

22 MR. CARROLL: Mike Carroll at the

1 American University of Washington College of
2 Law and also Creative Commons United States.

3 MS. PENROSE: Brooke Penrose,
4 Museum of Fine Arts, Boston.

5 MS. LEVINE: Melissa Levine, Lead
6 Copyright Officer, University of Michigan
7 Library.

8 MR. RYD N: Jerker RYD N, Senior
9 Legal Advisor at National Library of Sweden.

10 MR. MULLER: Thank you. And just
11 to give us a sense of scope, as Karyn
12 mentioned, we are transitioning from an
13 examination of use of orphan works on a
14 case-by-case or individual basis to an inquiry
15 into the mass digitization of creative works.

16 While orphan works are very often
17 incidentally included in mass digitization
18 projects, several commenters noted that the
19 issue of mass digitization is altogether a
20 horse of a different color.

21 As a preliminary matter, it may
22 be useful to touch upon a point raised

1 yesterday by one of our panelists, which is
2 what exactly is mass digitization? What is a
3 definition of the concept and what is the
4 scope of activities that can be accurately
5 described as the practice of mass
6 digitization?

7 Mr. Carroll.

8 MR. CARROLL: Yes, so that is an
9 excellent question and an important one
10 because digitization seems to focus attention
11 on the act of scanning, format shifting from
12 an analog to a digital format, which is really
13 the wrong place to focus. The focus should be
14 on the use of digital collections.

15 So, the format shifting is
16 clearly a fair use. And so it is sort of not
17 interesting to talk about the scanning. And
18 there are lots of reasons why you might want
19 to invest in that format shifting that, again,
20 don't even apply to the kinds of uses that
21 need licensing. For example, text mining or
22 other kind of computational analysis of

1 digitized collections would fall squarely
2 within \hat{u} either you are not reproducing the
3 work in copies because it is not even a
4 transitory duration to extract the
5 non-copyrightable facts out of that data or,
6 to the extent that you keep a reference copy
7 for the transformative purpose of verifying
8 your results -- that is a fair use.

9 So, those kinds of acts are not
10 of interest but many people who invest in the
11 format shifting, and it is an expensive
12 process, also have some conception of how the
13 digitized outputs will be used. And I do
14 think that is a place where we have a
15 conversation about what uses fall within fair
16 use and what uses fall within a license
17 solution. Does the current licensing market
18 capture those uses that should take place or
19 is there a market failure, such that some kind
20 of legislation?

21 So, I would say uses of large
22 scale digitized collections is what we are

1 really talking about and whether we have a
2 problem that requires a legislative solution.

3 And my perception is that the
4 orphan population within these large scale
5 digitized collections is not always such a
6 significant piece. So, I don't know that the
7 idea of one-off solutions versus mass
8 solutions quite fits when it comes to the use
9 issues.

10 MR. MULLER: Ms. Pilch.

11 MS. PILCH: A general definition,
12 I think, of mass digitization that would apply
13 anywhere is that it usually refers to efforts
14 by institutions such as libraries and archives
15 to digitize their entire collections or part
16 of their collections with the objective to
17 preserve them and to make them available
18 digitally.

19 In this country, as we well know,
20 our conversations about mass digitization
21 started in 2004 because of the Google effort.
22 And the term itself really comes out of the

1 Google effort and we are a bit stuck in that
2 model because that is where it came from.

3 You know, the idea when libraries
4 started working with tech companies to get
5 their materials digitized systematically and
6 factory-style. At that time, we had the
7 concept of mass digitization, large-scale
8 digitization, that wasn't factory style but
9 digitization of collections as a whole. And
10 then there was also the idea of niche
11 digitization, preservation of individual works
12 and making them available.

13 I think at this point in this
14 country we can say that the term mass
15 digitization was used in the context of
16 Google, Microsoft, Open Content Alliance
17 digitization about systematically scanning
18 works to preserve them, to make them
19 searchable electronically through full text
20 searches, to make them publicly available on
21 the internet in excerpts, and eventually in
22 full text.

1 Similar to mass digitization is
2 large-scale digitization by libraries and
3 archives to make works publicly available on
4 the internet. But I do want to mention one
5 other thing, which it isn't anymore only about
6 libraries and archives. There is another way
7 to think about mass digitization. I don't
8 suggest we do this, but I am throwing the idea
9 out. Digitization done by the masses. It is
10 not libraries and archives anymore. Lots of
11 people are putting works on the internet,
12 large amounts of them. And they are being
13 encouraged to do that. Databases are cropping
14 up all over the place as repositories not
15 connected with nonprofit libraries and
16 archives.

17 And so another way of looking at
18 it might be digitization done by the mass
19 population.

20 MR. MULLER: Thank you. Ms.
21 Constantine.

22 MS. CONSTANTINE: I think

1 digitization without authorization is a
2 violation of fair use and that it is not
3 authorized under the copyright law. I would
4 defer to some of the experts like June, who
5 has written extensively on this.

6 I don't think that your
7 definition, Michael, is really -- you are
8 assuming that this is all on the up and up.
9 And I think it started out as Google Gotcha.
10 They went to the libraries and they said I
11 will indemnify you for something that you know
12 and that you have written about, people like
13 Peter Hirtle and others have said, this is not
14 legit. This is a violation of Section 108 and
15 it is a violation of copyright law.

16 And they decided to just take
17 trucks, dump everything in a back of a truck,
18 whether it be public domain, whether it be in
19 copyright, out of copyright, in print, out of
20 print, they didn't check whether it was
21 disintegrating or whether there was any
22 problem in preservation and they just copied

1 20 million books, in violation of copyright.

2 And if you think that that is
3 fair use, notwithstanding the fact that two
4 judges in a lower court have issued that and
5 it is yet to be decided by the Second Circuit
6 or the Supreme Court, just wait for the next
7 lawsuit that we bring against some of you who
8 are using it in different ways than what is
9 being used now by the HathiTrust and by
10 Google. You go one page instead of a snippet,
11 we are going after you. This is a violation
12 of copyright law, pure and simple.

13 MS. CLAGGETT: And I would just
14 respond to that. And I think that Michael
15 Carroll will want to as well. Obviously --
16 (Laughter.)

17 MS. CLAGGETT: Obviously, there
18 is a difference of opinion. There could be a
19 difference of opinion as to whether fair use
20 is appropriate. And that is one of the
21 reasons why we are here, quite frankly.
22 Should there be a legislative solution, if

1 there is a difference opinion as to whether
2 fair use is appropriate, to be able to perhaps
3 still foster and facilitate these uses that
4 maybe the Authors Guild would be okay with if
5 they were compensated for in a way that would
6 still be efficient and easy to do.

7 So, that is the crux of the
8 conversation we are having today.

9 MR. CARROLL: I'm sorry, but we
10 just muddied the waters again and I want to
11 separate it. I'm sorry, Ms. Constantine,
12 there is no authority for format shifting not
13 being a fair use. You have no authority for
14 the proposition that format shifting is not a
15 fair use.

16 Snippets, pages, access is a
17 separate question. But the act of format
18 shifting itself is a fair use.

19 MS. CONSTANTINE: Section 108
20 says what a library can do vis-à-vis making a
21 digital copy out of a print copy.

22 MR. CARROLL: Section 108 is one

1 provision that gives libraries one source of
2 rights. Section 107 is another source.

3 MS. CLAGGETT: Yes, and I will
4 have to interrupt because we can't have a
5 debate about fair use today because I think
6 the legal scholarship as to what is fair use
7 or what isn't fair use could go on for some
8 time and even courts are struggling with that
9 as well.

10 So yes, I think for purposes of
11 the panel, we will have to assume, and we can
12 throw it out to the panelists, that even if
13 maybe format shifting was fair use, there are
14 certain types of mass digitization that I
15 think we could all agree might not qualify as
16 fair use, especially the making available
17 aspect of those in some way or form.

18 So, the question is should there
19 be some legislative solution? But we haven't
20 even got to the legislative solution aspect of
21 it because that is going to be in a later
22 panel. I think right now we are actually just

1 trying to get a grasp of what mass
2 digitization is, what are the types of mass
3 digitization out there. And there will be a
4 conversation later, I think, in terms of what
5 legislative solutions we might want to
6 consider.

7 And I will turn it over to Frank.

8 MR. MULLER: Ms. McSherry.

9 MS. MCSHERRY: So, I'm sorry, I
10 can't help but agree with Professor Carroll
11 but we don't have to have that fight. But I
12 do think fair use does cover a vast majority
13 of what we might be talking about here today.

14 But I also agree that it is more
15 helpful to focus, going forward, on not so
16 much the issue of format shifting, which
17 apparently there is a fight about, although
18 not in the court, but making stuff available
19 to the world for reuse. And if we are going
20 to create databases, what can we do with them?
21 How can we get the most public benefit out of
22 those? If we have this chance now in an

1 unprecedented way to preserve our cultural
2 commons and make our cultural commons
3 available for use and reuse and study and
4 scholarship, how can we best make that
5 possible? And I think it is much more
6 productive if we can kind of keep our focus
7 there.

8 The only other thing I wanted to
9 say is we are at this sort of definitional
10 stage. I think it is quite right that when we
11 talk about digital -- the digitization of our
12 cultural commons -- it is quite right that it
13 isn't only about libraries, nor, hopefully, is
14 it only about Google and libraries. I think
15 we want a world in which actually lots of
16 different people are creating new and
17 wonderful databases for other people to use
18 and reuse. And so, if we are going to have
19 any kind of solution or think about where we
20 should go, we should go to a place where a
21 thousand flowers can bloom, rather than trying
22 to create one or two monopolies. I don't

1 think that is practical and I don't think that
2 is what we want.

3 MR. MULLER: Thank you. Ms.
4 Prescott.

5 MS. PRESCOTT: In addition to it
6 not being just about libraries and being about
7 individuals, it is not just about published
8 works. So, I just wanted to make sure that
9 that gets interjected into the conversation.

10 A lot of times I hear us talking
11 at odds between the concept of collection
12 versus individual object. And I know that
13 this is what this session is about. And in
14 the last session, I know there was a
15 discussion about photographers having to
16 register thousands of images that they took at
17 a single event. And the concept of keeping
18 the concept of collection in consideration, I
19 think, is even important on that. Because if
20 you could consider that collection via a
21 single entity rather than a thousand
22 individual photographs when the metadata would

1 be identical pretty much anyway.

2 So, I think the concept of
3 collection versus individual is important in
4 a lot of ways and I think that it is important
5 to remember that within the academic universe
6 the world is changing drastically. When we
7 see elementary school children going off with
8 iPads as part of their education, we know that
9 digital objects are a fundamental part, even
10 now, and will only continue to be. And as
11 that happens, the published materials will
12 start to -- there will be solutions found, I
13 am confident. Maybe that is overly confident,
14 but it is the unpublished materials that
15 really are some of the thorniest issues from
16 a library perspective, in terms of mass
17 digitization. It isn't even necessarily the
18 published materials. It is the unique
19 materials that are going to go forward as
20 being of the most value within the academy.
21 So, I just wanted to make sure that we keep
22 that perspective as well.

1 MR. MULLER: Mr. Band, Mr.
2 Burgess, and Mr. Osterreicher.

3 MR. BAND: So, just to -- you
4 know I think the issue of mass digitization
5 actually is perhaps a little bit broader than
6 just the format shifting, even though that
7 that is certainly one context in which we have
8 seen it. And assuming the word or the phrase
9 mass digitization implies that you are
10 converting something from analog to digital.
11 But I think, really, the body of cases goes
12 way beyond just Google and HathiTrust. You
13 know, because those cases are based on other
14 cases that involve digital to digital; Kelly
15 v. Arriba Soft, Perfect Ten v. Amazon. In the
16 iParadigm case, I am not even sure if that was
17 digital, whether all the student papers that
18 may have originally been uploaded in Word, so
19 they were probably already digital.

20 So, I think, and to sort of
21 distinguish -- say okay well, we are going to
22 distinguish between just the format shifting,

1 as opposed to if the stuff that was ingested
2 was already digital to begin with, I think
3 that is sort of an artificial distinction. I
4 mean I think the notion is we are looking at
5 collections of large amounts of information
6 that then is preserved in the digital format
7 but to some extent, that is all behind the
8 curtain. And then the question is the uses of
9 those. And certainly, I agree with Mike that
10 everything sort of behind the curtain, every
11 case that is looked at has always said, yes
12 that is a fair use.

13 MS. CLAGGETT: Although, I will
14 just point out, as I am sure that the Authors
15 Guild would as well, that HathiTrust and
16 obviously, Google Book are both on appeal.

17 MR. BAND: Yes, we have at least
18 three other Circuit Court decisions that say
19 it is not a problem, as well as other courts
20 in the other cases that we haven't even talked
21 about, which is if we say in terms of scope
22 and who is doing what, you would have Reed

1 Elsevier and Thompson who have copied the
2 briefs that all of us in this room have
3 written and then they sell them. They sell
4 the full text. Right? They are making that
5 available. And that, the court has found that
6 to be fair use, too.

7 I mean, so that seems to me go
8 way beyond what anyone else in the room has
9 done or is talking about doing. But again,
10 the courts have found that, too, to be fair
11 use.

12 So -- but my point is that I
13 agree that we need to -- we should be looking
14 probably a little bit broader than just the
15 format shifting and sort of looking at like
16 the assembling of these large databases. That
17 is one thing. But then the real issue then,
18 at least certainly from the court's
19 perspective, is what are doing with that? And
20 that is where it starts to get much more
21 complicated. I think but for the Reed
22 Elsevier and Westlaw situation, the worry has

1 not been access to full text, with the
2 exception of for the print disabled in
3 HathiTrust. And so, that seems to be until
4 now a big distinction but certainly with Reed
5 Elsevier and West, I mean they seem to be
6 going a step further.

7 MR. MULLER: Mr. Burgess.

8 MR. BURGESS: Actually further to
9 that, I think from A2IM's point of view, you
10 know, the format shifting is one thing. But
11 what we are really concerned about is access.
12 It really comes down to access.

13 And I find it interesting that
14 before we start each one of these sessions,
15 everybody in this room gives permission for
16 anything they say to be used. And yet
17 implicit in this digitization is that it is
18 not okay. It is not creators and owners of
19 copyrights, in our case we are talking about
20 music, that would forego that right. I can't
21 even comprehend that and none of our members
22 can comprehend that.

1 And, by the way, in terms of the
2 masses digitizing, well, we have had that.
3 That happened 13 years ago, 14 years ago with
4 Napster. And now Napster could have possibly
5 been a good thing, if there had been a
6 business model attached to it if it flowed
7 money back to the creators and the owners, but
8 there wasn't. And we know in the ensuing six
9 or seven years, the music industry lost more
10 than half its value and it has never really
11 recovered.

12 So the question, I think, I mean
13 we talk a lot about the public good. But how
14 are we helping the public good if we are
15 damaging creators and owners of copyrights,
16 especially small businesses and small
17 individual creators?

18 I think that is really the
19 concern from our perspective, is how is this
20 work being used and is it -- are we actually
21 able to say yes or no and are we able to be
22 compensated really? From the point of view of

1 institutions and preservation, we are in
2 support of that. But as I said in the last
3 panel, it needs to be an incredibly narrowly
4 defined list of institution and an incredibly
5 narrowly defined list of uses, I think.

6 MR. MULLER: Mr. Osterreicher.

7 MR. OSTERREICHER: I just want to
8 preface my remarks with the fact that I am
9 somewhat precluded in talking in specifics
10 because NPPA is also involved with ASMP and a
11 number of other groups in the suit against
12 Google. But that said, earlier in the last
13 panel, it was said we are losing a whole lot
14 of our culture by not being able to put some
15 of this stuff out there. And I think part of
16 the mass digitization problem is that I think
17 it only adds to the fact that much of the
18 public believes that the internet is the
19 public domain and that anything there is there
20 for the taking.

21 I think really one of the
22 underlying themes here is, at least from the

1 Google aspect, this is more like mass
2 monetization. They figured out a way of
3 taking all this content. And it's a word that
4 I truly dislike. Content, to me, is something
5 that settles in the bottom of macaroni boxes.

6 (Laughter.)

7 MR. OSTERREICHER: I mean, you
8 know, we create works. It is not just
9 content. But unfortunately, that is what it
10 is being seen as these days. It is just more
11 and more, and more content going out there.

12 In terms of addressing some of
13 the cases, Plessy v. Ferguson was the law of
14 the land for a hundred years but that didn't
15 make it right.

16 So, just because we can look at
17 these things as courts deciding what is right
18 now, I think the bottom line is really if we
19 expect to have a culture, then the creators
20 now somehow need to be compensated in a way
21 that they can earn a living. And that is
22 really all we are asking for here.

1 MR. MULLER: Thank you. And Ms.
2 Penrose.

3 MS. PENROSE: Yes, I am glad
4 Section 108 was mentioned earlier because it
5 seems that the purpose of Section 108 really
6 was to enable repositories of material,
7 specifically cultural heritage material, to be
8 accessible to a wide amount of people. And
9 the reality is, there are more than libraries
10 and archives that are serving that purpose
11 now. Museums are not addressed in Section 108
12 or Section 504(c)(2). And that seems to be an
13 oversight in something that perhaps would
14 allow us to move forward with enabling more
15 access to our content.

16 Going back, though, to the
17 question on what is mass digitization, I think
18 what mass digitization, from our stance,
19 really is is recognizing that we have a duty
20 to a community beyond our brick and mortar
21 building. We have a duty to provide access to
22 a collection of hundreds of thousands of works

1 to a global community. Beyond that global
2 community, and recognizing that we are serving
3 a community beyond people that can't
4 physically visit our building, there are
5 hundreds of thousands of pieces of work that
6 aren't going to be on our floor at any given
7 time. We have hundreds of thousands of works
8 and we can fit maybe 10,000 works in our
9 galleries.

10 In order to provide meaningful
11 access to our entire collection, those works
12 have to live online. And until we are able to
13 do that, they are sitting in our basements.
14 No one is going to see them. No one knows
15 that they are around. So, it is really
16 critical that we are able to engage in those
17 activities.

18 MR. MULLER: Thank you. Ms.
19 Besek.

20 MS. BESEK: I have to say I came
21 in here with some prepared remarks but we went
22 so quickly from digitization by libraries to

1 that by individuals, beyond digitization for
2 certain uses that don't involve full text
3 display to uses that do, assumptions of public
4 benefits, and all of a sudden we are really
5 not limiting it in any way.

6 So, I am going to talk about mass
7 digitization in the context of the HathiTrust
8 and the Google cases, which involved
9 comprehensive digitization of collections for
10 purposes of search, text mining, et cetera.
11 The works are not used for the substance of
12 what is in them in the sense that they are not
13 provided to the public or at least to the
14 general public in full text form. And
15 currently, that is being done in reliance on
16 fair use, although it has been pointed out
17 those cases are still early days yet.

18 So, if that is kind of what we
19 are thinking about, I think these other things
20 show what a slippery slope fair use is. And
21 if that is the way we go ahead, I think there
22 is a lot of danger of this going far beyond

1 what I think anybody ever envisioned. That is
2 why, unfortunately, I think that legislation
3 really is appropriate to try to regulate what
4 may be a public benefit but not let it go too
5 far in the other direction.

6 So, if there were to be
7 legislation, I think that the things that
8 would have to be looked at are, is
9 digitization truly providing a public benefit?
10 Does the party who is digitizing have the
11 technical capability to do what it says it
12 does? If it is digitizing for preservation,
13 it ought to be able to preserve. And that is
14 not just digitizing. Preservation involves a
15 lot more than that.

16 What level of disclosure can be
17 made? In the HathiTrust and the cases we talk
18 about snippets. Well, what about
19 MegaSnippets? Are those allowed? Paragraphs,
20 pages?

21 There is a lot of confusion about
22 disclosure in the Google cases because Google

1 very intelligently combined its two databases,
2 the licensed one and the non-licensed one. I
3 have to say most of the people that I have
4 spoken to -- students -- say oh wow, this
5 database is so great, almost invariably are
6 talking about the licensed part of the
7 database, where they get a few pages, rather
8 than a few words.

9 So, what is going to be
10 permitted? Is it for profit or not? What
11 kind of security is being provided? If you
12 are going to do this, you ought to be able to
13 secure the materials that you have. And if
14 you can't, then you ought not be able to do
15 it.

16 Is opt-out to be permitted? What
17 if you are already in another database?
18 Because obviously, if there is more than one
19 database that covers the same material, and we
20 have heard here that somebody shouldn't have
21 a monopoly on that database, then does
22 everything have to be in every database? Or

1 if you are in one, do you have to be in the
2 other? Why shouldn't you be able to choose
3 yourself?

4 So, these are the things I think
5 we ought to be looking at in determining
6 whether there should be legislation and what
7 kind of legislation there should be.

8 I think it is just not reasonable
9 to think a lot of the things that are being
10 discussed here are not really more
11 appropriately done by amending the Copyright
12 Act in a significantly different way to
13 broaden many of the exceptions, rather than
14 the courts creating an even broader fair use
15 exception.

16 MS. CLAGGETT: And just to follow
17 up on that, if you have any thoughts, I know
18 we have kind of been talking really broadly
19 about high level general points but on the
20 mass digitization point, in terms of what it
21 is, do you have any thoughts or, again,
22 others, in terms of what mass digitization

1 actually is, and if we are looking at a
2 legislative solution to mass digitization,
3 what should that encompass and what should be
4 considered to be that?

5 MS. ROWLAND: Can I follow up on
6 that question just to tag along a little bit?

7 When Karyn talks about that, I am
8 also interested in are we talking about
9 numbers? Are we talking about types of uses?
10 So, are you talking about, obviously, 20
11 million books, or are you talking about ten
12 books, or are you talking about is it for
13 preservation or all of those things? So, I
14 would be interested in also hearing about that
15 and the definition of what mass digitization
16 is.

17 MR. MULLER: Mr. Dessy.

18 MR. DESSY: Thank you. I have a
19 slightly different take on what mass
20 digitization is. And I think we tend to think
21 of it as one solely a technological issue.
22 And I think we somehow have the assumption

1 that it is easy because it is technology.

2 Anyone who undertakes a mass
3 digitization project is making a large
4 financial investment. Having been involved
5 with many of them, it is not a matter of
6 simply putting something on a scanner and it
7 is done. There is a huge amount of work that
8 goes into preparing the collections to be
9 digitized. There is a huge amount of work
10 that goes into the quality control and the
11 inspection of those collections after it has
12 been digitized.

13 So, those who are mass digitizing
14 are making their own financial investments in
15 this product. So, I think you have to see it
16 as an economic issue as well.

17 Secondly, I think when people do
18 do mass digitization, there is a value-added
19 proposition to that as well. Again, when I
20 have been involved in mass digitization
21 projects, we are ensuring that we are in
22 compliance with various technological

1 standards for ease of use. We are creating
2 metadata. We are managing version control.
3 We may be developing our own software to
4 search that newly digitized content.

5 For the federal government, we
6 ensure that everything that is digitized is
7 ADA 508-compliant. So, there is a great deal
8 of value added in the process of mass
9 digitization. And I am not saying that money
10 and the value should drive the conversation
11 but I think we make it too simple if we don't
12 realize how much financial impact there is on
13 the digitizer.

14 MS. CLAGGETT: And just to kind
15 of follow up on that, because I think those
16 are some of the same points that June raised
17 in the sense that when the government, as you
18 said, digitizes it, they really have a high
19 level of standards that they apply. You know
20 for example, making sure that it is ADA
21 compliant.

22 So, when you are looking at mass

1 digitization for entities other than the
2 federal government, should those, for example,
3 same standards be required in order to
4 facilitate that so that the mass digitization
5 project actually has the type of public
6 benefit that we would really want it to have?

7 MR. DESSY: The simple answer is
8 yes.

9 MS. CONSTANTINE: Could I just
10 make a point about that? I mean security,
11 June brought that up, that is such a critical
12 piece of this. And you mentioned that in your
13 last statement. But the problem with a
14 financial investment and value is the
15 repercussions if this data is hacked into, as
16 we all know has happened in the past, that it
17 is compressed and it is taken out of the
18 context of the collection, like what happened
19 at JSTOR, and gets out into the ether, where
20 it is replicated perfectly numbers of times
21 and it eliminates the market for the creators.
22 Totally wipes it out because pirates are able

1 to get their hands on it.

2 So, I agree that there are
3 certain things that must be tagged onto any
4 kind of project like this in order to prevent
5 that from happening and I agree that there is
6 value in digitizing and making sure that it is
7 done in a proper way. But if mass
8 digitization occurs outside the context of a
9 respectable organization, but in the context
10 of a pirate or a niche collector of civil war
11 books and they are going to mass digitize 50
12 of the books that their followers want to read
13 and they just send them out there with no
14 software protection and no cares in the world
15 about market impact, it is a real problem for
16 creators.

17 MR. MULLER: Ms. McSherry, then
18 Mr. Sheffner, and Mr. Band.

19 MS. McSHERRY: Okay, well I was
20 going to talk about something else but if we
21 are moving into DRM, I have to talk about
22 that.

1 MS. CLAGGETT: No, we are not.

2 MS. McSHERRY: Oh, good. I'm so
3 glad we are not moving into that. So, let me
4 just make two broader points. One is I think
5 it is important when we are talking about, and
6 this is actually partially definitional, I
7 think it is important to keep in mind from the
8 get-go that to the extent that these
9 collections or the works that are digitized or
10 so on are out of print or, of course, orphans,
11 I think we need to be smart about how we think
12 about the compensation model and how we think
13 about that.

14 Presumably, these are works where
15 there was no commercial aspect to them before
16 anyway. They are out of print. They are not
17 commercially available. That is kind of the
18 point. And I think that trying to keep that
19 in mind -- that actually what may be happening
20 is that now suddenly they are available and
21 maybe there is a new commercial opportunity,
22 but there wasn't one before at all. So, let's

1 not lose track of that as we try to think
2 about compensation for creators.

3 And the second thing is I think
4 we are starting to talk a little about
5 standards here and if there should be some
6 sort of standards. And I want to just give a
7 couple of warnings there that I think we
8 should be very careful, especially if we are
9 thinking about legislation down the line. If
10 we bake in technological standards, they are
11 going to be obsolete before the law is passed.
12 I mean, that is not going to happen
13 realistically.

14 So, I just want to put that on
15 the table right away.

16 And then secondly, I do think
17 that we have a lot of conversations here about
18 security and hacking and worries that someone
19 is going to hack into these databases. If we
20 require, somehow, that any database comes
21 wrapped in some kind of technological
22 protection measure, we are all automatically

1 going to make it less usable, less user
2 friendly. We are going to undermine ourselves
3 from the get-go and undermine the public
4 interest from the get-go.

5 And finally, I'm sorry, I can't
6 resist suggesting that perhaps we should not
7 compare the HathiTrust decision to Plessy v.
8 Ferguson. Just, let's not do that.

9 MR. MULLER: Mr. Sheffner.

10 MR. SHEFFNER: Thank you. Ben
11 Sheffner with the MPAA. I want to start off
12 by saying obviously there are benefits to mass
13 digitization. That is why people are doing
14 that. That is why we are talking about them.
15 But as the discussion so far has, I think,
16 demonstrated, this is a big, important, and
17 complicated public policy debate. And just as
18 there are benefits, there are drawbacks for
19 creators, if not done in the proper way.

20 My concern, as we have seen this
21 debate developing over the last several years,
22 is that we are trying, basically, to pound the

1 proverbial square peg into a round hole, by
2 discussing this only in the context of fair
3 use. I mean I think we all learned in law
4 school and read all the cases about how fair
5 use is very fact-specific and case-by-case.
6 So, we are very comfortable with the Second
7 Circuit deciding you know what, this
8 particular new Jeff Koons' sculpture is fair
9 use and this other one is not. And even to
10 take a more recent example, in the Cariou v.
11 Prince case, I think there were 30 something
12 works at issue. And the court very carefully
13 said, you know what, these uses are fair,
14 these other ones we're not so sure, and we are
15 going to remand to the District Court to go
16 through work-by-work.

17 Then we have the Google Books
18 case and the HathiTrust case and we have 20
19 million books. And the court, all of a
20 sudden, saying you know what, 20 million books
21 and they are doing this big project, seems
22 fair to me, without -- and you know it's

1 unrealistic, obviously, to go through 20
2 million individual case-by-case fair use
3 analyses. But you know what? It lumped even
4 broad categories of books together. It didn't
5 make any distinctions between, to borrow an
6 example that someone else gave to me, it
7 doesn't make any distinction between a snippet
8 of a romance novel versus a snippet of a
9 travel guide book. Where you know what, if
10 you just want to do a search for hotels in
11 Istanbul, that snippet is pretty valuable to
12 you in a way that maybe the snippet of a
13 romance novel is not.

14 So anyway, it is a good thing
15 that we are discussing this in a broader
16 public policy debate. Because again, I think
17 that we are trying to make these broad public
18 policy determinations by individual district
19 court judges or now appellate judges and we
20 have to be careful that we don't sort of lump
21 all types of works together.

22 I mean I talked about one type of

1 book versus another but obviously, there are
2 a lot of other types of works, including
3 motion pictures, where the licensing model is
4 working pretty well. There are, in a sense,
5 mass digitization projects going on now and
6 I'm talking about things where there are
7 license models, things like Anyclips or
8 movieclips.com which, in a sense, allow you to
9 do pretty much what the Google Books project
10 is doing. You can go on. You can search
11 through metadata, find the clip you want, and
12 use them through a licensed model that
13 compensates the creator and the other rights
14 holders involved.

15 So anyway, again, I commend the
16 Copyright Office for undertaking this and
17 putting it in the broader public policy
18 context.

19 MR. MULLER: Ms. Penrose.

20 MS. PENROSE: Yes, I just wanted
21 to speak briefly to Mr. Dessy's comments on
22 adding value and what repositories can do.

1 Coming from an industry whose
2 business is fine art, we are able to do things
3 with technology that visitors would never be
4 able to do, as far as interacting. We are
5 able to do 3-D rotations now, where a visitor
6 would never be able to pick up a vase and turn
7 it around and flip it upside down. We are
8 able to take video to show how jewelry and
9 animatronic works can be manipulated, where a
10 visitor would never be able to pick up the
11 original piece of artwork and see what the
12 artist's intent really was when they created
13 that.

14 We are able to do time-lapse
15 videos of installations. We had a work that
16 took three days to install last year and it
17 was fascinating to be able to watch it in one
18 minute just sort of all go up.

19 So, I think those are investments
20 that, as repositories, we are happy to make
21 when it adds value. But if we are stopped on
22 the back end because of copyright

1 restrictions, it doesn't serve our purpose.
2 It doesn't seem to serve the purpose of the
3 public. And quite frankly, I am not sure if
4 it is the type of use that was really
5 envisioned by an artist when they originally
6 created the piece of artwork and sold it
7 initially, that they would, down the road, be
8 able to license it for time-lapsed
9 installation for an educational institution.

10 MR. MULLER: Mr. Band.

11 MR. BAND: So, I would just like
12 to respond briefly to June's comments about
13 legislation in this area. And when you
14 started to describe some of the kinds of
15 things that would go into the legislation, I
16 said well, gee, that sort of tracks, to some
17 extent, the existing factors of Section 107.
18 And it is also hard to imagine how you would
19 come up with legislation that would be really
20 any more specific than what is in 107 and, at
21 the same time, be at all future-proof -- to
22 use consultant slogan, sort of consultant's

1 jargon.

2 I mean, because the point is that
3 we are talking about the nature of projects
4 that we have no idea in five years what kinds
5 of uses people would like to be making or what
6 technology would allow and what we would think
7 of as beneficial in five years or ten years
8 and so forth. So, it is very hard to imagine.

9 Whereas, the beauty of Section
10 107 is that especially with respect to the
11 first factor and the fourth factor, the courts
12 can, looking at a specific project, they can
13 say okay, what is the purpose of this project
14 and is this a useful purpose or not? And I am
15 sure, so far, the courts generally have looked
16 at these projects and seen if they are useful.
17 But I am sure at some point someone is going
18 to come up with a project and the court is
19 going to say you know what, no. This is not
20 useful. This does not have the right purpose.
21 The purpose of this project does not serve the
22 ultimate purposes of the copyright system or

1 of the public.

2 Similarly, with respect to the
3 fourth factor, the courts have looked at it
4 very carefully to see if there is -- does this
5 specific use have a market impact. And so
6 far, they have found that it hasn't.

7 But Jan, to go to your example of
8 the 50 books, I mean I am sure if someone did
9 that, there is no question that the court
10 would say yes, that has an adverse impact on
11 the market and that is not permissible. I
12 mean, I don't see how that could possibly, you
13 know, what you described could possibly be a
14 fair use.

15 But by the same token, the second
16 factor of the nature of the work, I mean Ben
17 talked about the travel books, but in the case
18 where you, in the Reed Elsevier case I
19 mentioned where they did allow full access but
20 it was full access to briefs. It was full
21 access to works that, in a sense, did not have
22 any commercial value. I mean, these are

1 briefs filed in court that were never sold.
2 I mean, I guess actually they were sold for a
3 very expensive price. The lawyers that
4 produced them charged an awful lot of money
5 for producing those briefs, but they were not
6 commercial products in the normal sense. And
7 so, the court again found that the purpose of
8 allowing other lawyers, who have access to
9 these databases, to be able to access all
10 these briefs and benefit from the research and
11 the analysis in those briefs justified the
12 access.

13 But my point is that the fair use
14 allows the case-by-case granularity of
15 inspection that is really hard to imagine that
16 any legislation would ever do any better at.
17 And so, it seems that it is the perfect
18 solution to this problem, or at least a better
19 solution than any other solution that is
20 likely to emerge. And I think even the
21 security issue, a court can factor in to say
22 does this -- is this person going to be

1 providing adequate security or not? And if
2 they aren't providing adequate security, the
3 court can -- the four factors -- you are not
4 limited to four factors. The court can
5 consider whatever else it wants.

6 MS. CLAGGETT: I guess I have one
7 kind of follow-up question and we can open it
8 up, too. But the key distinction, of course,
9 with fair use, is that there is no payment at
10 the end. That would be a complete affirmative
11 defense to copyright infringement.

12 So, I think the one thing that we
13 are struggling with is whether there can be a
14 flexible kind of solution that would actually
15 still allow for some type of compensation or
16 permission, or involvement of the content
17 owner in terms of what kind of uses should be
18 allowed. Because right now we are faced with
19 kind of two very stark differences, either
20 fair use on the one hand, which does not
21 provide compensation or exposure to statutory
22 damages which, on the other hand, which Ms.

1 Penrose mentioned, might chill the ability of
2 certain uses.

3 So, we want to see if there is a
4 middle ground between those that actually
5 would make both the content owners as well as
6 those users more comfortable in the legal
7 context that we have.

8 MR. MULLER: Next we have Ms.
9 Besek, Mr. Carroll, and Ms. Pilch.

10 MS. BESEK: I want to go back to
11 what is mass digitization because I take a
12 very different position from Professor
13 Carroll. I think it is simply turning other
14 formats into digital form. Beyond that, we
15 all have different concepts of what mass
16 digitization is. And they don't agree with
17 each other because everybody looks at it from
18 their own perspective. Some people talk about
19 the value that they add and the circumstances
20 under which they do it and that is all
21 legitimate, but that is not a universally
22 accepted definition. So, one of the things

1 you would have to do in legislation going
2 forward is to embellish what is meant by mass
3 digitization. And the courts will have to do
4 that if it progresses under fair use as well.

5 I think the reason for
6 distinguishing between orphan works and mass
7 digitization is that the mass digitizers don't
8 want to review work-by-work. They feel that
9 what they are doing needs this comprehensive
10 collection of works and, therefore, they
11 cannot effectively do that, if they have to,
12 in fact, do any investigation. But the flip
13 side of that should be that indeed they get
14 fewer privileges and possibly also have to
15 pay, if that is what they are doing.

16 As far as the point about Section
17 107, Section 107 is too vague to really
18 address these issues. And addressing them
19 through 107 is distorting the law. The point
20 about we can't deal with security, for
21 example, or we can deal with it just as well
22 under 107 as we could under new legislation,

1 I don't think that is right. And if you go
2 back and look at what the Section 108 Study
3 Group did, in the context of allowing
4 libraries -- recommending that libraries be
5 allowed -- to copy, to digitize for
6 preservation purposes, the Study Group laid
7 out a number of standards of what libraries
8 should have to be able to do, in order to do
9 this preservation copying. And they tried
10 very hard to use standards that were already
11 out there in the industry and to use standards
12 that would not be susceptible to change over
13 time.

14 And I think with respect to
15 security they just said employ something like
16 a standard security apparatus to control
17 access.

18 So, I think that can be done.
19 But the fact that they have to employ a
20 security apparatus is what is missing in
21 Section 107.

22 And finally, I just want to say

1 that the point that we made earlier about one
2 of the great things about mass digitization,
3 it makes works available that aren't
4 otherwise, or otherwise haven't been
5 available, that is certainly true now. But I
6 just don't understand what is going to happen
7 going forward. So, if something has already
8 been made available through digitization, what
9 happens then? Is the next person not allowed
10 to do it? What about the works that come out
11 that are digitized? Are we saying we are only
12 dealing with legacy works here that have been
13 created in other forms? I would be very
14 surprised if most of the people around this
15 table would agree with that.

16 So, I think that is true now but
17 I don't think that that is a limitation that
18 people would want to put on mass digitization.

19 MR. MULLER: Mr. Carroll?

20 MR. CARROLL: Yes, so I guess I
21 just have a very different perspective. I
22 think Ms. Besek's example shows the point that

1 fair use has a role. It is not the whole
2 role. And, in fact, the fact that people talk
3 about Google Books when they are talking about
4 the licensed portion, shows that Google uses
5 snippets up to the fair use line and then it
6 engages in licenses to get the full value out
7 of the investment that it has made in
8 digitizing those works. And that is what I
9 expect the institutions in memory and the
10 cultural institutions would also have an
11 interest in, using fair use up to the point
12 where they can, but then looking for a license
13 solution for broader access.

14 And then the question is whether
15 the parties can negotiate those licenses or
16 whether there is a market failure such that
17 those uses beyond fair use need a statutory
18 license. And I haven't heard enough evidence
19 over the last two days to suggest that we have
20 that kind of market failure at this point.
21 The institutions of memory are not clamoring
22 for this statutory license. Or if they are,

1 it would be useful to understand what kinds of
2 uses you want that license to cover. Because
3 I think that is the more productive dialogue.

4 But I would also again urge -- I
5 think the Copyright Office can play a really
6 useful role in developing sophisticated
7 registries that would make the scope of the
8 orphan works going forward a lot lower. And
9 in thinking about what a registry is, you have
10 got to think about what digital technology is
11 capable of. YouTube's content ID is a
12 registry. It has a hashCode that identifies
13 works in ways that are much more effective
14 than metadata, other kinds of metadata.

15 So, we should really be thinking
16 about what digital technology can do to help
17 us identify works going forward. But we
18 should also recognize that the copyright owner
19 enjoys the benefit of being able to take
20 advantage of the value created by the
21 digitization because the digitizer will want
22 to engage in a license conversation.

1 And then, the last point about
2 the security, just be careful about how
3 onerous you think about making this because
4 otherwise, it becomes the TEACH Act, which I
5 think would be an unfortunate result, where
6 you are targeting the law-abiding
7 institutions. Because mass digitization is
8 taking place by the masses.

9 The seventh Harry Potter novel
10 came out. That thing was in digital form
11 before you could blink and it was available.
12 All of the text books are available via
13 BitTorrent. That has all been mass digitized
14 outside of the scope of what we are talking
15 about. So, if you create a security apparatus
16 only for the small number of targets that you
17 can get your hands on, you are going to
18 undermine the overall goal of moving 20th
19 century culture online.

20 MR. MULLER: Ms. Pilch.

21 MS. PILCH: My comment was going
22 to start with a similar comment that we can

1 talk about -- having an exception or a
2 licensing scheme for libraries and archives
3 but, in the meantime, the rest of the world is
4 going about its business putting works online.
5 And so we have to think carefully about how
6 anything we decide relates to what else goes
7 on under fair use or just goes on.

8 But the real point I wanted to
9 make was that before any conclusions are drawn
10 as to -- because I see the conversation being
11 associated with libraries and archives. To
12 the extent that mass digitization is going to
13 be associated with the cultural mission of
14 libraries and archives, it is important to say
15 that I don't think that all libraries assume
16 that they may or that their central mission is
17 to, under fair use, put all works, make all
18 works publicly available to a global
19 community. I think that many libraries
20 understand that that is desirable but not
21 necessarily possible and they are willing to
22 do it slowly, gradually, and to wait. We

1 don't assume that we can do it right now.

2 I think there are lots of lawyers
3 out there now telling libraries and
4 interpreting what libraries' cultural mission
5 should be.

6 A recent report that just came
7 out is telling libraries that they won't be
8 fulfilling their cultural mission if they
9 don't digitize orphans. And I don't think
10 that we always need people telling libraries
11 what their cultural mission is.

12 But aside from that, I think it
13 is really important for us to, when we come to
14 a solution, when a solution is reached, to
15 make very clear how the exception or the
16 licensing scheme relates to fair use. I think
17 that is becoming a real issue.

18 If there is a specific exception
19 and then there is a license possibility, or
20 specific exception or a license possibility,
21 and then there is fair use, we have the issue
22 -- why would anyone avail themselves of a

1 specific exception under certain conditions,
2 under restrictive conditions, if fair use
3 really allows you to do it anyway and best
4 practices are advising libraries that it is a
5 fair use to do it?

6 May I read from a fair use
7 practice that was recently developed? "It is
8 a fair use to create digital versions of a
9 library's special collections and archives and
10 to make these versions electronically
11 accessible in appropriate contexts."

12 Now, regardless of what that
13 means, many librarians interpret that to mean
14 it is a fair use. It is okay. We can do it.

15 And so, if we are -- again, why
16 would anyone avail themselves of a specific
17 exception or why would anyone pay money to
18 license if they are being instructed or
19 encouraged not to do that and that it would be
20 a fair use to do otherwise? That is the real
21 problem I see with the fair use argument.

22 MR. MULLER: Okay, Ms.

1 Constantine, Mr. McDiarmid, and Mr. RYD N.

2 MS. CONSTANTINE: I would like to
3 respond to a couple of people. Corynne, I
4 would like to educate you a bit on the
5 commercial use aspect of some of these books
6 that are involved in the mass digitization
7 without authorization or compensation that
8 Google did and that HathiTrust did. And that
9 is, that a lot of these works are now coming
10 back into print digitally via contract, via
11 publishers realizing that these are lost gems,
12 and that there is a market there for a lot of
13 the books that you claim have no value, no
14 worth because they weren't in print when they
15 were digitized.

16 With respect to Janice, I am
17 going to take you out to lunch today because
18 you sound like a reasonable librarian and I
19 haven't met one in a long time.

20 (Laughter.)

21 MS. CONSTANTINE: But I would
22 take issue with one thing you said. And that

1 is, foreign countries are putting things
2 online all the time. And in the Norwegian
3 countries, Norway and Sweden and other Nordic
4 countries, they are paying authors to put them
5 online. They are not taking the position that
6 they have a carte blanche to use all the books
7 in the literary marketplace of the Nordic
8 countries and putting them on without
9 compensating authors, which is what is
10 happening in the United States right now.

11 And if, as you say, everybody
12 assumes in the best practices, which I take
13 issue with, that you can do it with impunity,
14 why would anybody exercise any kind of a
15 license and pay creators for anything if
16 somebody is telling them do it, best
17 practices? And again, I warn you, if I find
18 out about it, I am going to sue you.

19 MS. CLAGGETT: Okay and just to
20 avoid a back and forth -- excuse me. I just
21 want to avoid a back and forth. We will all
22 agree that there are a number of reasonable

1 libraries and librarians. And as we have
2 heard a lot from libraries today, this is not
3 an attack on libraries or librarians because
4 there are a lot of very, very good actors in
5 that realm.

6 So, I want to avoid any back and
7 forth on that and avoid any back and forth
8 between Corynne and Jan for now.

9 MS. CONSTANTINE: I'm taking her
10 out to lunch.

11 MS. CLAGGETT: And we will go
12 around the table. And obviously, if you have
13 a general comment, we can address that in a
14 few minutes. Thanks.

15 MR. MULLER: I have Mr.
16 McDiarmid, Mr. Ryd n, and Ms. Levine.

17 MR. McDIARMID: Thank you. We
18 have reached the point in a long queue where
19 I may be repeating some of the earlier
20 comments, but I wanted to come back to the
21 subject of breadth versus precision. And I
22 think it is good on one hand that we are

1 having a very broad conversation because we
2 are talking about very good things on both
3 sides. We are talking about increasing access
4 to creative works. We are talking about doing
5 so well, fairly compensating rights holders,
6 and creators, and treating them fairly.

7 When we turn to solutions, I
8 think we may need to be more precise and think
9 about solutions, plural, and not solution,
10 singular. I tend to agree with a lot of my
11 colleagues here that fair use is doing some
12 important work and I agree with a number of
13 those decisions. I agree with some of the
14 other people on the panel that licensing is
15 taking care of some of these things on the
16 other end of the spectrum. But what we are
17 talking about and what I think it is
18 productive talking about is that space in the
19 middle where there is a publicly beneficial
20 use, such as full text access, that is outside
21 the bounds of fair use. I think the large
22 consensus that it would be outside the bounds

1 of fair use but, nonetheless, serves an
2 important public purpose. And I think that
3 that is where sort of conversations about new
4 licensing models or more specific targeted
5 exceptions could play a role.

6 MR. MULLER: Thank you. Mr.
7 RYD N.

8 MR. RYD N: I understand you have
9 discussed orphan works and that you mentioned
10 orphan works, the same term she also referred
11 to in the context of mass digitization.

12 And you might have discussed it,
13 but if you haven't, it would be good to know
14 that the European Orphan Works Directive that,
15 when it was chiseled out, and you find it in
16 the assessment report, the orphan works
17 solution, as it stands, was not the only
18 option. The Commission came to the conclusion
19 to choose that one because of one very
20 important aspect in Europe, the cross-border
21 access. But you will find this and many other
22 solutions possible, legal ones, and one was

1 actually extended collective licensing.

2 So, the reason for the European
3 Commission to come up with the solution it
4 did was cross-border access, which is not
5 something you may have to consider.

6 So, anyone who would like to
7 study the European situation should go to the
8 assessment report and not the final Directive.
9 Actually, in one of the draft Directives,
10 there was an Article 7. I think the Finnish
11 government would like to want that introduced
12 on ECL but it was left out.

13 So, it might look like a very
14 well-structured and focused solution, the
15 European one, but as always, it is a political
16 kind of compromise. And we have not enacted
17 the orphan works directive. It would have to
18 be enacted by October this year. But what one
19 should also consider, regardless if you refer
20 to it as mass digitization, is that everything
21 has a cost. A license has a cost but also an
22 orphan works solution, which in Europe it is

1 not a limitation. It is the exception. But
2 still, we have to have the manpower to do this
3 diligent search, which is not cheap.

4 And you will have to pay for,
5 most likely, some kind of registry because it
6 says in the legislation either you do it
7 yourself or you let someone else do it and
8 that might be ARROW. Is that free of charge?
9 No. And ARROW is more like a license.

10 But at the end of the day, the
11 orphan works Directive does not provide legal
12 certainty, the license does.

13 So, there is a very short, thin
14 line between the ECL solution and the orphan
15 works directive. Study it carefully because
16 the overall orphan works Directive was
17 monitored on Europeana -- one access point to
18 European culture -- and that was actually
19 about mass digitization but the focus was also
20 in cross-border access.

21 So, please bear this in mind when
22 you study the European situation, if you do,

1 you might draw different conclusions. Thank
2 you.

3 MS. CLAGGETT: And I will say we
4 will focus on the ECL model as a possible
5 solution in the next panel.

6 MS. LEVINE: So, I want to
7 respond to a few different things. First, I
8 am primarily interested in libraries and
9 memory institutions in this context. I
10 recognize that orphan works is a much broader
11 issue, but trying to map the universe doesn't
12 seem particularly productive, at least for me
13 personally. And I have been looking at these
14 issues for 20 years now. It is really hard to
15 believe that much time has passed and that we
16 are having a different version of the same
17 conversation.

18 I want to say that, like many of
19 my colleagues, we keep coming back to the same
20 cycle of conversation and we are really eager
21 to continue to move forward in a productive
22 way. So, I greatly appreciate the ongoing

1 tenacity of the Copyright Office in fostering
2 these forums.

3 I don't think that any of the
4 special pirate organizations have filed to
5 participate in any of the roundtables and they
6 may not be here to speak for themselves. And
7 I am a little tired of what verges on ad
8 hominem attacks on libraries and other honest
9 brokers for a variety of institutions and
10 positions.

11 I work at a university now. I
12 used to work at the Library of Congress. I
13 have worked at the Smithsonian. I have worked
14 at the World Bank. I have worked with
15 creators. I have worked with publishers.
16 This is a tremendously complex ecosystem and
17 every single one of us already recognizes
18 that.

19 I think that many of the specific
20 elements that June mentioned make a great deal
21 of sense. Ms. Penrose mentioned some of the
22 aspects of 108 and the role of museums. It is

1 interesting -- I know June served on the
2 Section 108 committee and one of the few areas
3 of pretty easy agreement was that museums
4 should be included in some way in the umbrella
5 that libraries and archives are already
6 recognized.

7 I also think, you know, this can
8 go in many different directions. I think
9 that, particularly for say June and Professor
10 Carroll, as law professors, I think any of
11 these due diligence standards creates sort of
12 the Permanent IP Lawyer Employment Act of 2000
13 something, if we get to that. And university
14 libraries used to not have copyright officers,
15 whatever, scholarly communications officers.
16 There is already a very serious and considered
17 investment in treating the stewardship we have
18 very, very seriously and it is not a
19 dismissive kind of thing. It is not a light
20 kind of thing. And it doesn't matter whether
21 it is a book or it is a film. I mean here, I
22 haven't met Mr. Dessy, but I used to work on

1 the American Memory Project. And what is so
2 striking are things like the film collection
3 here at the Library of Congress, which is
4 cared for, a very complex preservation of
5 material that goes back over a hundred years.
6 It is cared for at public expense, but the
7 copyrights are either unknown or they are
8 known. And when a filmmaker or producer wants
9 to assert rights or license the material, it
10 is done in a partnership sort of way with the
11 Library of Congress. So there is this, in a
12 sense, a public-private partnership where the
13 film simply would not otherwise exist. There
14 are a lot of materials, as many of you know,
15 that are now historical. They were commercial
16 materials when they were deposited as part of
17 the registration process over the last hundred
18 plus years. And we would not have them but
19 for that deposit process.

20 It is a bit of a digression, but
21 it is an important one. Copyright and
22 collections have worked integrally for well

1 over a hundred years. The United States has
2 not always been a beacon of copyright
3 protection. We have a lot to protect now and
4 we need to be responsible about it.

5 The last thing I wanted to
6 mention is that I had the privilege of helping
7 to produce a comment that was filed by the
8 American Bar Association IP Section. I am the
9 chair of the Copyright Policy Section. There
10 are a number of people who helped participate
11 in preparing that last year. Despite the
12 difference of perspectives reflected among the
13 lawyers, I think it is actually one of the
14 pieces of writing I am the most proud of
15 because it was -- there is so much conflict.
16 And I think Mr. Osterreicher's comment that in
17 the last panel where if you have a difference
18 of opinion you start with a phone call, seems
19 like a very prudent approach to much of this.

20 MR. MULLER: Mr. Band.

21 MR. BAND: So, two things.

22 First, I wanted to respond to Janice's

1 reference to the best practices. You know
2 that you grossly over-simplified. You just
3 read the high-level principle. There is a lot
4 of detail that gives a lot of nuance about
5 factors that explain, that really flesh it
6 out. And so it is simply the notion that the
7 best practices are sort of a green light to
8 sort of just scan everything in the libraries
9 is simply not accurate.

10 Second, with respect to what
11 Andrew was saying. I mean, I think that that
12 is a very important point that there is --
13 fair use takes you, has its role. Licensing
14 has its role. Clearly, there is a gap
15 somewhere. The big concern with many of us
16 saying okay, let's figure out how to fill the
17 gap is that inevitably, the gap, what is seen
18 as the gap -- we disagree on what is the gap.
19 And so I think what I see as the gap and what
20 Jan sees as the gap are two very different
21 things. And so I think what Jan sees as the
22 gap would cover almost everything that I

1 consider and my clients consider to be fair
2 use.

3 So the legislation that would be
4 filling the gap would result in, could end up
5 being a framework that would require the
6 libraries and others to pay into a collecting
7 society, a large amount of money for the kinds
8 of scanning that we would otherwise consider
9 to be fair use. Now, you could say oh, it is
10 going to be designed -- but I have a feeling
11 there is going to be inevitably a lot of gray
12 area and there will be a lot of fighting. And
13 certainly, the rights holders will be pushing
14 that what would be covered would inevitably
15 result in a lot of money being paid into a
16 collecting society, which then, and this is
17 really going to be the subject of the next
18 panel, but the truth is, very little of that
19 money is really ever going to go to any
20 authors. And so anyone who thinks that some
21 of these collecting societies are going to be
22 this pot of gold for the individual author,

1 that is not going to happen. I mean, most of
2 the money is somehow going to end up being
3 spent up top and not get filtered down or will
4 get filtered in a way that no one is going to
5 know. So, that is the concern that a lot of
6 money gets paid without much benefit.

7 MS. CONSTANTINE: Could I just
8 say two things? And really it has to do with
9 the next panel.

10 MS. CLAGGETT: Yes. And I will
11 say we are getting really close to the end.
12 We do want to see if we can have an
13 opportunity for a few comments from the
14 audience. We might not have those.

15 MS. CONSTANTINE: Thirty seconds,
16 that's all.

17 MS. CLAGGETT: Thirty seconds and
18 then we will turn it over to the audience.

19 MS. CONSTANTINE: I just want to
20 say that for a year and a half of my life I
21 spent sitting down with Google, publishers,
22 and on Google's shoulder were the libraries

1 because they weren't allowed in the room by
2 Google. And we came up with the book rights
3 registry, which I believe to be the solution,
4 which we will talk about at our next session.
5 It was not a collecting society. The money
6 went down all the way to the creators and the
7 authors. And we can sit down at a table and
8 talk, as long as there is permission, there is
9 a recognition of control, and there is
10 compensation at the end of the day.

11 MR. MULLER: Okay, we are going
12 to open it up for audience questions, if
13 anyone has a question. I see one.

14 MS. CLAGGETT: And just a
15 reminder, we only have a few minutes for
16 questions. So, we are sorry we will have to
17 cut you off if you go too long, but just about
18 two minutes for comments per person. Thank
19 you very much.

20 MR. BUTLER: Hi. So, my name is
21 Brandon Butler and I helped to write the best
22 practices that Janice was talking about a

1 while ago. And so I wanted to clarify
2 something really quickly. I think folks
3 around the room might disagree about the
4 import of the document but I want to make sure
5 there is just a fact of the matter about where
6 it came from. And the fact is, it took us two
7 years talking to hundreds of librarians in all
8 kinds of contexts and not a word in that
9 document doesn't come from the library
10 community. So, to the extent that you
11 disagree with it and you are a librarian, you
12 are in the minority. Thanks.

13 MS. O'KEEFFE: Just very briefly,
14 I think there has been a lot of discussion of
15 mass digitization of books. Sorry, Hope
16 O'Keefe, Library of Congress.

17 And I guess you are not opening
18 this up for comments, but I am curious to hear
19 about a different kind of mass digitization,
20 particularly mass digitization of manuscripts
21 and historic manuscripts as something we
22 covered in our comments that really needs to

1 be addressed in any solution.

2 MS. CLAGGETT: And we don't have
3 an opportunity to really open it up for
4 comments right now in the oral portion but, as
5 most of you know, we have requested additional
6 written comments after these panels to respond
7 to anything that was raised. So, we would
8 encourage people to respond to those issues or
9 any other issues in writing that we haven't
10 been able to explore in detail today or
11 yesterday.

12 MS. KOPANS: Nancy Kopans,
13 ITHAKA. Just to point out that so much in
14 mass digitization depends on the business
15 models and the purpose of digitization, the
16 scope, the audiences at mass digitization
17 preservation. Is it for on-site only? Is it
18 for worldwide access? Is it a fee-for-service
19 model? All of these factors weigh on
20 permissioning and interests of rights holders.

21 MR. HOLLAND: Brad Holland from
22 the Illustrators Partnership.

1 I noticed this gentleman here was
2 commenting on the high cost to mass digitizers
3 of the cost of mass digitizing work. And I
4 just wanted to comment that that confirmed
5 what we said yesterday about the high cost to
6 individual creators of digitizing our work to
7 be in compliance with the orphan works law.
8 So that, if the orphan works law were passed,
9 compliance would be so impossible that most
10 artists would be unable to comply with it.
11 And if Congress passed both an orphan works
12 law and a law that permitted mass
13 digitization, we would essentially be talking
14 about the transfer of an enormous amount of
15 private property from the hands of creators
16 into the hands of corporations who have the
17 money to engage in that kind of mass
18 digitization.

19 MS. DEVORAH: Hi, I'm Carrie
20 Devorah and identify myself, these days, as
21 the Center for Copyright Integrity. But I
22 think it is important to share that a room

1 filled with suits and people that are paid to
2 be here, I am actually the arts content
3 creator who made a living from the age of 19.
4 You are talking in terms of arts actors and
5 content. You are talking about people with
6 passions that don't get the monthly paychecks
7 you get everywhere and they have the same
8 expenses that you do.

9 And fair use, I have to remind
10 you, number four says if you deprive the
11 content creator of their ability to make a
12 living, it is not fair use. So, when we are
13 talking about ways to accommodate these new
14 exploding business models, we need to remind
15 these people that there are laws on the books.
16 Title 17 is followed by what I love to tell
17 people, Title 18, the Criminal Code.

18 If you steal and take something
19 that belongs to someone else, it is a criminal
20 behavior. When you are approving what Google
21 is doing and the private companies that run
22 the internet, you are approving some entity

1 that is complicit to a crime.

2 And I only want to point out
3 there is a gentleman to my left here who is
4 sight-challenged. And in terms of the piece
5 I covered earlier, there is the misconception
6 that people without sight want to not to pay
7 for what they are being given. There is the
8 Marrakesh Treaty, which I have followed and
9 participated in. And the head of the WBU said
10 something I think is important for all of you
11 to hear. He said, we don't want to be treated
12 differently than anybody else. We want to be
13 treated like you. So these encouragements for
14 the blind and other, speak to the people
15 instead of just the suits here.

16 And I would encourage you -- I am
17 on a later panel -- but in future panels there
18 are more arts people like me that understand
19 these laws that you decide for us and deprive
20 us of our content. If you feel so strongly
21 that the models you are proposing work, then
22 I am asking all of you at the end of your

1 months, give me your paycheck because you are
2 taking away my money.

3 MS. DRYDEN: My name is Jean
4 Dryden and I represent the Society of American
5 Archivists.

6 And I would just going back to
7 the beginning, the meaning of mass
8 digitization. For archivists, up to now we
9 have been cherry-picking items for
10 digitization and making available online. But
11 the meaning of someone's collection of papers
12 or records is in the whole. And it is
13 increasingly important to us that we digitize
14 the whole thing. And in those collections,
15 there is an awful lot of orphan works. So,
16 that is a perspective about the meaning of
17 mass digitization that I don't want to be
18 lost.

19 Thank you.

20 MS. RUSSELL: Hi, I'm Carrie
21 Russell from the American Library Association.
22 I just wanted to comment that verbal threats

1 of lawsuits to libraries is not really a good
2 plan for getting us to negotiate with you.

3 MS. CONSTANTINE: It has worked
4 before.

5 (Laughter.)

6 MS. CLAGGETT: Again, on that
7 uplifting note, we are going to break for
8 lunch, where everyone can feed themselves, get
9 some more energy for the later afternoon
10 panel.

11 A reminder that our afternoon
12 session will actually take place downstairs in
13 the hearing room. As I said before, sorry --
14 excuse me. As I said before, that is a much,
15 much smaller space, so much more intimate. We
16 apologize in advance but we lose this room in
17 the afternoon. And so it is on the fourth
18 floor. It is the Copyright Office Hearing
19 Room. All right, thank you.

20 (Whereupon, the above-entitled matter
21 went off the record at 11:49 a.m. and resumed
22 at 1:00 p.m.)

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

(1:00 p.m.)

1 MS. CLAGGETT: Okay, I think we
2 will get started with our afternoon session.
3 We might need to open the door at some point.
4 If it gets too hot in here, let me know. As
5 I said, we apologize we were unable to keep
6 the other room, which was much better
7 accommodations but, hopefully, we will
8 continue the conversation that we started
9 earlier. Our focus for the afternoon session,
10 as mentioned, is in mass digitization. I will
11 read our standard disclaimer with respect to
12 audience participation in a moment.

13 But in terms of one other kind of
14 piece of logistics, I just want to reiterate
15 to the panelists and to the audience that this
16 is a safe zone. That is, we really would like
17 to engage in, I think, a very productive
18 conversation. We, obviously, understand that
19 this is a very complex and passionate issue
20 with a number of positions on both side. But
21
22

1 we want to make sure that the conversation
2 back and forth is civil, no one will be
3 serving process during this particular panel,
4 hopefully, or threatening lawsuits. And we do
5 want to make sure that the conversation is
6 civil.

7 That being said, I do actually
8 think it is helpful to hear from both sides in
9 terms of their beliefs as to what the best
10 practices are, things that they agree with or
11 not. But we will just make sure that we do so
12 in a very civil and productive manner.

13 So, I am going to read now our
14 standard that I think you have now heard about
15 eight times. This panel discussion is being
16 video recorded by the Library of Congress.
17 There will be a short question and answer
18 period at the end of the session. If you
19 decide to participate in that question and
20 answer period, you are giving us permission to
21 include your question or comments in future
22 webcasts and broadcasts.

1 At this time, I would like to ask
2 you to turn off any cell phones or electronic
3 devices that might interfere with the
4 recording of this event.

5 So, our session right now is
6 entitled "Extended Collective Licensing and
7 Mass Digitization." Our previous panel right
8 before the break was focused on mass
9 digitization generally, trying to come up with
10 a definition of mass digitization. I don't
11 know that we did, but we started the
12 conversation. And now we want to really focus
13 on potential solutions to that gray area that
14 people were referencing during the last
15 session, that is the gray area between
16 something that folks may disagree on, is fair
17 use and something that is clearly infringing
18 and should be exposed to statutory damages.

19 So, should there be some type of,
20 for example, extended collective licensing
21 solution that would be able to facilitate in
22 a productive way, in an efficient licensing

1 way, that licensing of the gray area. And
2 that is one thing that we want to focus on
3 today. We know, as I mentioned before, that
4 extended collective licensing is something
5 that has actually existed for some time in
6 Nordic countries. Other countries, such as
7 the United Kingdom, are also considering it
8 very, very seriously or have, in fact, adopted
9 it for purposes of some uses recently.

10 So, we wanted to really explore
11 whether, even though this is not something we
12 have currently in the structure of our law, it
13 is something that the United States should
14 consider.

15 Again, I mentioned earlier that
16 the Google Books settlement, many believed,
17 was a form of extended collective licensing in
18 some way, although it was done through a
19 private settlement agreement, as opposed to a
20 government-sanctioned kind of legal framework.
21 And so we at least know, at least for some
22 users and content owners, that type of

1 approach is not going to be completely
2 anathema because they were willing to do it
3 through the course of a settlement agreement.

4 So, I will open it up, first, to
5 kind of a general question. Is extended
6 collective licensing generally something that
7 we should explore as a possible solution for
8 that gray area to facilitate mass digitization
9 and perhaps make it available in certain uses
10 in the United States?

11 Oh, I'm sorry. Yes, before we do
12 that, I will go around the table. I will
13 start with Fred from the NFB.

14 MR. SCHROEDER: Thank you. My
15 name is Fred Schroeder. I am with the
16 National Federation of the Blind.

17 MS. CLAGGETT: Oh, and just, one
18 other housekeeping. Sorry. When we moved to
19 this room, there are some mikes that stay on.
20 And I actually just think that it is the mikes
21 up here. For the rest of you, when you speak,
22 you actually have to hold down the button.

1 So, please do that when you are speaking.

2 MS. CONSTANTINE: Jan Constantine
3 with The Authors Guild.

4 MR. SHEFFNER: Ben Sheffner, Vice
5 President, Legal Affairs, Motion Picture
6 Association of America.

7 MR. RECHARDT: Lauri Rechartd,
8 IFPI. An association representing the
9 recording industry worldwide.

10 MR. MAHONEY: Jim Mahoney from
11 the American Association of Independent Music,
12 which is a small or medium-sized independent
13 label association.

14 MR. RUSHING: I'm Colin Rushing.
15 I am the General Counsel at SoundExchange.

16 MS. TURNER: Cynthia Turner,
17 Co-Chair, American Society of Illustrators
18 Partnership.

19 MR. BARNES: I am Greg Barnes.
20 I am General Counsel of Digital Media
21 Association.

22 MR. KATZ: I am Ariel Katz from

1 Faculty of Law, University of Toronto.

2 MR. WEINBERG: Michael Weinberg,
3 Public Knowledge.

4 MS. LaKIND: Debra LaKind, Museum
5 of Fine Arts, Boston.

6 MR. FURLOUGH: Michael Furlough.
7 I am the incoming Executive Director for
8 HathiTrust.

9 MR. BUTLER: Brandon Butler, I am
10 at the American University Washington College
11 of Law.

12 MS. McSHERRY: Corynne McSherry,
13 Electronic Frontier Foundation.

14 MR. RYD N: Jerker RYD N,
15 National Library of Sweden, Senior Legal
16 Advisor.

17 MS. CLAGGETT: All right, thank
18 you. And I think you know all of us. Oh,
19 actually one more.

20 MR. RAE: Yes, I am over here on
21 the government side, for some reason.

22 (Laughter.)

1 MR. RAE: Casey Rae, Future of
2 Music Coalition.

3 MS. CLAGGETT: Thank you. So
4 again, I would open it up with just a very
5 general broad question. Is ECL something that
6 we should consider in the United States to
7 foster licensing in that gray area for
8 purposes of mass digitization? Starting with
9 Ariel.

10 MR. KATZ: Okay, so the short
11 answer is no. And now the reasons.

12 The reason is that the American
13 copyright system has a deeply-rooted market
14 logic to it. It's based on the grant of
15 limited exclusive rights or mini monopolies,
16 it also contemplates -- embedded in the
17 marketplace we incorporate owners. And this
18 has actually been a defining feature of
19 American or Anglo-American copyright laws
20 since the very beginning. It was a feature
21 that was decided by choice.

22 And this idea of competitive

1 marketplace was designed as an antidote to the
2 oppressive monopoly that Parliament has
3 revolted against at the beginning of the 18th
4 century.

5 And the idea of marketplace and
6 competing copyright owners is also intimately
7 and historically connected to the notion of
8 the marketplace of ideas that underlie the
9 First Amendment. And, consistent with that,
10 the United States has, among most nations, has
11 the most minimal system of collective
12 administration of copyrights. And when they
13 exist, they are closely supervised under the
14 antitrust laws, for the most part. And the
15 justification for that and when they are,
16 those collective administration organizations
17 exist, at least the assumption is that they
18 are an efficient solution to a market failure
19 and, therefore, they have sufficiency and they
20 are also no more anti-competitive than is
21 necessarily the case. So, it is a clearly
22 identified market failure.

1 Now, within this framework, I
2 think before we adopt extended collective
3 licensing, we therefore should ask what
4 exactly is the market failure that we are
5 trying to solve here? Can ECL actually solve
6 the market failure or merely shift it away?
7 Can it solve it without creating other
8 problems or even a bigger part of them or just
9 as important problems and how ECL actually
10 compares to other solutions?

11 And I think ECL does not really
12 solve the problem. The fact that you pay
13 someone for the use of works of unlocatable
14 copyright owners doesn't solve the problem
15 that those owners are unlocatable. So, it is
16 easy to collect. ECL is a very easy
17 collecting mechanism but there is a question
18 of how you distribute the money, to whom you
19 distribute money, that is one set of
20 questions. The other is, again, if we get rid
21 of the mechanism of competition, then you have
22 to get into the question of okay, how do you

1 set the rates? Now, that is a serious issue
2 for the music industry but music is relatively
3 a simple thing, compared to what we are
4 talking here because, again, most popular
5 music is radio stations that play the entire
6 song. It is probably not fair use. And the
7 products are quite homogeneous, you know
8 three-minute songs.

9 Here, we are talking with an
10 enormous array of works from letters to you
11 name it, we all know what it is, that many of
12 them don't actually have any market to use any
13 benchmark to determine the price. But it is
14 a total unknown.

15 So, again, it is a very effective
16 mechanism for collecting. You create a
17 monopoly that collects money. Some users may
18 be happy to do that because they get a license
19 and they are fine. But that is not that much
20 different.

21 If the problem with orphan works
22 is that the people don't pay, that solves the

1 problem. But I don't think that is the
2 problem. It is not a sin to use work. Right?

3 And in a way, ECL is not that
4 much different, in my view, than what the
5 Catholic Church did in the late Middle Ages
6 when it started selling indulgences so people
7 could pay -- they would get a license to -- it
8 was a very effective way to monetize sin.

9 MS. CLAGGETT: All right. Well,
10 thank you very much, Ariel. We will have to
11 hear about -- you know we have had Plessy v.
12 Ferguson. We have heard about the Catholic
13 Church. We will try to focus it on specific
14 things happening in this century.

15 But let's try Jim, I think,
16 Mahoney, was next.

17 MR. MAHONEY: I will try and help
18 here a bit because representing small and
19 medium-sized independent labels, my community
20 would be slightly bruised that you think that
21 music is all played on the radio or has no
22 value because my membership includes labels

1 that invest in blues music, and classical, and
2 the list goes on and on.

3 But nonetheless, but I do agree
4 that music, in particular, has spent the last
5 15 years losing a ton of our value to work
6 towards maturing a marketplace of licensing
7 and working on rates. And so while I applaud
8 and am appreciative of being invited to this,
9 I think that for music, in particular, to the
10 purposes of what you smart folks might talk
11 about today, extended collective licensing
12 wouldn't be a solution. And speaking with my
13 members prior to coming down here, I noted the
14 European models. And even with the opt-out
15 clause, they say that the price is forced
16 downward for even those who choose to opt out
17 because of the immense pressure, in
18 particular, on the smallest of players in our
19 community.

20 MS. CLAGGETT: All right. And I
21 think I have Brandon Butler, and then Lauri,
22 and then Fred.

1 MR. BUTLER: Thanks. And Jim's
2 remarks sort of anticipate mine very well.

3 So, I want to sort of say two
4 things. One is sort of in the real world,
5 this is based on a little article that I did
6 collecting anecdotes about collecting
7 societies. What are people saying about them?
8 How are people affected?

9 And Jim raised the great point
10 that smaller entities often feel that
11 collecting societies are not attentive to
12 their needs. They get lost in the mix and all
13 of the attention goes to the stars.
14 Meanwhile, larger artists complain. So, I am
15 just going to go through, very quickly, some
16 of the complaints we found.

17 Larger artists complained that
18 the revenue from their works are being used to
19 pay for the collection of royalties for the
20 small guys because some of those royalties
21 aren't even worth collecting, in the view of
22 the larger guys, and you are taking some of my

1 money and using it to get that guy's money.

2 All of the authors who use these
3 societies, even the ones who choose to, have
4 complained about inefficiency,
5 non-transparency. We don't know where the
6 money goes, where it comes from. Corruption.
7 I mean you know folks who run these agencies
8 have been indicted in some countries. Lack of
9 accountability, mismanagement, high overhead,
10 slow pace of adaptation to new market
11 environments. This last one is especially of
12 great concern to smaller artists. There are
13 all kinds of ways to make your stuff
14 available. And large centralized licensing
15 folks sometimes aren't keen to allow those new
16 uses in favor of old uses that favor larger,
17 more established artists.

18 Users, on the other hand, also
19 have complaints about collecting societies.
20 So, for example, sometimes users are bullied
21 by overreaching licensors. Once you tell
22 someone you can collect money when someone

1 does X, the definition of X gets larger and
2 larger in their view. And so, users sometimes
3 feel that gosh, I am just running a mom and
4 pop store. The Girl Scouts are trying to sing
5 fire camp songs and we get a demand letter.

6 Users can be galled when they see
7 that the license money that they give to
8 licensing organizations are then turned around
9 and used to sue more users. Right? So, I
10 know in the library context, the fact that we
11 give money to CCC and then they fund lawsuits
12 against libraries just drives libraries
13 bananas.

14 And then finally, users, of
15 course, are harmed when there is monopoly
16 pricing, when there is one person who they
17 have to go to for a license, then the price of
18 that license is no longer subject to
19 competitive influences.

20 The other quick point I wanted to
21 make was that ECLs can have a real damaging
22 effect on fair use. So, as Professor Carroll

1 pointed out, I think by definition, any orphan
2 works or mass digitization scheme needs to
3 pick up where fair use leaves off. In
4 reality, though, what we have seen is that
5 risk averse potential fair users love a safe
6 harbor and they can be taught to love a safe
7 harbor as well by the folks who are outside of
8 the safe harbor, telling them what happens if
9 they leave.

10 And so when you create something
11 like an ECL regime, you are going to have
12 people paying who don't have to pay, I mean,
13 by definition, and that is a tax. It is an
14 unnecessary tax on those socially-beneficial
15 uses. We have seen this over and over again.

16 A savings clause, on the other
17 hand, is both unnecessary and insufficient.
18 This is the last thing I am going to say. It
19 is unnecessary because fair use is a
20 constitutional doctrine. We know from Golan
21 and Eldred that fair use is a First Amendment
22 right. And so if you don't like what judges

1 have said about fair use, you are kind of in
2 the same position as someone who doesn't like
3 what judges have said about public fora.
4 Right? I mean, you are kind of stuck with it
5 because it is a First Amendment doctrine.

6 So, it is unnecessary. But that
7 kind of doesn't matter because, again, it will
8 be an ineffective measure because, as we have
9 seen in the lawsuits that are already afoot,
10 we have heard that 108 doesn't allow for fair
11 use, even though it is right there in the
12 plain text, there is your savings clause. And
13 similarly, as I said before, once there is a
14 perceived safe harbor, it kind of doesn't
15 matter that you are told in theory you could
16 leave. People don't leave. So, there is a
17 real risk there of fair use shrinking as the
18 ECL grows.

19 MS. CLAGGETT: Okay, I think I
20 have a long list of people. I have some
21 follow-up questions that I will ask in a
22 minute in terms of does the flip side also

1 apply as well, in terms of people who are risk
2 averse wanting to have a safe harbor through
3 a legislative -- because they don't want to
4 risk even the possibility of litigation.

5 But I think we had Lauri next,
6 then Fred, then Mike Furlough, and then Mike
7 Weinberg.

8 MR. RECHARDT: Thanks. And
9 actually -- maybe in a way just to sort of
10 complement what Jim was saying, what I am
11 going to say is from the point of view of the
12 recording industry as a whole, both the big
13 one, majors, as well as the small guys. What
14 I am going to say is also probably more from
15 the international side.

16 But looking from the outside --
17 and if the question is do we need ECL, from
18 the recording industry side, I think the
19 answer is no. Licensing already will.

20 But at the same time, again, if
21 you look at the different models that are
22 applied, yes, the first option, if you will,

1 is always to go direct -- license directly.

2 And that is what the industry is doing.

3 But, having said that, in many
4 cases in the U.S., outside the U.S. even more
5 so, industry is also using collective
6 licensing as a tool, but it is always
7 voluntary and choose voluntary collective
8 licensing when collective licensing makes
9 sense.

10 And the problem with ECL that we
11 see around the world, basically, that it
12 forces people to use collective management
13 organizations, even if they wouldn't want to
14 do that. And I don't think that has anywhere
15 proven to be the best solution to the real or
16 foreseen problems with licensing.

17 And the last point is, there is
18 a little bit of sort of collect -- inside your
19 CMO-bashing here. Some of it, I am sure, you
20 know is at least partly justified. But part
21 of my job is to oversee the recording industry
22 collective management organizations -- music

1 licensing companies, actually, as we happen to
2 call them, globally. And I can assure you
3 that these guys in the main are -- they are
4 good actors -- responsible in what they want
5 to be, or, at the very least, become, instead
6 of responsible service organizations.
7 Whenever the industry needs -- collective
8 licensing solutions, they are there, and they
9 can provide those services. It is all based
10 on voluntary, not statutory solutions.

11 MS. CLAGGETT: Okay, thank you.
12 And we will go to Fred next, Mike Furlough,
13 Mike Weinberg, Casey Rae, and Jan Constantine.

14 MR. SCHROEDER: Thank you. Let
15 me just begin by saying that mass digitization
16 breeds an opportunity for blind people to have
17 access to information in ways that is
18 unprecedented. If you think about it, blind
19 people have literally not had a means of
20 reading and writing for well, it has been less
21 than 200 years since Louis Braille developed
22 the Braille code. And with mass digitization,

1 this gives us the opportunity to gain access
2 to millions of works that otherwise would have
3 been unavailable to blind people.

4 I know you all know this, but I
5 set that stage to say anything that inhibits
6 or has a chilling effect on activities of mass
7 digitization will serve to limit access not
8 only to the broader community but specifically
9 to the blind community that needs these works,
10 particularly in the area of academic studies.
11 And I won't belabor that point.

12 So, I am not a copyright expert
13 and not an expert on intellectual property but
14 extended collective licensing, if it has the
15 effect of reducing the efforts of mass
16 digitization, that will have a serious impact
17 on blind people and our access to information.
18 Not to be maudlin about it, but blind people
19 wanting to read isn't just to sort of pass our
20 lonely hours. Blind people want to be active,
21 productive, employed, integrated members of
22 society and access to information is key to

1 that.

2 The second thing I would say is
3 I understand the need to protect intellectual
4 property but once materials have been
5 digitized, whatever structures are put in
6 place that allow access to that material,
7 those procedures must not be so cumbersome as
8 to inhibit access by the end user. In other
9 words, they should be simple enough,
10 straightforward enough that blind people and
11 others who are using these works can readily
12 use them and use them with, certainly,
13 whatever safeguards are needed, but still
14 remembering the needs of the end user.

15 The last thing I would say is,
16 again, with materials that are made available
17 in digital format for blind people, I know
18 there is concern that what if some of these
19 materials then make their way into the
20 marketplace and all of that, and I certainly
21 understand that concern. Blind people aren't
22 in any way seeking to damage the intellectual

1 property rights of authors.

2 But at the same time, there is a
3 pretty long history of materials being
4 produced in alternative formats. And as far
5 as I am aware, there literally are no data, no
6 instances of those materials, be they put in
7 braille, be they recorded, et cetera, that
8 have been misused. And I will stop there.
9 Thank you.

10 MS. CLAGGETT: Thank you. Now we
11 will go to Mike Furlough, and then Michael
12 Weinberg, Casey Rae, Jan Constantine, Jerker,
13 Ben, and Corynne.

14 MR. FURLOUGH: I'm Mike Furlough.
15 I am the Executive Director for HathiTrust and
16 I wanted to say how proud we are to be working
17 with the National Federation of the Blind to
18 be able to make so many texts accessible to
19 readers who are print-disabled and
20 sight-disabled.

21 So, I guess the point I want to
22 make here is that we have been talking about

1 ECL as a solution to mass digitization and I
2 am not sure that mass digitization, as we have
3 conducted it with Hathi, needs a solution. We
4 have shown that we are able to do this within
5 the boundaries of the law. We make lawful
6 uses for search. We make lawful uses for
7 preservation, and we make lawful uses for
8 access to the blind.

9 To extend the collective
10 licensing regime to something like this would
11 make it fairly impractical. Mr. Dessy from
12 the Library of Congress this morning spoke
13 about the costs that are invested in making
14 mass digitization efforts or any digitization
15 efforts to add further costs on cultural
16 heritage institutions begins to add a tax on
17 what we do. And I would remind everyone that
18 cultural heritage institutions exist to serve
19 the public. They exist to serve the folks in
20 this room, not just their own needs and their
21 own ends.

22 I think the last point I would

1 make at this point is to build on something
2 Brandon was saying earlier, and that is, if
3 collective licensing regimes will take off
4 where fair use leaves off, there is a real
5 concern I have in making it the norm to pay.
6 I think, as Brandon was saying, if it becomes
7 the norm to pay, then individuals become less
8 willing to take risk or more risk averse.
9 You, at that time, begin to see the fair use
10 bar pushed farther and farther back.

11 MS. CLAGGETT: Yes, and I was
12 going to follow up, but you kind of answered
13 the question that I was going to pose that
14 others might as well, in terms of yes, there
15 are certainly issues already kind of decided,
16 at least on the District Court level, as I am
17 sure you will be reminded, with respect to
18 what mass digitization would be allowed under
19 fair use.

20 One of the main issues that
21 wasn't addressed in the HathiTrust or the
22 Google Books case was full access beyond

1 access for persons who are blind or otherwise
2 print disabled.

3 MR. FURLOUGH: May I follow up?

4 MS. CLAGGETT: Yes.

5 MR. FURLOUGH: I just wanted to
6 point out, yes, that is the case. We do not
7 make full text access available for
8 in-copyright works. Never have.

9 There are mechanisms that exist
10 for us to do so by working directly with
11 rights holders, however, and we have worked
12 with many rights holders, individuals, and
13 publishers to make their materials openly
14 available through HathiTrust with their
15 permission where they hold the rights to do
16 so.

17 So, there are mechanisms that
18 work now to do this.

19 MS. CLAGGETT: Michael Weinberg.

20 MR. WEINBERG: Yes, I just wanted
21 to echo, again, this concern -- that I think
22 I am encouraged that I have heard a lot of

1 concern about the idea of formalizing some
2 sort of extended collective licensing for all
3 these things under mass digitization, for all
4 the reasons that have been said before.

5 I also wanted, just because I
6 know this is the orphan works and mass
7 digitization roundtable, and I also am glad
8 that we have largely separated those two
9 issues but because it is that, I wanted to
10 just put a flag and say that extending this
11 idea to some sort of way to address the orphan
12 works problem is one that would raise a lot of
13 concerns, not the least of which is almost by
14 definition you are talking about the kinds of
15 works that Brandon was talking about, the
16 users who are at the very far end of that tail
17 and you run this risk that always exists with
18 collective licensing, but especially in the
19 orphan works context, of generating a large
20 amount of money that is not really disburseable
21 or disbursed to anyone, and so it creates a
22 drag on the economy.

1 So, I am glad that we are
2 actually not talking about that but I wanted
3 to at least mention it.

4 MS. CLAGGETT: Casey?

5 MR. RAE: Thanks. In some ways
6 ECL feels a little bit cart before the horse
7 because, in order to have truly functional and
8 effective collective licensing mechanisms, you
9 probably need interoperable and standardized
10 database systems. Obviously, that doesn't
11 exist in the case of orphan works, but we
12 could think not just about right now, but
13 think about the future. Everybody is talking
14 about, for example, Bitcoin as a currency.
15 But the blockchain technology could be used
16 just as easily to track rights ownership.

17 And part of the problem with
18 orphan works is figuring out how to deal with
19 it now. ECLs should be part of the
20 conversation, but we should also be looking in
21 the future to mechanisms that can be devised
22 that would limit the number of new orphan

1 works. You know, smarter database systems,
2 better tracking of ownership could aid in
3 everything from knowing who to pay to also
4 being able to send the notice to the right
5 person in an instance of one wanting to
6 exercise their termination rights.

7 In defense of today's existing
8 collecting societies, we have to remember that
9 the systems that we are dealing with now were
10 largely devised to operate in an analog world,
11 with the exception of Colin's organization.
12 And clearly, the use environment is much more
13 diverse and the systems for tracking uses can
14 be much more granular. But they are all
15 virtues to the existing system and one that
16 doesn't get brought up enough is leverage for
17 smaller artists who aren't able to compete or
18 even get to the negotiation table in direct
19 deals.

20 And I think that even if there
21 are tensions in how rates are determined and
22 set, it is important to remember that some of

1 those artists really do depend on having a
2 proxy in negotiations when rates and uses are
3 being decided upon.

4 MS. CLAGGETT: Thank you. We
5 will go to Jan. And I don't know if you want
6 to discuss any of the positive aspects of the
7 Google Books settlement, as I said, which was
8 somewhat of a model that people thought was an
9 ECL but there were, obviously, antitrust and
10 other kind of monopoly-type concerns raised
11 with the specific settlement.

12 MS. CONSTANTINE: Right. I would
13 like to say that we -- collective licensing
14 presented us with a way of resolving the
15 Google dispute, which all of the parties, as
16 I said, including libraries as third-party
17 beneficiaries, believed was a win-win-win.
18 And just to briefly state authors and
19 publishers as right holders have control.
20 They got compensated for uses.

21 Their works were digitized by
22 Google and they had access to those works for

1 those who wanted it. And out-of-print works
2 had new markets for their books. These were
3 non-exclusive rights that were given. They
4 could take the rights of the digital books and
5 do whatever they wanted with them. Libraries
6 were able to have mass digitization of their
7 collections, preserve copies, it was access
8 for the visually-impaired, and limited access
9 for restricted uses, as per the terms of the
10 settlement.

11 And Google had its business
12 models. It got released from past
13 infringements and made lawful future uses and
14 funded, I think \$40 million was the funding
15 for, a registry that was going to take a very
16 small administrative fee, only five percent,
17 I believe, and it was going to use money to
18 find rights holders, so that the orphan works
19 issue would be minimized.

20 And Google also agreed, unlike
21 HathiTrust, to remove all works from the
22 database and exclude works from business

1 models if a creator wanted them to.

2 HathiTrust, I understand Mike --
3 and you can correct me if I am wrong -- takes
4 the position that everything stays in the
5 database because to take anything out would be
6 to put a hole in the database.

7 So, nobody -- if they wanted to
8 talk to HathiTrust about removing their books,
9 they would not be able to do so.

10 So, it basically functioned as a
11 de facto collective licensing organization.
12 It was a clearinghouse for rights and its
13 mandate was to pay rights holders. And I
14 think it would have worked. The court would
15 have blessed it, so there would have been a
16 kind of court-driven due process of law,
17 although the government was involved, and
18 there was a default-in mechanism for
19 out-of-print books. The focus of it was to be
20 on out-of-print books and in-print books were
21 not in unless somebody affirmatively asked
22 them to be in.

1 And I think the reason why that
2 was done the way it was done is that all
3 parties felt it was a good solution.
4 Unfortunately, the Justice Department didn't
5 agree and there were others who were third
6 parties who took issue, although many of them
7 have come to me and said if they had known
8 then what they knew now, they would have
9 supported it. But in any case, that is behind
10 us.

11 I do believe that there are
12 elements in there that could be useful. The
13 Nordic models are efficient and they have
14 proven successful. So, we could support
15 something along those lines. We would insist
16 on an opt-out right for an individual author
17 to license individually because I think that
18 is important. We would insist upon a
19 representative body to negotiate licenses and
20 the authors would have to be at the table.
21 There would have to be an opt-out right if an
22 author was unhappy. And there would have to

1 be secondary rights, limited to areas that
2 make sense, like photocopying and library
3 lending. And there would have to be an
4 inexpensive and efficient dispute resolution
5 mechanism like we had in the settlement
6 agreement, which I think would have benefitted
7 everyone in the same way that the small claims
8 court would. It would have been very easy to
9 do and would have resolved a lot of disputes
10 beforehand.

11 MS. CLAGGETT: Thank you. And we
12 will turn to Jerker, which I think is a good
13 segue because you mentioned the Nordic model
14 and other foreign models in terms of ECL. And
15 maybe you can give us some examples of some of
16 the things that have gone on in Europe, in
17 terms of the development of ECL.

18 MR. RYD N: Yes, thank you.
19 First of all, I would like to clarify, just as
20 far as fair use and ECL. We don't have fair
21 use, but we have exceptions for digitizing for
22 preservation reasons. So you don't need to

1 use an ECL for that and neither to do text
2 mining, if you have an exception in your
3 national legislation, as in Norway and the UK,
4 something that might happen also in France.

5 ECL has not been introduced on a
6 European level, with the exception of the
7 satellite and cable directive, Article 9. And
8 it is a solution that exists in national
9 states, in member states. In 2010, although
10 the EU Commission introduced or initiated a
11 stakeholder dialogue on art owners' works, the
12 lot, and then it was narrowed down to books,
13 and then journals. That took eight months.

14 And it is a soft law solution.
15 The stakeholders, publisher, writers, all of
16 them signed this MOU and agreed upon, in
17 principle, how to digitize to make available.

18 It was also in the interest of
19 the publishers. They also need a license
20 because going back, they have not the digital
21 rights in Europe. So, we also need that kind
22 of solution.

1 As to this day, this has been
2 transformed internationally in Germany, which
3 is the biggest publishing nation in Europe.
4 It passed both chambers. And most likely, the
5 rest of Europe will follow. It has already
6 been in other countries.

7 So, that is the situation. It is
8 a voluntary agreement. You give an example of
9 the ECL provision and the legislation to
10 extend license to nonmembers, including orphan
11 works, which enables the national broadcaster,
12 for example, to digitize the archive. They
13 are a producer but they don't have all the
14 rights and they are unclear of some rights,
15 just like the Google case.

16 The agreement was not entered on
17 behalf of the film industry. They choose to
18 not be part of it. And that I stress. They
19 choose not to be a part of it. That shows it
20 was not in their interest. They were not part
21 of the agreement. And they protected the
22 interest. And that's okay. That is the way

1 it should be.

2 So, that is the example of what
3 is voluntary.

4 As far as this extended effect on
5 the outsiders and the nonmembers, also to
6 include orphan works, the usage of an ECL
7 previously was an analog world because in the
8 digital world, it would be quite different.
9 It has to be widely publicized. It would have
10 to have databases you can search as you are
11 rights holder. Is my work part of this
12 repertoire being digitized? So, you have to
13 have many civil safeguards different to the
14 old ECL solution, which was then reproduction
15 at universities, photocopying more or less.

16 MS. CLAGGETT: And I want to just
17 follow up. In Germany, you said they are the
18 largest publisher in Europe, or publishing
19 country in Europe, that has ECL. What types
20 of uses are you allowed to make?

21 MR. RYD N: The driving force was
22 still, as I mentioned before lunch, Europeana,

1 but the Commission realized that the Orphan
2 Works Directive would not do the job. And
3 actually, the stakeholders, all of them
4 approached the EU Commission and said they
5 wanted a market solution. The stakeholders
6 should sit down and discuss a solution.

7 So this one was facilitated by
8 the EU Commission, but the stakeholders agreed
9 upon the terms and conditions, given the
10 mandate that they have.

11 And then Germany is the biggest
12 publisher nation in the E.U. It is about,
13 then, getting Europeana digitized and make it
14 available on the internet.

15 As I said, it is a two-fold
16 interest. Also the publishers have an
17 interest in this, a commercial interest.

18 MS. CLAGGETT: Thank you. Ben and
19 then Corynne.

20 MR. SHEFFNER: Thank you. I just
21 want to go back to sort of echo something that
22 Lauri mentioned at the beginning of this

1 panel, which is that the preference should
2 always be for individually negotiated licenses
3 between copyright owners and those who wish to
4 exercise any of the Section 106 rights. And
5 I think the Copyright Office, in fact, has
6 recognized this before.

7 In preparing for this, reading
8 back through the 2011 report, I just want to
9 quote a couple of sentences, which I heartily
10 endorse. It says "a mandatory licensing
11 scheme would be a measure of last resort.
12 Congress would need to conclude that there is
13 a compelling public need and that that need is
14 frustrated by market failure. It would also
15 need to be sufficiently narrow to comply with
16 treaty obligations of the United States."

17 I would also just add that any
18 such system, whether it is ECL or statutory or
19 compulsory license, whatever the specifics,
20 needs to address the specific market that we
21 are talking about. And one thing that has
22 become sort of highlighted for me over the

1 last couple of days, listening to the
2 discussions is -- you know what, what archives
3 do with hundred-year-old letters is just a
4 world of difference from what major motion
5 picture studios do when they release a movie
6 that they just spent \$200 million producing.

7 There are different problems and
8 there are different solutions that would need
9 to be devised to facilitate licensing.

10 Frankly, from the industry that I represent,
11 voluntary licensing works very well. And
12 studios are able to negotiate with all sorts
13 of distributors and arrive at market prices
14 that tend to work pretty well.

15 There is now over a hundred
16 different legal websites to watch movies and
17 television for consumers, not to mention all
18 the traditional licensing arrangements with
19 movie theaters and cable channels and networks
20 and the new models like Netflix and Hulu and
21 all of those.

22 So, when we are talking about

1 things like ECL, again, it is not that ECL is
2 good or bad or that any sort of collective
3 licensing scheme is good or bad.

4 When I was walking in here this
5 morning, I noticed the banner celebrating a
6 hundred years of ASCAP. That is a collective
7 licensing system that has survived the test of
8 time -- an entire century. I think nothing is
9 perfect, but it has worked pretty well for
10 both songwriters and publishers and those who
11 wish to license it.

12 But again, there is no
13 one-size-fits-all for any sort of these
14 licensing solutions. You need to look at the
15 specific technologies and market conditions
16 and economics of each individual copyright
17 sector.

18 MS. CLAGGETT: Thank you.
19 Corynne and then Ariel, Jerker, and then
20 Debra.

21 MS. McSHERRY: Okay, this doesn't
22 actually happen all that often but I mostly

1 agree with Mr. Sheffner -- it is like one
2 other time ever.

3 But -- so and along those lines,
4 I am going to keep my comments brief so that
5 we are not being too repetitive. I think that
6 it is right and I think I am hearing this from
7 a number of different sources that what is
8 likely is that there is not one solution. And
9 depending on the kind of work you are talking
10 about, different solutions might be
11 appropriate.

12 Even within just books, there are
13 many different kinds of authors. I talk to a
14 lot of academic authors and they didn't like
15 the Google Books settlement because they
16 didn't feel like their interests were being
17 represented. They write to be read. They
18 don't need to be compensated. They don't care
19 about that and they were worried about that.

20 So, depending on even the kind of
21 author you are, you have different interests.
22 And I hear a lot about maybe voluntary

1 licensing systems, which I think make a ton of
2 sense or at least fit the situation,
3 potentially a little bit better.

4 And also, it is not just
5 different kinds of authors and different kinds
6 of works but also the varying status of the
7 work. Is it a hundred year old letter or is
8 it a \$200 million motion picture that came out
9 last year? I do think that is an important
10 distinction to make. It is in-copyright or
11 out of copyright?

12 So, to the extent that we talk
13 about these things, I really think our first
14 impulse should be trying to narrow down what
15 problem do we really need to solve right now
16 and focus there, rather than trying to come up
17 with global solutions to all things, which I
18 think will take a lot of time.

19 The one thing that I haven't
20 heard, and I don't think you are likely to
21 hear from anybody else, is that I work for an
22 organization that cares very deeply about

1 intellectual property rights. We also care
2 very deeply about privacy rights.

3 And so the one thing I just want
4 to put a pin in is that, as we continue these
5 conversations, one of the aftereffects of
6 licensing schemes, depending on how they
7 develop, is you could start collecting a large
8 database of information of who is reading
9 what. Who is listening to what, in what
10 circumstances?

11 And so I just want to put on the
12 table -- we are a long way away from this --
13 but privacy concerns have to be part of that
14 conversation, should we ever get there,
15 because that is a lot of First
16 Amendment-protected information.

17 MS. CLAGGETT: Thank you. Ariel?

18 MR. KATZ: I just wanted to kind
19 of raise a -- to make a provocative thought
20 experiment. There is something about extended
21 collective licensing that sounds great.
22 Right? It is extended and it is collective.

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MS. CLAGGETT: And it is
licensing!

(Laughter.)

MR. KATZ: Okay, so I have a
proposal for the start-up idea. I want to
recruit a few authors. I am an author and I
get a few authors around the table and we
create a licensing scheme for the use of our
works and we sell licenses. No issue with
that. We are totally entitled to do that.

But we also say okay, but we have
a business model. We tell our users, you pay
us a fee, a subscription fee or whatever model
we use and we actually give you a license to
use not only our works but the works of anyone
else, even if they have never authorized us to
act on their behalf. And we are good and
reasonable people and we collect the money and
we agree and we promise to pay any nonmember.
If you show up, we will distribute the money
to you. And we even will try to locate you,

1 even if you don't show up. We put the money
2 in escrow and we just collect on behalf of
3 everyone.

4 I don't think that is legal.
5 Right?

6 (Laughter.)

7 MR. KATZ: I think Napster
8 wanted, basically eventually they wanted, to
9 do something like that. They said we will
10 start a business and then we figure out with
11 the copyright owner some workable model. And
12 probably the courts frowned upon them and
13 maybe rightly so.

14 So, what is really, what is the
15 difference? Is the fact that the organization
16 is owned by copyright owners that have some
17 authors on the board, did that really make a
18 difference?

19 MS. CLAGGETT: I think it would
20 have to be legislation, probably, that would
21 make the difference that would legalize it but
22 others might have a different opinion.

1 MR. KATZ: Why would something be
2 frowned upon in one context and then we think,
3 okay, we may need legislation, but what is the
4 point of letting one person administer the
5 rights of another?

6 MS. CLAGGETT: Yes, and I think
7 that is one of the things that we might
8 actually explore in even more detail in the
9 next panel. But if it was legislative, you
10 would have the opportunity to provide certain
11 standards and requirements for any collective
12 management organization. You would have
13 ongoing oversight by the government. So,
14 there are things that would mitigate any
15 concerns that you would, obviously, have if
16 some just pirate wanted to go in and try to
17 operate as a collective management
18 organization.

19 I think, Jerker, you were next.
20 And I don't know if you have anything to offer
21 in terms of the actual experience,
22 practically, in some of these countries that

1 have ECL. Are there any statistics or data
2 that you would suggest that we look at in
3 terms of the effectiveness of ECL regimes?

4 And do you know anything, not to
5 put you on the spot, but I think you are one
6 of our only, other than Ariel, foreign expert
7 on this on the panel. But do you have any
8 experience or evidence in terms of how things
9 are going on in the United Kingdom, where they
10 just did adopt an ECL? It hasn't actually
11 kind of been put up yet, so to speak, but I
12 know that that was something that they
13 recently discussed and adopted.

14 MR. RYD N: Please remind me if
15 I miss any of your questions.

16 MS. CLAGGETT: Yes, sorry.

17 MR. RYD N: Ben Sheffner really
18 stressed two really important issues. I think
19 he stressed two. One was that the traditional
20 way to licensing is the number one -- and also
21 stressed in the ECL legislation in Sweden. If
22 you could read Swedish, you would know that,

1 but that is a problem. But it is stressed
2 that that is option number one.

3 And collective licensing is
4 something you consider if the transaction
5 costs are so high it is simply impossible and
6 now you have the problems with the outside --

7 MS. CLAGGETT: Market failure.

8 MR. RYD N: -- in market failure,
9 simply. But that is stressed in the
10 legislation.

11 As far as competition in Sweden,
12 you can have competing collecting societies,
13 but it is like Google's market penetration in
14 Sweden. It is over 90 percent. A small
15 country. These are piracy monopolies because
16 as an author I am a monopoly.

17 So, it is kind of difficult to
18 have competition because you can actually have
19 it if legislation is open for it, it is for
20 the market to both find a way to be
21 competitive.

22 As far as your questions, as to

1 UK, I had just had a meeting -- had a chat --
2 with a colleague at IPO and she said we have
3 all the formal decisions, so it is more or
4 less a formality now to introduce it.

5 And then experience --

6 MS. CLAGGETT: Yes, is there any
7 kind of like hard data in terms of experience?

8 MR. RYD N: Yes, I think actually
9 the CEO of the Swedish RO, he had been here
10 for an RO conference, IFRO, he had a
11 presentation. He could provide figures of
12 actually how quite effective the Nordic ROs
13 are because they are quite effective. They
14 deliver revenue to the rights owners. It is
15 an extremely lean organization. We do not
16 want to like have -- that is their side of it
17 -- to have any kind of bureaucracy imposed by
18 European Commission as far as regulations
19 because there will be additional overhead.
20 So, happy to contact IFRO and they could then
21 forward information.

22 As far as usage, what libraries

1 will likely need, as we see it, as making what
2 is streamlined as far as the library and
3 cost-effective -- low overhead. And the
4 rights holders' positions would be to protect
5 the rights. That is not a problem. That is
6 -- overall they are helpful because we don't
7 want to be caught in a situation where there
8 would be some kind of ambiguity as far as we
9 are violating copyright. So, the CMO -- RO --
10 is the safeguard to that and takes on that
11 role to safeguard us, rather than being in
12 some kind of uncertain situation. That is the
13 library perspective. Thank you.

14 MS. CLAGGETT: Thank you. And I
15 was just going to follow-up and we can maybe
16 get back to this at some later point but I
17 know there are some people waiting to speak.

18 But I know, for example, in
19 Finland, with the ECL model, they have a way
20 where the Ministry of Education actually
21 approves the CMO, in some sense, that will be
22 using the ECL. So, those are some of the

1 types of models that they use in other
2 countries, to ensure that some of the concerns
3 that have been raised about transparency,
4 corruption, and things like that are not
5 actually part of a CMO that exists in the
6 United States or elsewhere.

7 I think we had Debra and then
8 Brandon.

9 MS. LaKIND: I just want to
10 reiterate, from a museum perspective, that
11 individually-negotiated licenses work for us.
12 That is really the best way. That is what we
13 have been doing. We are not only content
14 providers but we also use other people's
15 content as well. So, it is kind of a license
16 that works both ways.

17 So, we kind of also have a dual
18 mission. This whole idea of access to the
19 collection, we want to, obviously, try and
20 digitize not necessarily everything in our
21 collection, but the objects and works that
22 make sense. We have, I don't know, 100,000

1 shards of Egyptian artifacts and, quite
2 frankly, they all look the same. So, you
3 really don't need a photograph, an image of
4 that.

5 (Laughter.)

6 MS. LaKIND: However, works on
7 papers and our European and American paintings
8 and such.

9 But we rely on revenue from
10 licensing. And we negotiate those deals. And
11 you have probably heard now in the media
12 community there is this whole trend now
13 towards open access and open content, and how
14 the Smithsonian has put 45,000 images online
15 for any use, not just educational use, but
16 commercial use as well. And we are seeing
17 that that is seriously affecting -- it is
18 affecting our revenue stream from generating
19 revenue from licensing. We are all for free
20 and open access to scholarly and educational
21 use. However, the MFA, we rely on income that
22 is generated from licensing our collection.

1 We have also seen, I believe it is the Getty,
2 now has always had that policy. Well, these
3 are institutions with large endowments and
4 that are funded by the government. We are
5 completely private institutions. So, we rely
6 on that revenue for licensing. And I think
7 any type of collective association would not
8 be in the best interest of the museum.

9 MS. CLAGGETT: Thank you.

10 Brandon and then Cynthia.

11 MR. BUTLER: So, I want to see if
12 I can describe very briefly what I think is a
13 kind of consensus here. Cass Sunstein calls
14 this an incompletely theorized agreement.
15 John Rawls calls it the overlapping consensus.
16 It is a shallow agreement.

17 So, I think commercial rights
18 holders, the folks in this room who own
19 rights, whether they are writers or publishers
20 or whatever, and then the downstream users,
21 whether they are librarians, or website
22 operators, or whatever -- they all agree on a

1 couple of things that I think are really
2 important. Where there is a ready market
3 solution for your non-transformative use, you
4 are just doing what -- you are in the market.
5 You are competing with Best Buy. You probably
6 ought to get a license. And any legit person
7 is not going to be able to look you in the
8 face and deny that.

9 And then where there is fair use,
10 whether you are talking about commentary or
11 whatever, pick your core fair use, whatever
12 that is, maybe preserving rotting films, that
13 is in the history of the Copyright Cct, the
14 Congress said surely if anything is fair use,
15 preserving films that are rotting in
16 warehouses, that is fair use, even if there is
17 a lot of them, by the way.

18 So, there is this incompletely
19 theorized -- so, when it is fair use, don't
20 pay. When it is not fair use, pay. And
21 everyone in this room believes strongly,
22 rightly, that they are not an orphan. They

1 know where they live. There were submissions
2 in one of the last inquiries along these lines
3 -- sort of somebody thought my dad who was an
4 author was an orphan but he is not because I
5 know where he lives.

6 So, no one in this room thinks
7 they are an orphan. And the folks who are in
8 this room who are rights holders are deathly
9 afraid of being wrongly classified that way.
10 And so, for any use either no exceptional
11 limitation applies and in that case, everyone
12 agrees a negotiated agreement is the right
13 thing to do.

14 Where there is no limitation or
15 exception already in the law, what you want is
16 to talk to the other guy and come to terms.

17 And also, everyone agrees that
18 where there is one that clearly applies, you
19 shouldn't have to do that. What we disagree
20 about is the line -- what divides those two
21 situations. And I think that line is going to
22 get clearer and clearer. It is getting

1 clearer and there might be some more lawsuits
2 and some more case law in the coming years.
3 And so, I think there is no one who thinks we
4 should create, or very few people so far, who
5 think that those two categories are not
6 exclusive and that we should create a third
7 category for things that are neither fair nor
8 subject to this free market thing. And they
9 are all very, very worried about what happens
10 when you do that. And I just wanted to see if
11 that is a description of what is going on.

12 MS. CLAGGETT: Well, I will just
13 say, just to let everyone know, obviously, we
14 have a certain number of people, 16 people
15 here who are participants. We have gotten a
16 lot of comments. So, there are different
17 perspectives raised and some supporting, some
18 not supporting ECL and other approaches in the
19 written comments and we are going to ask for
20 more submissions.

21 So, I don't know that we can say
22 that there is a consensus, just based on the

1 participants here. But I will say there was,
2 in the last panel and a little bit here, a
3 discussion of this gray area in-between and
4 whether there should be some type of solution
5 that is not necessarily, again, fair use or
6 infringement, perhaps not extended collective
7 licensing, perhaps voluntary collective
8 licensing, or something else. But there was
9 a discussion about what should we do about
10 that gray area.

11 I think I have Cynthia next, and
12 then Casey, and then Fred.

13 MS. TURNER: Thank you. I would
14 like to speak about visual art and,
15 specifically, about illustrators for a little
16 bit because visual art does have to have some
17 special considerations and I think it warrants
18 special exemptions here in the orphan works
19 and the mass digitization schemes that are
20 being talked about.

21 In past orphan works legislation,
22 visual art was swept in, all visual art as

1 orphans, even by living creators currently
2 licensing their work. And we risk that again
3 in any of these schemes that have been talked
4 about today.

5 From 2005, we have very openly
6 advocated for very limited, defined exceptions
7 to allow archivists, museums, and libraries to
8 complete their missions. Any orphan works
9 legislation has got to be sure that it does
10 not invade functioning markets. Copyright
11 exists to create the property right, to
12 sustain the market for us to disseminate our
13 works.

14 Now, when we move to mass
15 digitization, which to me is a completely
16 separate entity than orphan works -- and it
17 bothers me that we have to talk about them at
18 the same time because I don't see a lot of
19 overlap -- so I would like to address that
20 separately.

21 In mass digitization, speaking
22 again for illustrators, for visual artists,

1 our work is at risk in two ways. Most visual
2 art is contained. It is both stand-alone, so
3 we risk having mass digitization of individual
4 works, but it also is embedded in books and
5 periodicals which are being swept along. Now,
6 it is very nice that people are working out
7 negotiations with publishers in some cases but
8 we have a 30-year history in this country
9 where visual artists and writers have not been
10 permitted to participate in the reprographic
11 licensing of the secondary rights streams,
12 even with Supreme Court wins with Tasini.

13 And it has been mentioned by
14 Barbara Ringer, it has been mentioned by Ruth
15 Bader Ginsburg, that there is an extreme need
16 in the U.S. to create a functioning
17 reprographic licensing system that will
18 address this. And I see that as a solution.
19 It is not an extended collective license by
20 any means. I see that as a good, potential
21 solution for mass digitization.

22 MS. CLAGGETT: Thank you. I

1 think we have Casey and then Fred.

2 MR. RAE: Yes, I think Ben was
3 really smart to bring up the distinction
4 between different sectors and different
5 practitioners, and different expressive works
6 and how they relate to the marketplace and
7 what might or might not work in a collective
8 environment.

9 I would also say, though, that I
10 don't want to speak for Jim but I know that
11 some of your members must understand pretty
12 acutely what it is like to have perceived
13 market share work against you in voluntary
14 licensing scenarios.

15 This is a really great
16 conversation. I am having a little bit of
17 difficulty, personally, it might be the cold
18 meds, in separating the part of the collective
19 licensing conversation that applies to orphan
20 works solutions and just the generic idea of
21 collective licensing mechanisms, blanket
22 licenses, compulsories, or consent decree

1 managed licenses and their efficacy in like,
2 Ben would say, very specific use environments.

3 MS. CLAGGETT: Yes, Fred and then
4 I actually have another question for the
5 group.

6 MR. SCHROEDER: Yes, on this
7 issue of the extended collective licensing, I
8 am thinking for the museum I would be glad to
9 give you a license for those 100,000 shards of
10 Egyptian pottery. And I promise I will go try
11 to find the pharaohs to whom those shards
12 belong and pay them their royalty.

13 (Laughter.)

14 MR. SCHROEDER: Where I am going
15 with this, one of the concepts, and again, I
16 mentioned the economic disincentive to
17 digitize if there is added costs and the
18 impact that has on access to materials for
19 blind people, but also the very idea that a
20 library that has purchased a book and
21 digitizes it and is not making full text
22 available has really changed the nature of the

1 book in such a way that it has to seek
2 permission from rights holders or
3 alternatively, that a right holder could say
4 I want you to take that out of your
5 collection, I think it really works against
6 the public interest of access to blind people.

7 And I say that because a sighted
8 person, assuming a book is in print, can go
9 and buy a copy of the work or, if it is in the
10 library collection, they can go and read it.
11 That is not the case for blind people. And if
12 there is a digitization of a work that now
13 makes it available for the right holder, for
14 reasons fully unrelated to access to blind
15 people, for whatever reason, says I want this
16 book taken out of your digitized collection,
17 we, again, are left with no access to that
18 book, even though all of the work that made
19 that book accessible has been done.

20 So again, my point here is simply
21 to say as you look at these very technical and
22 complex issues, we urge you to bear in mind

1 that there is a sector of the population that
2 desperately needs access to these works and
3 consider whatever scheme is put into place
4 that it not have any chilling impact on access
5 to blind people.

6 MS. CLAGGETT: Thank you. And so
7 I actually did have another question. I
8 wanted to kind of narrow our focus a little
9 bit in the final few minutes before we open it
10 up to audience participation because I did
11 take notice of a lot of the comments, which
12 said that you can't have a one-size-fits-all
13 solution and that is has to somehow take
14 account of the work, take account of the use.

15 So, just narrowing it down to
16 maybe books because I think we have a model
17 somewhat already in the Google Books
18 settlement, but what do people think in terms
19 of an approach, as I said, where we get into
20 a gray area with respect to the law, in terms
21 of full access? The Google Books settlement
22 would have provided access in certain

1 circumstances, at least, in libraries through
2 a subscription model. Would that be something
3 that people would think is something that
4 should be supported and maybe done through
5 some type of legislative or ECL model? Is
6 that kind of narrow focus something that
7 people would be willing to consider in light
8 of the fact, obviously, that certain sectors
9 were willing to consider it at the time of the
10 Google Books settlement?

11 So, I just wanted to throw that
12 out there, starting really narrowly just on
13 books and access to books through some type of
14 licensing or ECL regime.

15 Yes, Mike?

16 MR. FURLOUGH: No. No, I think
17 for the reasons I stated earlier -- that I
18 think we are looking at adding costs into
19 access. And it is not that we don't want to
20 pay for legitimate uses, because we do and we
21 can and we have. But I think that adding
22 costs into the system for access to works we

1 already have on our shelves, it is a little
2 difficult for us to swallow. We do it
3 sometimes with certain publishers but we try
4 to avoid doing it. And to do it across the
5 scheme of all we have in 90 libraries would be
6 quite challenging.

7 MS. CLAGGETT: Now, I have one
8 quick follow-up on that in the sense that if
9 the alternative is that you are not able to
10 provide full access, is that an okay, I guess,
11 resolution of the issue or is it voluntary ECL
12 regime where if the library wanted to take
13 advantage of it and pay for full text access
14 under an ECL regime they could; if they don't,
15 then they obviously do not have that option.
16 So, I am just trying to see kind of in more
17 detail whether the alternative is something,
18 you know, the current status is something you
19 are willing to --

20 MR. FURLOUGH: Well I think right
21 now we cannot make and we do not make full
22 text access available. We would like to be

1 able to do that but, as I said earlier, I
2 think we would want to work with individual
3 rights holders and prioritize categories of
4 content or books, rather, in the HathiTrust
5 database.

6 Individual libraries may have
7 slightly different preferences, depending upon
8 the collecting areas that they have and what
9 the curriculum under university campus is or
10 their community needs. But I would say in
11 general, the market solution needs to work,
12 rather than an imposed solution.

13 MS. CLAGGETT: I think I saw
14 Lauri, Jan, and then Ariel.

15 MR. RECHARDT: I have a
16 confession to make. I am a foreigner, too.

17 (Laughter.)

18 MR. RECHARDT: And not only that,
19 but I actually am Finnish.

20 MS. CLAGGETT: Oh, wow.

21 MR. RECHARDT: But I won't go
22 into details. Just following up on your

1 question and a couple of sort of more
2 technical points, I think if, and it is a
3 really big if, if you would consider ECL in
4 this country, drawing up from the Nordic and
5 European and international experiences, I
6 would say that you would need to go through
7 the type of sort of access that we were
8 outlining, which is consider sector, consider
9 the uses, look at the representing of the body
10 that would seek to become an ECL licensing
11 body, and insure it all. And maybe those are
12 the sort of ingredients that you could come up
13 with.

14 But having said that, we have
15 already a couple of examples where actually
16 ECL has been the follow-up owner sort of an
17 industry agreement what you were referring to
18 the MOU, the European MOU and what happened in
19 Germany, actually broadcast as archives. Or
20 there is a similar process in the Nordic
21 countries where, actually, the industry first
22 negotiated and then ECL was enacted after to

1 support the industry agreement between all the
2 stakeholders. Maybe in those circumstances.

3 Maybe in those circumstances, ECL
4 could be something that works. But then it
5 really, I think, it has to be not only
6 construed, you need to have the safeguards.
7 I mean it has to be supported by all the
8 participants.

9 MS. CLAGGETT: Thank you. Ariel
10 and then Jan and I think then we will close it
11 off and have audience questions or
12 participation.

13 MR. KATZ: Okay, so just about
14 the idea of narrowing down to books and
15 libraries, educational institutions or
16 something like that, I want to make two
17 shocking revelations and one trivial economic
18 observation.

19 So the two shocking revelations
20 are the following. First, the resources and
21 budgets of libraries or universities and so on
22 are finite. They are limited and they are

1 finite. There is only that much amount of
2 money that they have at any given period.
3 Revelation number one.

4 Revelation number two: you can
5 only digitize, reuse, or whatever you do, with
6 what you actually have, with your actual
7 collections.

8 Now, if doing more things with
9 what you actually have costs more money
10 because you need to get licenses for reusing
11 those things that you already have, and you
12 need to get it from a monopoly, then trivial
13 economic point number one: if prices go up and
14 you have limited resources, you have less
15 money to spend on other things. And that
16 means, for libraries, that means, again, the
17 more it costs them to reuse their existing
18 materials, the less money they have to spend
19 on new acquisitions of new books.

20 Why is that in the interest of
21 known owners, known authors, and libraries, I
22 don't know. I don't think it is.

1 MS. CLAGGETT: Jan and then I
2 will actually let Brandon and Jerker follow up
3 with really very, very short comments as we
4 are getting ready for the audience.

5 MS. CONSTANTINE: It seems to me
6 that a library who purports to want to give
7 universal access to its collection and has a
8 digital copy available to it, then it should
9 want to be able to do that in a perfect world.
10 Let's say money is not an object. Here it is
11 an object because they are not able to do that
12 because fair use doesn't allow them to do
13 that.

14 So, if a library wants to find a
15 rights holder, and apparently Mike may have a
16 way of doing that, it would seem that a
17 registry of rights holders who would step
18 forward and say here is my book, I want the --
19 I am ready to have the following uses for it.
20 If anyone comes to you and agrees to that,
21 then that is fine, they can use my entire book
22 digitally and make it available for everybody

1 in the world.

2 And I just want to comment we
3 have a registry that The Authors Guild, The
4 Dramatist Guild, the ASJA, and the agents'
5 organization developed in 1995. And we've
6 paid out \$20 million to date. We have paid
7 over 10,000 authors, members and nonmembers.
8 And last year, we distributed about \$2.8
9 million. And the principal people that we get
10 money from are the Authors Licensing and
11 Collecting Society under an extended
12 collective license and LIRA in the Netherlands
13 for library lending right payments.

14 And we have 1.25 employees that
15 are doing this and we are very successful.
16 And we did a sampling, and our success rate is
17 better than 80 percent in finding people whose
18 names are given to us from these agencies as
19 being owed money from foreign rights
20 organizations.

21 So, I think it would be more
22 efficient and probably relatively inexpensive

1 if you could set up a registry that would be
2 able to find people efficiently, quickly, and
3 allow much more than the HathiTrust case
4 allows now.

5 MS. CLAGGETT: Thank you. Ariel,
6 and then really briefly Jerker. And then we
7 have a few minutes before the -- Brandon --
8 and then we have a few minutes before -- we
9 will have like a few minutes for audience
10 questions. So, Brandon and then Jerker.

11 MR. BUTLER: So, I just wanted to
12 point out that there is a really nice way that
13 the fair use and fair use dynamics can work
14 together here. And that is that if you agree
15 with Professor Carroll, and I do, and with the
16 District Courts so far, that there are some
17 kinds of uses that are mass digitization uses
18 that are fair, then you get all this stuff
19 into the digital format that would not
20 otherwise be.

21 And you have people, do-gooders
22 like HathiTrust and craven monopolists, or

1 however you would like to characterize them,
2 like Google, they are digitizing for their own
3 reasons and they are climbing this mountain of
4 challenges in terms of getting stuff into the
5 digital and discoverable and seeable. So,
6 fair use gets you that far and no further.

7 So, the uses that are
8 contemplated short of the Google Books
9 settlement are actually pretty modest. Again,
10 nobody except for the print-disabled -- who if
11 anybody deserves it, they do -- gets full
12 access to this corpus. And then if you want
13 to do more, then you have got to go and find
14 somebody or hope that they find you. And,
15 increasingly, they know who you are because
16 they are suing you.

17 So, there is a nice push-pull
18 going on here. That is, stuff that wouldn't
19 otherwise get digitized gets digitized for
20 good reasons that hurt no one. And then for
21 the further reasons that make people nervous,
22 you go out and get a license. I think that is

1 actually not a terrible dynamic and that is
2 the dynamic we have right now.

3 MS. CLAGGETT: Yes, and I would
4 just follow up. The question, I think, one of
5 the questions we are asking, though, do we
6 have an effective regime that allows you to go
7 out and get that license if you are wanting
8 to, for example, digitize and make available
9 an entire collection where some of those
10 owners may or may not be locatable.

11 Jerker and then we will open it
12 up for a few minutes of audience comments.

13 MR. RYD N: There is a consortium
14 in Europe called eBook on Demand. It is
15 situated in Innsbruck. It has 35 libraries,
16 national libraries, research libraries. They
17 try to clear rights. It could sometimes take
18 up to six months and they still conclude they
19 couldn't clear rights. The total of those
20 collections would amount to quite many books.

21 We are just, as far as funding,
22 I mean funding is never reason to violate the

1 copyright or any other legislation. There is
2 nothing such as a free lunch, I am told. But
3 if you don't have the money, you might find
4 money to have a private-public partnership.
5 We have, with one publishing house, Schibsted,
6 digitized some three million newspaper pages.
7 The ECL, we need that to digitize and make
8 available to -- send the files to the
9 publishing house. And we bound it and it goes
10 to another publishing house almost the same
11 amount of newspaper pages.

12 The first agreement would amount
13 to some 30 million copyright-protected works.
14 I can't imagine anyone who would have the
15 staff to manually clear the rights of those
16 works, articles which go way, way back. But
17 if anyone could find a way, they would please
18 find the model.

19 But as I see it, it is collective
20 licensing you could resort to because the
21 transaction costs, going about that, would be
22 so high, it would never happen.

1 MS. CLAGGETT: Thank you. And
2 now we will open it up. We only have a few
3 minutes. We will open it up for a few
4 audience questions. Gene.

5 MR. MOPSIK: So, my comments are
6 directed specifically related to collective
7 licensing, photo space, not archiving or
8 preservation use. And I guess in the best of
9 all worlds, I would say our members would
10 prefer to have a rights-managed license usage
11 for their images. But I guess I would say
12 that in the photo space, specifically, there
13 is a market failure right now and that in the
14 secondary rights, so the secondary licensing
15 of images, I would say that the vast majority
16 of those images right now, that those needs
17 are being fulfilled by theft of images, theft
18 of service.

19 And there are any number of
20 business models that are built on the display
21 and transmission of images without any
22 compensation going back to rights holders and

1 that perhaps some form of collective licensing
2 would be a solution for those secondary uses.

3 MS. CLAGGETT: Thank you.
4 Carrie.

5 MS. DEVORAH: Hi. Following up
6 on points the others made, a quick
7 introduction and points.

8 Addressing foreigners, I am a
9 former member of the NUJ. I have covered news
10 in the UK, Ireland, and parts of Asia plus.

11 Addressing point one is authors'
12 contracts allow the publisher to produce the
13 book in alternative formats. You have to pay
14 the author and illustrator. They are
15 contracted royalties. It should not be for
16 free.

17 Two, there is a lot of chuckling
18 going on about museums and artifacts. Let me
19 make the point that there is a continuing and
20 ongoing effort by countries to repatriate
21 their icons and artifacts that are in museum
22 collections. Case in point, Monument Men with

1 George Clooney.

2 Three, respecting entities that
3 set up models and now don't want to pay the
4 royalties due, you sort of put the cart before
5 the horse, knowing all along that the works
6 belong to others.

7 And four, to whomever had said if
8 you have less money by paying content owners
9 their royalties, it is not that it is not the
10 concern of the content owner, because in not
11 paying royalties to the content owner, they
12 have less money, too.

13 So thank you.

14 MS. CLAGGETT: Thank you. So
15 right now we are going to take a very short
16 15-minute break and get ready for our next
17 panel to continue our discussion of ECL.

18 We also will have a sign-up sheet
19 outside for those audience participants who
20 have not had a chance to speak yet because our
21 last panel will just be audience participation
22 at four o'clock.

1 (Whereupon, the foregoing matter went off the
2 record at 2:16 p.m. and went back on the
3 record at 2:29 p.m.)

4 MS. CLAGGETT: All right, we will
5 start off with, again, the normal housekeeping
6 rules. As we had mentioned before, this panel
7 discussion is being video recorded by the
8 Library of Congress. There will be a short
9 question and answer period at the end of the
10 session. If you decide to participate in that
11 question and answer period, you are giving us
12 permission to include your question or
13 comments in future webcasts and broadcasts.

14 At this time, I would like to ask
15 you to turn off any cell phones or electronic
16 devices that might interfere with the
17 recording of this event.

18 This session, basically, can
19 probably be seen as a continuation of the last
20 session. And this is that we have talked
21 about ECL as a possible solution more broadly
22 in the last session, and now we want to kind

1 of focus a little bit more on the details as
2 to whether we would be able to develop some
3 type of ECL solution in the United States. One
4 of the issues that we touched upon in the last
5 session was that, again, any solution cannot
6 be a one-size-fits-all solution but, instead,
7 should take account of different types of
8 works, different types of uses, and be
9 narrowly tailored to an actual instance of
10 market failure.

11 So, we want to really focus in on
12 that type of detail. Are there specific
13 instances of market failure? If so, should an
14 ECL solution be done in those instances? What
15 are those instances? Is it an instance of
16 mass digitization of books, of journal
17 articles? What types of uses should it apply
18 to commercial versus non-commercial?

19 So, more specifically, we really
20 wanted to explore if the United States wanted
21 to try to develop an ECL model, what are the
22 specific things that they should consider and

1 how should we go about that approach?

2 Before we begin, we will do a
3 quick round of introductions, starting with
4 Casey.

5 MR. RAE: Casey Rae from Future
6 of Music Coalition.

7 MS. DEVORAH: Carrie Devorah,
8 Center for Copyright Integrity.

9 MR. HILL: Doug Hill,
10 RightsAssist.

11 MS. CLAGGETT: And just a quick
12 heads up. Except for ours, unfortunately, you
13 have to push the button down and there should
14 be a green light that comes on in order to use
15 the mike.

16 MS. LEVINE: I'm getting very
17 good at pushing buttons. Melissa Levine,
18 University of Michigan Library.

19 MS. PILCH: Janice Pilch, Rutgers
20 University Libraries.

21 MR. RUSHING: Colin Rushing,
22 SoundExchange.

1 MR. LEHMAN: Bruce Lehman,
2 Medical Illustrators -- Association of Medical
3 Illustrators. Sorry.

4 MR. BARNES: Greg Barnes, Digital
5 Media Association.

6 MR. KATZ: Just in time. Ariel
7 Katz, University of Toronto.

8 MR. HABER: Fred Haber, Copyright
9 Clearance Center.

10 MR. PERLMAN: Vic Perlman,
11 American Society of Media Photographers.

12 MS. SHANNON: Salley Shannon,
13 American Society of Journalists and Authors.

14 MR. STEIN: Greg Stein, Tulane
15 University.

16 MS. CHERTKOF: Susan Chertkof,
17 Recording Industry Association of America.

18 MR. RYD N: Jerker RYD N,
19 National Library of Sweden, Senior Legal
20 Advisor.

21 MS. CLAGGETT: Great. And again,
22 we want to continue on the discussion. So, we

1 want to get a little bit away from, I suppose,
2 the just general question as to whether ECL
3 should or should not take place in the United
4 States. We heard a lot of concerns about ECL,
5 and so we will definitely take that into
6 account, obviously, as we assess. And if you
7 have additional comments on a general level
8 like that, we certainly want to hear from you
9 in terms of concerns with ECL overall. But
10 now we want to see if we can drill down a
11 little bit, as I said, into are there more
12 narrow areas where ECL might be appropriate.
13 And if so, what are those areas and how might
14 we actually structure any ECL regime in the
15 United States.

16 So, I will open up first. Are
17 there are more narrow areas that people think
18 ECL should be considered in the United States?
19 And if so, what type of structure do people
20 think the United States should consider in
21 adopting a more narrow ECL focus? I will
22 start with Greg.

1 MR. STEIN: Thank you. I think,
2 first of all, orphan works specifically, as
3 opposed to the mass digitization part of the
4 problem, would be specifically useful to use
5 ECL as a solution. And a few of the things
6 that, in my research that I did at Tulane Law,
7 that I found, especially from the Google Books
8 settlement that was instructive, there were a
9 few things that caused that mass digitization
10 project in some of the -- in the court
11 decisions where orphan works was really an
12 issue.

13 So, first of all, with the
14 settlement that was kind of a de facto ECL,
15 the orphan works issue and the fact that it
16 was an opt-out system made it very difficult
17 because, as we said, orphan works, the rights
18 holders aren't there to opt out. And that is
19 one of the reasons why the settlement failed.

20 So, one thing that I would
21 suggest the Copyright Office look into is that
22 instead of having an opt-out system, that

1 instead you allow orphan works holders, if you
2 were to have an ECL for orphan works, to come
3 forward later on, still using that license
4 that was negotiated under the ECL and use that
5 as a reasonableness standard.

6 If the copyright holder wants to
7 come forward later, the orphan works copyright
8 holder comes forward later and wants to
9 challenge the reasonableness of that license
10 as used in their situation, they can do that
11 in court and you could have a rebuttable
12 presumption that the license that was
13 established under the ECL for the orphan work
14 was reasonable.

15 And then secondly, another thing
16 from the Google Books settlement, there were
17 a few parties involved -- the Authors Guild,
18 the publishers. And I would just warn that
19 the U.S. Copyright Office if they were allowed
20 to -- if you gave yourself the rulemaking
21 authority to designate the parties that would
22 negotiate that ECL -- that you look into

1 exactly which parties are being represented by
2 those interest groups.

3 In the Google Books settlement,
4 for example, the publishers settled out before
5 the authors did. The authors remained in the
6 suit. So, just make sure that it is clear who
7 the parties are representing and whose
8 interest they are representing.

9 MS. CLAGGETT: Okay, Vic, then
10 Carrie, then Doug, and then Janice.

11 MR. PERLMAN: Let me go to the
12 overall question about ECL. From the panel we
13 just heard, I heard a number of negative
14 comments about ECL from the rights holder
15 side. I heard a number of negative comments
16 from the user side. And it reminded me of the
17 old adage that when you are trying to
18 negotiate a settlement, if everybody hates it,
19 it is probably fair.

20 If there is any medium in which
21 there is a breakdown in the marketplace, it is
22 in the photography world, particularly in the

1 internet world. Search engines based on image
2 recognition tell us that something like at
3 least 80 percent of the images that appear on
4 the web are there without authorization.
5 Everybody that uses the web seems to
6 understand that stealing a movie is piracy,
7 stealing music is piracy. They may choose to
8 do it anyway, but at least they know that.
9 But when it comes to photographs, somehow
10 there is this alchemy under which once a
11 photograph appears on the web it becomes
12 automatically part of the public domain.

13 This situation kind of reminded
14 me of the first Woodstock concert when
15 everybody was supposed to have a ticket and go
16 in through the gate and pay. And the system
17 just didn't work. There were too many people
18 who wanted to get in there all at once. The
19 fences weren't adequate and the whole thing
20 just collapsed. And a half million people,
21 most of whom didn't pay, came in and just
22 crushed through.

1 So, trying to analogize that to
2 the current situation, I'm trying to figure
3 out well, what could they have done? One
4 possibility was, obviously, to build up prison
5 walls. That is not going to work in an
6 internet context, even if it were practical in
7 a brick and mortar world.

8 The other one would have been to
9 set up some kind of an E-ZPass, automatic toll
10 payment on the highway leading in. So, I
11 started to think about, well what is like that
12 in our world and it occurred to me and some of
13 our colleagues that some people are doing that
14 already in the music space and that is in the
15 form of SoundExchange. And Colin may say that
16 the worst thing you could would be to set up
17 a SoundExchange type of operation for
18 photographs but, based on what we are hearing
19 and seeing right now, that to me seems to be
20 the logical approach.

21 And as Gene mentioned in the last
22 comment, we are talking about secondary

1 licensing here, not primary licensing.

2 MS. CLAGGETT: Carrie.

3 MS. DEVORAH: I'm right handed.

4 I tend to write better than just speaking off
5 the cuff. I am all about licensing. I am all
6 about keeping my royalties. I have no
7 interest in anybody licensing for me or my
8 licensing anyone else. I choose to mentor,
9 and the last thing I need is an agent and yet
10 one more person to have complications with.

11 While prior panelists did their
12 job of promoting their constituents,
13 understand and I'm going to say this over and
14 over again, there is only one wheel and many
15 variations thereof.

16 The conversations here have
17 focused on guilds and lawyers and completely
18 ignoring that along with IP theft online, is
19 also ID theft online, which is who we are. We
20 are the identity of our works.

21 And this has also grown into an
22 area now exponentially bundling our data onto

1 the sites like Spokeo who are challenging the
2 FCC.

3 Understand that a settlement
4 after a lawsuit is not collective licensing,
5 nor is it a precedent for collective
6 licensing. It is paying for your crime at a
7 reduced rate.

8 And while we are talking about
9 orphan works, there is no such thing as an
10 orphan work. Every piece that is created has
11 a mommy or a daddy whose metadata is being
12 actively scraped at the back of the content by
13 the tech companies who should be in this room
14 with us, their CEOs, not their lawyers. Fair
15 use states very clearly if you cost someone
16 their ability to make their living, it is not
17 fair use.

18 And also, if helping people steal
19 content by providing the mechanism to steal
20 with, and guide people through it, click on my
21 image, pull it off your desktop, infringement.
22 So, it is being complicit to a crime. It is

1 a conspiracy to commit a crime. So, there
2 really is no safe harbor either. And there
3 would be no conversation of orphan works if
4 you required that the private company
5 technologies that we all implement the
6 technologies we know exist. If you go onto a
7 website, a box pops up. You have to click it
8 off. There are sites, try as hard as you will
9 to copy a phrase and then to work with it, you
10 can't copy it. You should be forcing your
11 things to be activated to mitigate the issues
12 and conversations ongoing now.

13 So, I recommend that what you
14 ought to consider in the future is to these
15 tables bring the CEOs, bring the venture
16 capitalists who thinks it is a hoot to toss
17 millions of dollars at the technologies that
18 we are placing and playing catch up to. And
19 then I would also bring in more of the arts'
20 creators. I will give you names of people who
21 are launching suits time after time.

22 MS. CLAGGETT: Thank you. Doug?

1 MR. HILL: I have to concur that
2 the issue, as I see it from working as
3 strictly middleman between copyright holders
4 and those who would like to use that content,
5 is that the users of the content now have
6 licenses that say I can use this image in
7 perpetuity anywhere in the universe, no longer
8 just in the United States or North America or
9 in the English language.

10 So, we have allowed the users to
11 be able to create license mechanisms that
12 facilitate their use going forward, which is
13 fine as long as there is adequate
14 compensation.

15 But I have to concur that there
16 should be a promulgation by the Copyright
17 Office that says stripping out metadata is an
18 intent to infringe the copyright, period. No
19 question if you do that, you will change the
20 rules of the game quickly. We need to also
21 get the technology caught up so that there
22 aren't orphan works.

1 An agreement for copyright should
2 include the entire term of the copyright and
3 all possible outcomes that might occur. So,
4 it just can't be that the copyright user says
5 that the person who is purchasing the
6 copyright to be able to create content can
7 protect it themselves, they have to protect
8 the copyright of the individual. So, it has
9 to say if my firm goes bankrupt, this
10 copyright reverts to you. You will begin to
11 eliminate these problems that I run into all
12 the time where no one really knows what to do.
13 And it is not just individual users, but large
14 organizations. National Geographic has a
15 group of images they have no idea whether they
16 own the rights to.

17 MS. CLAGGETT: Thank you. I will
18 just say I know that there are a lot of broad
19 questions and conversations that we have had
20 earlier. For this panel, we do really want to
21 focus on what structure, if any, we would have
22 in an ECL. So, we want some comments along

1 that line as well.

2 Janice and then Ariel.

3 MS. PILCH: In speaking about the
4 structure, and I should say that I don't
5 really have a definite opinion on this issue
6 but it seems like it would be very hard to
7 structure in this country because we don't
8 have a great tradition of this.

9 But, very important to establish
10 what we are talking about, I don't think we
11 can discuss published books in the same way
12 that we discussed unpublished materials, for
13 among other reasons, if an extended collective
14 licensing regime extended to all photographs
15 ever made by any citizen, any person, any
16 picture ever taken, any letter ever written,
17 then you can't do that. And what CMO would
18 take care of that? Published works are a
19 separate issue.

20 In fact, I think that most
21 extended collective licensing regimes don't
22 deal with unpublished works, if I am correct.

1 MR. RYD N: That is correct. It
2 is the prerogative of the author to make
3 available to the public. That is his or her
4 decision.

5 MS. PILCH: The right of first
6 consent to publication. That is the issue
7 there.

8 The other is CMOs are formed by
9 a substantial number of members, usually of
10 professional groups. Everyone in this room
11 represents professional creators and it is a
12 different thing when you are dealing with just
13 people who do things for amateur reasons. And
14 so, for those two reasons to begin, it is
15 difficult.

16 Moving on from there, if you
17 didn't have an extended collective licensing
18 regime, then perhaps we are talking about --
19 no, then you are getting into books. So,
20 let's just talk about published works. And
21 then we could discuss the Google Books
22 settlement as a possible model, I suppose. I

1 do like the idea that Brandon brought up
2 before, of having a combination of solutions.
3 I sketched out this kind of a diagram. What
4 would be if you had -- because you are talking
5 about the digitization preservation dark
6 archive, then opening up, making it available
7 to the public. And beyond that, subsequent
8 uses, either by institutions or by
9 individuals, I suppose. We haven't even
10 talked about that.

11 Either both the digitization and
12 the subsequent uses could be a licensing
13 regime. I don't think that would work very
14 well because libraries don't have the money to
15 pay for the licensing of the digitization. I
16 think we have established that.

17 How about digitization under an
18 exception and subsequent uses governed by
19 licensing? That is Brandon's idea, and I
20 think that is almost where the Section 108
21 study group got. Almost, not quite.

22 Digitization under a licensing,

1 subsequent uses by an exception, that is kind
2 of illogical. Both digitization and
3 subsequent use governed by an exception, I
4 think that takes us to where fair use might
5 just be too broadly defined.

6 And so going back to Brandon's
7 idea, I think that is a productive idea for
8 published works.

9 MS. CLAGGETT: And I just had one
10 quick follow-up on that. So, you said an
11 exception plus perhaps licensing. Were you
12 talking about direct licensing or extended
13 collective licensing to fill in that gap?

14 MS. PILCH: I'm not sure.

15 MS. CLAGGETT: Okay. Ariel, then
16 Bruce.

17 MS. SHANNON: Excuse me. Point
18 of procedure. For those of us who couldn't
19 get into the room when Brandon was talking,
20 would you summarize what you said?

21 MS. CLAGGETT: Brandon, do you
22 want to do that? There is an extra slot right

1 here, Brandon, if you want to come up.

2 MR. BUTLER: Hey, happy to join
3 you guys. Very, very briefly, the idea was at
4 a very, very high level that there is two
5 kinds of justifications for use, fair use or
6 an actual license either from a collective or
7 from an individual person that is not
8 compulsory and not extended.

9 And that the world we are living
10 in now, apparently, seems to be that, and if
11 the District Court cases are going to continue
12 to go the way they are going, is that mass
13 digitization can be conducted by libraries.
14 You can get stuff from paper onto hard drives,
15 which is great and important, and a collective
16 action problem that is not going to get solved
17 otherwise. But then what happens next is
18 something that we are all just going to have
19 to fight about.

20 And I was just proposing that how
21 far you can go from mass digitization to
22 accessing different fora and for different

1 reasons is something that we can fight out in
2 the courts under the rubric of fair use and if
3 that is actually a not terribly bad
4 alternative to an ECL or a similar regime.

5 From earlier mention by others,
6 Google people have plenty of case law.

7 MS. CLAGGETT: Well and that is
8 actually one of the reasons why we are here.
9 Is there a reason, a public policy reason, to
10 try to avoid having to fight it out in the
11 courts and risk uncertain decisions and
12 varying decisions across Circuits in different
13 states and actually have a broad-based law
14 that would apply in that gray area.

15 Ariel and then Bruce.

16 MR. KATZ: Okay, three really
17 quick comments.

18 One in response to Mr. Perlman's.
19 If I heard you correctly, you indicated that
20 photography might be an area that ECL might be
21 a good idea. As far as I recall, I think that
22 the UK photographers' organization have been

1 one of the most vocal opponents of the new
2 British ECL scheme. So, I think it is kind of
3 interesting to see what is going on, what
4 their views were. I don't know what the
5 answer is.

6 The other, in response to Mr.
7 Stein, about the benchmark of reasonableness,
8 I do not think that if there is a voluntary
9 ECL, if they charge things, that should be
10 considered as a benchmark for what is
11 reasonable for two reasons. One is that
12 actually ASCAP, which is an example of
13 enduring collecting society, not ECL but
14 collecting society, under their antitrust
15 consent decrees, ASCAP actually has the burden
16 of establishing that the fees that its
17 requests are reasonable. That is part of the
18 consent decree. And that makes sense because,
19 again, there are monopolies that aren't really
20 subject to significant market discipline and
21 that is why the consent decree puts the onus
22 on them.

1 Second, going back to one of my
2 comments in the morning, why do we have orphan
3 works? Largely because the owners of those
4 works don't really anticipate to generate
5 enough future revenue stream to make it worth
6 their while to maintain themselves locatable.
7 That suggests that what is the reasonable
8 royalty, and the only royalty for damages in
9 copyright is okay, what would be the
10 royalties, had the license been in place. But
11 by their own behavior, they kind of indicate
12 that that is probably very low.

13 And the last point, I think that
14 the Copyright Office initial approach, about
15 maybe with some tweak about the remedy
16 tweaking, gets the best out of it. It gets
17 the advantages, or some of the advantages, of
18 ECL in the sense that it removed the threats
19 of disproportional penalties, which keeps
20 people away from using works, so it takes that
21 away by tweaking the remedies. And it also
22 preserves the kind of bilateral relationship

1 between an owner and the user in a market
2 system without having the need to take care
3 all of the how you structure a monopolistic
4 entity and overseeing it, and setting the
5 royalties and all of that. So, you get all
6 the goods without the down side. And I think
7 that is the best approach.

8 MS. CLAGGETT: Thank you and I am
9 aware of the number of people who want to
10 respond. Bruce and then Casey.

11 MR. LEHMAN: Thank you. First of
12 all, I would like to start with a definition.
13 I am not sure that the announcement really
14 gave a clear definition of what we mean by
15 extended collective licensing. So, I will try
16 to describe what I think we are talking about
17 here.

18 I think when we are talking about
19 an extended collective licensing license, we
20 are talking about a license that, in this
21 case, would be established by law because we
22 are talking about a potential statutory

1 change, and it would be a collective license.
2 And we have a lot of experience with
3 collective licensing for many years.

4 But, what makes an extended
5 collective license is that it covers people
6 who haven't directly been given authorization
7 for the licensing organization or the
8 licensing system to represent them. So, that
9 is what we are talking about.

10 Of course, we have a lot of
11 experience, a long experience in the United
12 States, with collective licensing -- perhaps
13 not as extensive as Europe, but we have an
14 extensive experience. And for the most part,
15 the system here, since we don't have culture
16 ministries or anything, has largely been a
17 system that sort of arose on an ad hoc basis
18 and a lot of it was just driven by
19 individuals, industries, and so on, without
20 government intervention.

21 The closest thing we have here,
22 or maybe they are extended collective

1 licenses, in the United States are the
2 statutory licenses. Now, when I started out
3 in this business, there were compulsory
4 licenses. But because of the Berne
5 Convention, we had to make them into statutory
6 license. Then to some degree, they aren't
7 quite exactly compulsory because it is a
8 system that encourages parties to work things
9 out and then the Copyright Royalty Board steps
10 in when they can't do that. But in the end,
11 everyone is sort of bound by the decision.

12 And we have several long-standing
13 collective statutory licenses. I think the
14 oldest one is Section 114, which is the
15 mechanical license -- 115 -- sorry, 115. And
16 that came about because copyright owners lost
17 a case, *White-Smith v. Apollo*, and then they
18 ended up not having any protection.

19 And so Congress then stepped in
20 and said okay, we are going to protect you.
21 But since you lost your case, we are going to
22 kind of give you limited protection. And that

1 came in the form of a compulsory license,
2 where Congress actually set the amount that
3 was to be paid for each piano player role to
4 the music publisher, and then that continued
5 in the sound recording industry.

6 Then, we have Section 111. And
7 Section 111 came about again because of
8 litigation where audiovisual rights holders
9 wanted to -- asserted that they had an
10 exclusive right over the retransmission of
11 cable television signals and that went up in
12 two cases to the Supreme Court and the Supreme
13 Court said, no, you don't. And so again,
14 Congress had to stuff the genie back into the
15 bottle. So, they said okay, well we will give
16 you -- and by the way, cable television, in
17 that case, agreed to do it. So it was an
18 industry agreement and they agreed to do it to
19 achieve industrial peace so that they could
20 build out their urban systems and so on. But
21 that was, again, a case where the rights
22 holders started out with nothing and they got

1 something but not everything.

2 And then the same thing is true
3 of the Section 118 license for public
4 broadcasting, where there was no right for
5 not-for-profit uses with music and, in 1976,
6 it was agreed, some not-for-profit users
7 agreed to liability but only with a compulsory
8 license, again, where ultimately then the
9 copyright tribunal and then the Copyright
10 Royalty Board would protect them from abuse.

11 The important thing about all
12 three of those is that they were cases where
13 there was no -- where clearly the courts had
14 ruled that there was no right. And I don't
15 think we are dealing with that here.

16 So, I think we have to keep in
17 mind this is a much, much different system.
18 And if we have any kind of mandatory license,
19 we are going to be on new ground.

20 Now, I won't go into it very much
21 because other people have reiterated it, but
22 certainly in terms of medical illustrators,

1 there is obviously a huge difference between
2 the primary market and the so-called secondary
3 market. Obviously, the primary concern is
4 that the primary market remain available to
5 them and that works that get out onto the
6 internet and then become orphan or whatever,
7 don't end up competing with their basic
8 business.

9 But on the other hand, there are
10 a lot of secondary uses that could be licensed
11 more efficiently and actually would be a
12 win-win situation because people would get
13 licensed use and the rights holders would
14 actually get some money that they are not
15 getting right now. And those secondary uses,
16 a lot of them we have heard about here --
17 certainly archival use, library use. But one
18 of the things, I think, in the last go around
19 that was a cause celebre with some people was
20 that college students wouldn't be able to
21 write term papers because they wouldn't be
22 able to get stuff. Well, you know, this could

1 address that situation.

2 The problem in all of this is
3 that if you have got any kind of collective
4 license, who is going to pay the money?

5 Now, when we originally -- I have
6 to say I was very much involved, as some of
7 you know, in the creation of the DMCA. That
8 started out with a white paper that was put
9 out by the Executive --

10 MS. CLAGGETT: Bruce, I am sorry
11 to interrupt. I am going to ask you to wrap
12 it up really quick because I know we have a
13 lot of other people.

14 MR. LEHMAN: Well, I know you do
15 but --

16 MS. CLAGGETT: So, I just want to
17 make sure that we can hear from everybody.

18 MR. LEHMAN: Yes, and I will wrap
19 up and I really probably don't need to say
20 much.

21 The problem -- what I actually
22 had envisioned back in the '90s is that we

1 wouldn't need any of these because we would
2 have a system of micro-licensing. But that
3 only becomes possible if the people who
4 control the pipe do the micro-licensing. And
5 there is going to be a hearing later this
6 week, I believe, on Section 512.

7 MS. CLAGGETT: On Thursday, yes.

8 MR. LEHMAN: Yes, and the PTO
9 actually is also having a hearing, sort of a
10 related hearing later in the month. And that
11 came about because the people who control the
12 pipe said no, we don't want to be bothered.
13 So, we have the access provider exemption.

14 So, I think, because of that,
15 some kind of statutory license may be
16 appropriate, as long as it observes certain
17 principles and that one that it applies only
18 to the secondary uses of the kind that I
19 described.

20 But, this is the most important
21 thing of all, is that the primary test for any
22 licensing system is that the rights holders

1 have to get the money. Now, we have systems
2 right now. Publishers get money from the CCC.
3 Composers and lyricists get money from ASCAP
4 and BMI. Sound recording interests get money
5 from SoundExchange. Publishers get money from
6 Harry Fox agency. And so everybody is fairly
7 happy.

8 But visual artists and
9 particularly medical illustrators are getting
10 no money from anybody, in spite of the fact,
11 by the way, that extended collective licensing
12 systems are in place in Europe for which they
13 are entitled to income but they are not
14 getting it, even though that is not a
15 reciprocal right. It is a national treatment
16 right. And why can't they do it? It is
17 because they don't have the money to set up
18 the society.

19 So, it is really all about the
20 money and making sure that there is a system
21 where they can get paid.

22 MS. CLAGGETT: Thank you. I know

1 we have a lot of people waiting to speak. So,
2 I will go, I think it was Casey next.

3 MR. RAE: So, I will talk
4 super-fast.

5 MS. CLAGGETT: Or otherwise, I
6 will have to start holding up the one minute
7 signs.

8 MR. RAE: Yes, I am in the speedy
9 phase of the cold medicine. So, that should
10 work for me.

11 I am going to talk about music.
12 Surprise, surprise. I think one of the
13 issues, if I were to create two huge buckets,
14 we have got an issue of access. We want to
15 facilitate and expand access to expressive
16 works as we are making this migration to
17 digital, which is maybe taking a little bit
18 longer than folks like Bruce expected back in
19 the DMCA drafting days. And then you have the
20 issue of compensation. So, how does that
21 money get divvied up to the rights holders,
22 and to me, more importantly, the creators and

1 the authors.

2 You know, I think putting this in
3 an orphan works context, we should be looking
4 again to find out ways to not have orphan
5 works in the future. That should be a primary
6 goal. Right? To me, there are two ways that
7 you can go about that. One would be having
8 more accurate systems to track ownership
9 transactions and not just commercial public
10 transactions. In music, we have had
11 tremendous difficulties over the years. I am
12 looking at Susan -- just kidding. See, I told
13 you I was going to talk fast.

14 We have had tremendous difficulty
15 over the years keeping track of ownership with
16 mergers and acquisitions of record labels and
17 publishers.

18 Now, we do have technologies that
19 are coming and some of them are getting sorted
20 out right now. That could track through
21 decentralized mechanisms or broad distributed
22 ledgers, track these ownership things as they

1 happen to make sure that when somebody needs
2 to get paid, they know who the last person
3 that owned the copyright was.

4 Now, some folks might not like
5 systems like that, because then you would have
6 to pay people what they are supposed to be
7 paid under the terms of the contract.

8 The other side of this is
9 interoperability. This would be maybe the
10 public-facing system or at least the system
11 that would work for licensees. Interoperable
12 databases with uniform data standards that are
13 searchable to facilitate licenses. Now,
14 whether that is a compulsory license, a
15 statutory license, a voluntary license, or an
16 opt-in, opt-out universe, an la carte, the
17 systems will serve us better if we actually
18 build them.

19 Since I have been doing this work
20 for about seven years, I have heard pretty
21 much every year, every music conference that
22 I go to, oh, the global voluntary database

1 registry will be in about three to five years.
2 I am going on year eight here and we still
3 don't have them. So, either somebody is just
4 enjoying stalling this for purposes that I
5 can't divine or -- I don't think
6 technologically, they are fundamentally that
7 hard to build.

8 But I think, in order to solve
9 the problems of the future, we need to start
10 thinking about a world without orphan work
11 works and not just what we do to retroactively
12 fix the issue that we have from the analog
13 age.

14 MS. CLAGGETT: Thank you. Greg?

15 MR. STEIN: That was fast. Thank
16 you.

17 To kind of piggyback on to what
18 you were saying, Mr. Rae, I think that
19 compensation that is then collected through
20 maybe an ECL, either the principal or interest
21 after that money is collected into a trust
22 account could be used for things like

1 registries of authors and owners. It could
2 also be used for finding orphan works owners
3 as well. And that could be something that the
4 Copyright Office could look into.

5 In terms of how an orphan works
6 ECL would be different from a collective
7 licensing system like ASCAP, it is very
8 difficult to go ahead and have the discussion
9 of what a reasonable royalty would be, if you
10 don't know who the copyright holders are. And
11 that is the difference. That is what an
12 extended collective licensing system would be.

13 So, the idea would be to have an
14 idea of what that reasonable royalty would
15 look like by looking to all of the other
16 owners that you know of. Once you have that
17 as a baseline and also allowing owners that
18 step in, orphan works owners that step in
19 later on, to challenge that if they don't
20 think that is fair.

21 I think that at last goes part of
22 the way towards balancing those two interests.

1 MS. CLAGGETT: Thank you. And I
2 know I have a long list of people. Jerker, I
3 think, was next.

4 MR. RYD N: Well, it is very good
5 if you are trying to reduce the problem of
6 orphan works. But since rights are
7 transferred under some corporate regimes back
8 to the writer and that author is dead, it is
9 the children. If those children are dead, you
10 will most likely find yourself in the future
11 that you have, in the future, still orphan
12 works that will still exist.

13 As far as contracts, you don't
14 sign a contract, acquire rights for eternity.
15 It is like a television producer, because you
16 require the rights you need. You are not
17 willing to pay for much more.

18 So, like broadcasters will find
19 themselves that they don't have an agreement
20 that will cover that kind of usage. It was an
21 old agreement. And it would be very good if
22 you could trace the rights holder and the ones

1 who have the right license. But I still think
2 in the future, you will have the same problem,
3 even when you have electronic works because
4 you have -- people die. That is a problem,
5 but they do.

6 MS. CLAGGETT: Unfortunately, for
7 now. Maybe we will be able to deal with that
8 in our next roundtable.

9 I am going to go to Carrie, Vic,
10 then Susan, Fred, Colin, and Salley.

11 MS. DEVORAH: Well a couple of
12 points. I will try to make them all quick.

13 People are savvy nowadays. First
14 point to make, people are savvy nowadays.
15 They write everything into trusts and they
16 donate things away so institutions are
17 benefited for life.

18 Vic does not speak for my
19 community. I am an alumni of the White House
20 Press Photographers Association. Many of us
21 are freelance and any time you want the arts
22 creators to come in a panel before you, I will

1 bring them in and you will hear firsthand how
2 nobody wants more government and more
3 intrusion in our ability to make our living.

4 Ariel, are you telling me that if
5 I see a backpack there, that I can walk up and
6 take it because it doesn't have your name or
7 your hand on it?

8 And in terms of an image --

9 MR. KATZ: Do you want an answer?

10 MS. CLAGGETT: No. We don't. We
11 don't want an answer.

12 MS. DEVORAH: The point being,
13 you don't want me to do that so nor should
14 anybody do that.

15 MR. KATZ: How do you know? I
16 didn't give you an answer.

17 MS. CLAGGETT: No, we have got to
18 make sure that we keep focusing on the
19 structure of the ECL.

20 MS. DEVORAH: In terms of what
21 images are important, let me remind people
22 that a few years ago Justin Bieber was just a

1 kid on YouTube. So, every image has potential
2 when it finds the resonating audience.

3 What I want the USPTO to walk
4 away from is look at, there is no borders in
5 this internet age. Everything is --

6 MS. CLAGGETT: The Copyright
7 Office.

8 MS. DEVORAH: Excuse me. The
9 USPTO and the Copyright Office. I apologize.
10 But there are no borders anymore. So anything
11 we do is everywhere within an instant. And
12 the Copyright Office, the USPTO, the FTC, the
13 FCC are all neutered agencies which have the
14 requirement to implement regulation but you do
15 not have an enforcement arm.

16 I do think you need to bring to
17 your next table law enforcement. I will
18 personally introduce you to the guys from ICE,
19 the FBI, all of the others that are entrusted
20 with having to do the dirty groundwork to
21 implement our rights protection and I think
22 that will flesh out the voice for you.

1 MS. CLAGGETT: Thank you. I have
2 Vic, Susan, Fred, Colin, and Salley.

3 MR. PERLMAN: To respond to a few
4 points -- as to why orphan works exist, I
5 think that the idea that people who created
6 those works don't care about them is a crock,
7 at best. At least in the photography space,
8 orphan works exist because the work and the
9 attribution information are almost
10 automatically separated in a huge number of
11 contexts and very easily separated, whether
12 intentionally or inadvertently.

13 As to our fellow photographers in
14 Britain, it has been a while since I was
15 reading their comments. My recollection is
16 that they were opposed to earlier versions.
17 I don't know what their final bottom line was.
18 It may come down to differences in the rights
19 being granted under the different regimes and
20 it may be a difference in the sense that our
21 view is that getting some compensation is
22 better than getting no compensation for

1 something that is happening anyway.

2 For drilling down, I thought I
3 had done that to some extent by referring
4 specifically to SoundExchange but in our view,
5 an ECL regime would be a secondary license to
6 individuals for non-revenue,
7 noncommercial-type uses. As to who pays, it
8 would be essentially the aggregators of those
9 images.

10 And finally, I have to say that
11 my head explodes when I hear the museum and
12 library communities say that they can't afford
13 to pay licensing fees. If they can't afford
14 the brick and mortar building, they don't
15 build it. If they can't afford the computer
16 system, they don't put it in. If they can't
17 afford to acquire the print collections, they
18 don't acquire them. If you can't afford to
19 license these images, you don't license them.

20 MS. CLAGGETT: Thank you. Thank
21 you very much for your specific comments in
22 terms of what your approach would be on an

1 ECL. I do want to see if we can get some more
2 specific comments in terms of what would the
3 structure look like.

4 So, I have Susan, Fred, Colin,
5 Salley, and Greg.

6 MS. CHERTKOF: Hi, thanks. I
7 just have three very quick comments. First,
8 you had started off this panel by asking
9 whether there was different sectors or
10 different markets where ECL may or may not be
11 relevant. And I just wanted to go on the
12 record as we think for the recorded music
13 industry, there is absolutely zero need. The
14 market is working really well. There are
15 numerous services that have tens of millions
16 of digitized sound recordings that are
17 available. There is free services. There is
18 paid services. There is all manner of digital
19 music services. And so if you are doing this
20 on a sector-by-sector basis, you can leave our
21 sector out.

22 The next point that I wanted to

1 make was one thing that you might consider, a
2 number of people have talked about voluntary
3 licensing being far -- voluntary collective
4 licensing -- being far preferable to any sort
5 of government mandated collective licensing
6 system. And I think voluntary collective
7 licensing really can work.

8 A big obstacle to that are the
9 antitrust laws. And if you are really looking
10 to facilitate collective licensing and to do
11 it on a voluntary basis that doesn't involve
12 government mandates that make, it seems like,
13 almost everyone's hair stand on end, you might
14 want to look at ways that you might amend the
15 antitrust laws to facilitate voluntary
16 collective licensing.

17 MS. CLAGGETT: I expect that
18 would make a lot of other people's hair stand
19 on end, in terms of amending the antitrust
20 laws, but continue.

21 MS. CHERTKOF: Well, it could be
22 a narrow amendment. But I mean we bump up

1 against it all the time. I mean you wouldn't
2 believe how many calls I, personally, receive
3 every week asking why it is not easier to have
4 some sort of online database where you can
5 just go and get licenses for music and have a
6 unitary price. And the answer is because
7 there is antitrust laws that prevent
8 competitors from getting together and setting
9 a price.

10 And then the last point I want to
11 make, which is a little bit of a tangent but
12 just to respond to Casey about data -- is I
13 think you are underestimating the complexity
14 of data in the music industry. What you have
15 is, in most cases, the publishing is split in
16 any number of ways. I mean, you can have
17 seven rights owners on the publishing side.
18 And you need to figure out who they all are
19 and what shares they each have and how you
20 match that up against the recordings, and I
21 think that some of the slow time to market on
22 the music data front.

1 MS. CLAGGETT: Okay, thank you.

2 I think we had Fred next and then Colin.

3 MR. HABER: Hi. At Copyright
4 Clearance, we are actually trying to act as a
5 collective management organization. I am not
6 going to -- I'm sure Colin is going to have
7 some other things to add to this as well and
8 I am going to tie together a couple of other
9 things that have been said.

10 We work very hard to find parents
11 of orphan works. We are doing this all the
12 time. We are doing it in the text world,
13 primarily. It is hard. You need metadata.
14 You need databases that are large and that we
15 build ourselves from smaller databases. You
16 do need the interoperability among databases
17 because the number of times that we represent
18 ourselves as a text licensing organization get
19 questions about music and movies and
20 television and everything else is remarkable
21 because people don't make that distinction.

22 I think one of the things that we

1 have talked about here is sort of not coming
2 up with a one-size-fits-all kind of model and
3 we are talking about different kinds of works.
4 One of the things that we have learned over
5 time is that you also have to be very careful
6 of what rights you are talking about.

7 If you decide to proceed with
8 going with an ECL, ECL is just a structure
9 that then has to be filled out by somebody who
10 is actually going to run it. It is run by
11 collective -- in Scandinavian countries, it is
12 run by collecting societies and it is run
13 pretty well with participation from the
14 government at some level.

15 Here, I think the most recent
16 effort at doing an ECL was in the United
17 Kingdom. And the last I saw, there was a
18 paper put out by the Intellectual Property
19 Office of the UK to deal with orphan works in
20 the UK under an ECL model. And they figured
21 out, and this goes to what Bruce's comment
22 was, which is it goes to the money, is they

1 couldn't find somebody to run an ECL for
2 orphan works in the UK and so the government
3 is going to do it. The IPO is going to run a
4 collective license. That is going to be, for
5 those of us who run them, they are going to
6 have a great time finding out what this is
7 like and it is very expensive. And one of the
8 concerns that we would have about an ECL is
9 that, again, as Bruce said, there not only
10 needs to be money for the rights holders,
11 which we absolutely agree with, there needs to
12 be money to run the thing. And the
13 likelihood, in an orphan works context, that
14 there is going to be money that is available
15 to pay for running the system, in addition to
16 paying the rights holders is a very, very
17 difficult question. And we do think that the
18 money should be getting to rights holders but
19 you need someone to run it.

20 MS. CLAGGETT: Thank you. Fred,
21 then Colin, then Salley.

22 MR. RUSHING: So, I am just going

1 to build on a couple of things that people
2 said.

3 MS. CLAGGETT: Oh, I'm sorry.

4 MR. RUSHING: I think I am next.

5 MS. CLAGGETT: Yes, you are next.

6 Sorry, I said Fred but I meant Colin.

7 MR. RUSHING: That is what I
8 thought. I didn't know if there was another
9 Fred.

10 MS. CLAGGETT: No, I just wanted
11 Fred to speak again.

12 MR. RUSHING: Fair enough. So,
13 I think, and I think we all agree, or many of
14 us agree, on the last panel as well as this
15 one. The starting point is the policy
16 question. And Victor, you asked if I would be
17 opposed to some sort of SoundExchange-like
18 system for photographs. I, frankly, have no
19 idea if a system like that would work or is
20 necessary or anything like that.

21 Just a couple of observations
22 about the Section 114 license that

1 SoundExchange administers. So, this is a
2 license for digital radio services to sound
3 recordings. And it was interesting listening
4 to Bruce talk about the history of some of the
5 other statutory licenses. They sort of
6 emerged out of this very specific context.
7 And in the case of 114, they merged out of the
8 creation of a public performance for sound
9 recordings, which previously didn't exist.

10 It is therefore a fairly narrow
11 right that is applied to a pretty specific use
12 of a specific copyright. And it is what it
13 is, and this system sort of grew out of that.

14 One of the other observations I
15 would make is the great question mark in any
16 sort of system adopted by the government is
17 how the rates are set. And that is just a
18 profoundly complex question that is different
19 from market-to-market and industry-to-industry
20 and then right-to-right.

21 MS. CLAGGETT: And I might have
22 a question maybe to work on later on in terms

1 of if you could give us some examples in some
2 other countries where there is an ECL, where
3 they do the rate setting.

4 MR. RUSHING: How it works,
5 right. And if there is a backstop or
6 something like that and if there is a
7 backstop, how that works. In the U.S. system
8 that we have sort of grown up with in 114,
9 these rates and proceedings take forever. And
10 in fact, the very first webcasting proceeding
11 before the CRB is still going on.

12 So, those are just some
13 observations. I think the thing this panel is
14 focused on is administration, to a large
15 degree, and sort of what structures work. And
16 I think, and Susan alluded to this as did
17 Casey, what really matters are the sort of
18 principles, I think, guiding the licensing
19 body, whoever it is, and whether it is
20 voluntary or if it is under ECL or if it is by
21 statute or by something else. I think the
22 principles are really the same. It is

1 efficiency, transparency, and accuracy.

2 Whenever you are administering someone else's
3 rights, those are really the three most
4 important things.

5 And there have been some things
6 said generally about collective organizations
7 in earlier panels about sort of lack of
8 efficiency or lack of transparency, things of
9 this sort. I think it is as different from
10 organization to organization and you can even
11 have non-collective organizations that are
12 corrupt and efficient.

13 We sort of brag a little bit
14 about SoundExchange. Our admin rate is around
15 five percent, which is about a third of the
16 rate that prevails at most of our peer
17 organizations. We pay out monthly. We pride
18 ourselves on sort of pulling the curtain back
19 to the extent that we are allowed to. I think
20 those are the sorts of ideals that really
21 should guide any collective organization,
22 whether it is organized under law or through

1 voluntary agreements.

2 Lastly, and this is building on
3 Casey's point, if the question really is about
4 sort of making sure there are no orphan works,
5 and I think that probably is, in terms of
6 sound recordings in particular, maybe in terms
7 of copyrighted works generally -- and I agree
8 the point is sort of getting all the
9 stakeholders engaged in making sure that
10 systems are being put in place. I do think in
11 music that is happening, largely because there
12 is a compelling business need for it. It is
13 probably slower than anyone would like to have
14 seen, but I think we are going to continue to
15 see industry work to solve that problem and I
16 would expect that other efforts are taking
17 place in other copyright sectors.

18 MS. CLAGGETT: Thank you. I have
19 Salley, Greg, Doug, Brandon, and then Carri.

20 MS. SHANNON: Thank you. First
21 off, I want to thank Bruce for his excellent
22 explanation. That was very helpful.

1 We have significant doubts about
2 whether an ECL would work in the print
3 industry, mainly because the contracts for
4 books and magazine articles and the like have
5 changed so radically in the last ten years
6 that it would be very hard to find a
7 one-size-fits-all kind of model; however, we
8 are willing to consider that possibility. But
9 if we do, I totally agree with Colin's remarks
10 that we really have to pay attention to
11 transparency, accuracy, the core values.

12 And I also want to say that we
13 could only support any sort of system that was
14 voluntary and opt-in, not opt-out. And we
15 would be very hesitant to endorse any scheme
16 that was run by a profit-making entity. We
17 would prefer any scheme to be overseen by you
18 folks at the Copyright Office. And I know you
19 hear me say that and you think, using what for
20 money.

21 But to undertake to give this
22 sort of thing to a profit-making entity that

1 raises his hand and says yes, yes, we will do
2 it, I think we will have serious issues down
3 the road.

4 MS. CLAGGETT: Thank you.

5 Greg, then Doug, then Brandon.

6 MR. BARNES: Yes, Colin touched
7 upon a lot of the points I think are
8 important.

9 And without addressing, I guess,
10 the question of whether or not the ECL is
11 necessary and helpful in the context of orphan
12 works and/or mass digitization, just folks
13 knowing your question, just the structure, I
14 think the fact that Colin making that comment,
15 I think that is really important.

16 What we find and we do, we engage
17 at DiMA with a lot of the CMOs, voluntary
18 collective licensing organizations, that is.
19 And what we find is the aggregation of those
20 rights sometimes can, from our perspective,
21 lead to inflated pricing. And the backstop is
22 important because you make sure then that

1 there is a third-party objective arbitrator
2 that can kind of make sure that the process
3 worked efficiently.

4 In the context of the 114
5 license, Colin alluded to the CRB process,
6 which has this issue, undoubtedly, and is very
7 long and lengthy yet there still is a
8 backstop.

9 Ariel earlier mentioned ASCAP and
10 the consent decree. Well, the consent decree
11 is an example of sometimes how the aggregation
12 can lead to "anti-competitive practices."
13 That is not my terminology. That is not my
14 language. That is Department of Justice.
15 They brought the suit years ago. Maybe we
16 could look at modifying that, but it exists
17 for a reason.

18 The last thing I will say is as
19 you talk about the scope of artists, whether
20 they need to opt-in or opt-out, obviously, we
21 would prefer an opt-out system. And even in
22 that context, I think it is important to make

1 that on a periodic basis, meaning it can't be
2 a one-time opt-out because then you actually
3 can reignite the orphan works problem because
4 you don't know if they have opted out because
5 they really are still actively trying to
6 engage in direct licensing regimes or if they
7 just opted out and they kind of walked away
8 from the process.

9 So, those are just a couple of
10 things. The last thing I will say is the
11 compensation I think can be handled. After a
12 royalty paying licensee pays this type of ECL,
13 SoundExchange, again, a great example, they go
14 out, they try to find rights owners,
15 distribute royalties and if they don't find
16 those individuals, they have another system,
17 which I think is fair and appropriate for
18 distributing unpaid royalties.

19 So, I think there is a lot of
20 things that are out there in terms of
21 structure that has been built upon that can
22 help this system, should we need one because

1 we are not in that conversation.

2 MS. CLAGGETT: Yes, we haven't
3 resolved that. And before we go to the next
4 speaker, I did want to just give Jerker a
5 quick chance to maybe describe, if he does any
6 of the kind of the rate setting or the way
7 that ECL works in terms of establishing the
8 type of license fee that would be underneath
9 any ECL in some of the regimes that you
10 mentioned before.

11 MR. LEHMAN: And I would just ask
12 him to answer who pays the money into the pot,
13 too.

14 MS. CLAGGETT: Well, and that as
15 well, if you would like to.

16 MR. RYD N: Since we have several
17 different ECL schemes, not only for the kind
18 of uses you discussed like library and
19 archives, I won't go into those because that
20 will shift the focus.

21 But since the libraries concerned
22 are publicly run libraries, nonprofit, it

1 would be the government that would pay the
2 license fee. So, that is the simple answer.

3 And the fee, as you mentioned,
4 Gregory, it is a safeguard for the
5 unrepresented in that the represented rights
6 holder has the business interest to negotiate
7 a fee that is okay for them. The notion is
8 that if it is okay for them, then it would
9 surely be okay for the unrepresented or the
10 outsiders, although they have the right to
11 their own compensation, individual kind of
12 contract, so to speak, if they don't opt-out.

13 So the market price, since this
14 is not on the marketplace, if you take very
15 old material, what is the market value? For
16 the rights holder, it might be close to zero
17 because this has never really been on the
18 marketplace or, if it has, it is so old, it
19 has no relevance whatsoever, which might be
20 the case, actually, or it has a greater value.
21 But if you take a repertoire that will stretch
22 from very old to a fairly new, you have a flat

1 rate. So you would never see what was the
2 price for that one because it is a flat rate.
3 That is how this is administrated -- fairly
4 streamlined and very cheap. If you go for
5 each work, that would be very costly to
6 administrate those rights because that has
7 been the history. Of course, that might
8 change, depending on what kind of works you
9 license. It all depends on the works.

10 I would say the focus should be,
11 I think, from my perspective, is this is a
12 market-driven solution. You sit down and you
13 negotiate. The rights holders and user. The
14 dynamic is in that situation when you
15 negotiate. Then you could construe safeguards
16 which you won't find in the legislation but
17 you would find constructive and very good in
18 that specific contractual context because the
19 legislator cannot foresee what will happen,
20 but you, as party can do so.

21 So that is really the upside of
22 the whole thing, is that you could make things

1 happen as a party in that contract because the
2 government will not fix the whole thing for
3 you. They will provide the framework.

4 MS. CLAGGETT: Thank you. Bruce,
5 did he answer your question as well in terms
6 of who pays?

7 MR. LEHMAN: Yes, you did. And
8 I think the important thing is in Europe, it
9 is money going from one pocket to the other,
10 basically. You have got this whole system of
11 big culture ministries, lots of money,
12 educational institutions that just assume from
13 the get-go that they will have to pay. This
14 kind of a system, really, is the alternative,
15 historically, to fair use in Europe.

16 MS. CLAGGETT: So I think we have
17 Brandon, Carrie, Susan, and Melissa next.

18 MR. BUTLER: So, what might be
19 helpful in terms of thinking about how to
20 design ECL and who is in and who is out, so
21 maybe rather than read my little story earlier
22 as the reason there should be ECL, say well,

1 if you can tell this story about fair use
2 running out and licenses taking over but the
3 two people involved don't agree on when that
4 happens, well, that is a place where ECLs
5 probably shouldn't be introduced yet because
6 there is not agreement on when they would be
7 feasible or reasonable to apply.

8 So, that might have a kind of
9 counterintuitive consequence because I think
10 in the places where ECLs operate, they operate
11 in the context of education and nonprofit
12 uses. But of course, those are uses that are
13 staunchly defended fair use territory in this
14 country.

15 MS. CLAGGETT: Although, I think
16 in the UK they would have extended to both
17 commercial and noncommercial uses.

18 MR. RYD N: As was Sweden. As I
19 mentioned, this public-private partnership
20 means that the publishing house would be able
21 to use this material. They don't own the
22 digital rights to this content. They need a

1 license to make their archive available. And
2 since our archive is in much better condition,
3 they would like us to digitize our copies and
4 that will finance our whole digitization.
5 That is the free lunch, so to speak, -- so
6 far, so good. But they need to clear the
7 rights to get the digital content to the
8 publishing house.

9 MR. BUTLER: So I was just going
10 to say one way to do the triage then, is to
11 say well there are these places where there is
12 warfare going on over the boundaries and we
13 don't want to step into that.

14 And now these other places like
15 Susan's group say well, just leave us out
16 where there is not warfare but there is sort
17 of agreement, everybody is participating but
18 no problem is solved.

19 And so what you are looking for
20 are places where there is agreement about the
21 bounds between fair use and licensing and yet
22 there is still missing folks. And so that

1 might be the way to look for the sectors that
2 might benefit from ECL the most.

3 MS. CLAGGETT: Carrie, then
4 Susan.

5 MS. DEVORAH: I'm beginning to
6 feel like I am watching a camel being built.
7 The old adage is a camel is a horse that was
8 put together by committee.

9 I am represented by a UK Agency.
10 I have seen a five-figure monthly check drop
11 down to dollars. It goes into what is called
12 a black box. That is what they have resorted
13 to. We get pennies on what we used to get
14 from it. Basically, the monthly check has
15 gone off the fiscal cliff.

16 What immediately is needed, well
17 a few things. One is a common language. I
18 think everybody needs to get onboard that
19 piracy and theft and copyright infringement
20 are the same darn thing. And that way, you
21 mitigate the splitting of hairs.

22 But I am also finding everybody

1 a way to participate in this ongoing crime,
2 rather than just saying no, this isn't good.
3 I have no interest in common licensing. My
4 agency has -- well, the other agencies that
5 are a collective of have any interest in
6 collective licensing. I really think the
7 focus ought to be more in the enforcement or
8 the stopping, going back to what I said
9 earlier. Stop the tech companies.

10 I encourage you, one, to visit my
11 website where I gather links from around the
12 world of other people and how they are dealing
13 with the issues of IP. Search my name on
14 Google, on Baidu, on AOL, and Yahoo. You are
15 easily going to find over 4,000 plus hits of
16 my images and I don't get a penny for one.

17 So, understand there are people,
18 the voices that need to bump up against the
19 lawyers and the professors that have all these
20 wonderful ideas. Your ideas are not paying
21 our bills.

22 MS. CLAGGETT: Thank you. I

1 think we have Susan, then Doug, Melissa and
2 Jerker, and Salley.

3 MS. CHERTKOF: I want to raise
4 one other issue that I don't think that has
5 been mentioned so far, which is that if you
6 were setting up any sort of ECL or if, perish
7 the thought, you were ever thinking of setting
8 up another statutory license, the first thing
9 you would have to do is define the use case.
10 And I think that is what we have been talking
11 about here. You would need to figure out what
12 works are involved, what kind of use is
13 involved, who are the users. Is it commercial
14 or noncommercial, et cetera, et cetera.

15 And if you look at the Section
16 114 statutory license, for example, which is
17 one I am very familiar with, it is a very
18 narrow use case. It is radio-style
19 programming over the internet and it got, I am
20 trying to picture, there are at least ten, I
21 think, statutory conditions, the sound
22 recording performance complement, there is a

1 whole host of them. So, it is very narrow.
2 And you would have to do the same thing if you
3 were going with ECL. If you are going to
4 figure out what is the use that people are
5 going to pay for and who are the users, you
6 need to define it.

7 And the point that I am trying to
8 get to is that we think that stifles
9 innovation because you have not boiled
10 everything down to one homogeneous business
11 model and you know if the whole music industry
12 was governed by one big statutory license, you
13 would have nothing but internet radio. But
14 because there is a portion of the industry
15 that has been left outside the statutory
16 license, you have an emerging marketplace
17 where there is all sorts of innovative
18 services coming out and new services come out
19 every year that have all sorts of different
20 functionality that would just never been
21 envisioned or permitted under a
22 one-size-fits-all cookie cutter solution that

1 any sort of ECL would make.

2 MS. CLAGGETT: Yes, and I think
3 the one consensus I think that we are coming
4 to here, even though we haven't even been able
5 to decide, I think whether an ECL is
6 appropriate -- that if there was an ECL, it
7 would have to be very narrow and it would have
8 to be sector-by-sector and address specific
9 works and specific issues and really be -- in
10 an instance where there is that gray area
11 where there is a market failure that needs to
12 be resolved.

13 I have Doug, then Melissa,
14 Jerker, Salley, and Casey. So, Doug.

15 MR. HILL: Yes, I think the
16 question that comes up when ECLs are talked
17 about is what is the problem that you are
18 trying to solve. If the problem that you are
19 trying to solve is to pay money into a pool so
20 that a future license holder can come forward
21 and be able to collect because they couldn't
22 be found in some mass digitization project,

1 then you are just creating a bank that is
2 going to have nothing but administrative
3 headaches and nightmares to be able to deal
4 with.

5 The reason why music works so
6 well is because it is a repetitive use of the
7 same object over, and over, and over again or
8 near same object.

9 If you are talking about
10 photography, photography does not fall into
11 the same category. You have got things that
12 might go out of use for 25 years, regardless
13 of what others have said about does it have
14 commercial value. The 25th anniversary of the
15 Blizzard of 1977 became important 25 years
16 after it occurred. And those licenses had to
17 go back and try and find that photographer and
18 many didn't bother to do that. They assumed
19 that photographer was dead. He is very much
20 alive and sitting in the back.

21 So in the process of doing this,
22 we need to figure out what are the mechanisms

1 that are going to facilitate -- in an
2 individual industry, what could work? Any
3 transactional element that is over and over
4 and over again would be a great ECL. Anything
5 that has got individual uses that are going to
6 be sporadic that they are not going to be able
7 to either have a market price because that is
8 going to be the difficulty then, is it
9 important 25 years later and what is the value
10 of the only pictures of that particular event,
11 then it is going to be impossible to set that
12 pricing, nor should you.

13 MS. CLAGGETT: Thank you.
14 Melissa, Jerker, then Salley, and Casey. And
15 then I think we are going to have to cut it
16 off and open it up for audience participation.
17 Melissa.

18 MS. LEVINE: So first, money.
19 Museums and libraries that I have worked at,
20 of all sizes and scale, we pay ASCAP, we pay
21 BMI. Where there is something that needs to
22 get paid for, it is addressed appropriately.

1 And there are different kinds of uses and
2 those have been covered in many different
3 manners over the last day or so.

4 We have talked a lot about who
5 pays, how we set up a system to pay but we
6 haven't talked about, in the context of orphan
7 works, who gets the money. And here, when
8 Fred talks about things like the
9 administrative costs, the logistical costs,
10 the idea of a government paid license, as
11 Jerker mentioned, I think, is not likely here,
12 we aren't getting to who gets paid.

13 And so the whole problem with an
14 orphan is you don't know who to pay. So, to
15 have a big complicated mechanism where say,
16 from my perspective working with libraries
17 right now, we are basically paying a giant
18 kill fee, or a form of insurance, or extortion
19 money so that we can do what are proper uses
20 without any desire or intention to make a
21 taking of other people's intellectual property
22 is really problematic. It is, functionally,

1 a form of taxation from my personal view.

2 I think ARROW is an interesting
3 approach in EU because, basically, it is a
4 form of notice. And sort of in my own
5 practical work, I do wish that the notices of
6 intent to enforce from the GATT days had been
7 maintained and continued and I could see a
8 system like that being very helpful, both so
9 that proper actors can make those notices
10 functional and make individual arrangements
11 with rights holders when they emerge,
12 especially if there is a due diligence element
13 for libraries.

14 The last question -- I actually
15 had two questions. Jerker was talking about
16 the system in Sweden but it wasn't clear to me
17 whether it covered orphan works. Those
18 licenses do cover purported orphan -- okay.
19 So, that works there.

20 But Ariel, I think you mentioned
21 yesterday the situation in Canada, which is
22 not a very effective system and it is maybe a

1 longer conversation for another time.

2 MS. CLAGGETT: Yes, we probably
3 won't be able to --

4 MS. LEVINE: What works and what
5 doesn't is a big question.

6 MS. CLAGGETT: Salley, and then
7 Casey, and then I actually am going to have to
8 cut it off and then get audience
9 participation.

10 MR. HABER: Another question is
11 where does the money go. And this is a
12 problem for the mechanics -- is you are going
13 to have a federal preemption problem because
14 the states think they get the money in escrow
15 and that is a big problem. Unclaimed
16 property.

17 MS. CLAGGETT: Jerker, and then
18 Salley and then Casey.

19 MR. RYD N: You asked about
20 orphan works. Just to make a remark that ECL
21 has been in existence for like 50 or 60 years.
22 From the beginning, they covered orphan works.

1 No one discussed orphan works in those days
2 because it was sufficient, not a problem. It
3 has always been a problem nevertheless.

4 ECL used to be called, itself,
5 very Nordic. Unless you are a specific
6 country, you can't export it. I was told by
7 a colleague at the British Library -- silly,
8 small languages.

9 Now it is being used in the UK.
10 The MOU on out-of-commerce works does show it
11 has a relevance. It has an impact even in
12 Germany and Germany is a bigger country than
13 UK economically, a much bigger publishing
14 nation.

15 Anyhow, I suggest -- I have to
16 leave, I have a train -- that if you haven't
17 studied an ECL, an ECL is difficult to study
18 because the provisions are very kind of -- it
19 is not many words -- is that you read the MOU
20 on out-of-commerce books and learned journals.
21 It is online. Here is my email address. If
22 you email me, I can provide you with a link,

1 if you cannot find it yourself. And there is
2 some frequently asked questions. There is a
3 press release, and there is a recommendation
4 on behalf of the EU Commission to introduce it
5 in each country by the Commission.

6 The MOU is very good because it
7 directly addresses both the rights holders,
8 the library community, and the government.
9 Because it recognized there is a problem as
10 far as transparency of some organizations, the
11 CMOs in some countries. I won't point
12 fingers. So, it does address those problems
13 and it is very, well, kind of very useful as
14 a document.

15 Thank you so much for being
16 invited. I have to catch a train. And I wish
17 you the best of luck, whatever solution you
18 find.

19 (Laughter.)

20 MS. CLAGGETT: Well with that,
21 okay, so we do want to open it up to the
22 audience. So, Salley and Casey and then we

1 are going to have to open it up to the
2 audience.

3 MS. SHANNON: I just want to say,
4 Karyn, I think you are right that anything we
5 did would have to be very narrowly drawn.

6 But if we do do it, and I am not
7 sure that it is at all a good idea, I really
8 agree with Victor when he said that the outfit
9 who pays should be the person who wants to use
10 the work, not the person who is the creator of
11 the work. If we do it at all, it should be
12 structured that way.

13 And the last thing I want to say
14 is that going back to our conversation
15 yesterday, we would have a lot fewer orphans
16 if we took care of changes in Section 203,
17 because thousands of publishers have gone out
18 of business. We have orphan publishers, not
19 orphan works, at least in print.

20 And the question of what you do
21 about that is quite obvious, is to change 203.

22 MS. CLAGGETT: Thank you. Casey.

1 MR. RAE: Sure, I will try to be
2 brief as well.

3 I just wanted to respond really
4 quickly to a couple of things that Susan said,
5 the bulk of which I agree with in terms of how
6 you construct systems to track uses. But I
7 would push back a little bit on the idea of
8 direct licenses kind of unleashing innovation.
9 You know, there is incredible concentration
10 among the major labels and the major
11 publishers as well, although they license
12 under a different construct, a compulsory
13 construct.

14 But on the master use side, it
15 can take, I think, on average, up to two years
16 to get through negotiations with the rights
17 holders in order to be able to bring a product
18 that contains enough catalog to be attractive
19 to a user and compete against free, which we
20 can all agree is a terrible situation to be
21 in.

22 I think that in terms of what the

1 government lays out, they draw the parameters
2 for what is permissible with regard to digital
3 licensing. And I don't know that we would
4 only see broadcast radio-like products if the
5 licensing rubric looked different for the
6 master use. I think we might see more
7 innovation. It is just right now it breaks
8 down between interactive and non-interactive
9 pretty cleanly.

10 At the end of the day, it comes
11 down to market share. And I think about the
12 independents a lot, independent artists but
13 also independent labels. And I wonder every
14 single time a tech company wants to develop
15 something and bring it to the marketplace, for
16 example, Amazon --surprise, surprise -- wants
17 to get into the streaming music game, there
18 are tons of complaints because the independent
19 sector simply does not have the leverage to
20 push for fair terms or at least terms
21 consistent with what the major labels are able
22 to achieve.

1 I just wanted to bring that up
2 because I think in some ways the licensing
3 framework for digital music does affect how
4 things play out in the marketplace, both for
5 consumers and for artists who would be
6 compensated under those systems.

7 MS. CLAGGETT: Thank you. And I
8 think we are going to have to go to the
9 audience.

10 MS. DEVORAH: I have a quick
11 comment. In terms of the value of the artist
12 and the photographer and the journalist,
13 without our industry, the music industry would
14 be dead a lot sooner. It is our images that
15 come back into play year after year and
16 hundreds of years later. So, keep that in
17 mind.

18 MS. CLAGGETT: Thank you. So we
19 are going to open it up for a few minutes for
20 audience comment, if anyone has anything.
21 Again, this panel is on -- the focus is the
22 structure of ECL. So if you have a specific

1 comment about the structure of a potential ECL
2 regime in the United States. Please.

3 MS. FERTIG: Rachel Fertig, with
4 the Association of American Publishers.

5 Karyn, I just wanted to respond
6 to your question that you posed at the
7 beginning of this panel and part of the end of
8 the last panel. If we just narrow the
9 question to mass digitization of books,
10 published books at that and journals, from the
11 Association of American Publishers members, we
12 would say that we are not in favor of an
13 extended collective licensing approach. We
14 don't think that is appropriate at this time
15 and we are in favor of voluntary collective
16 approaches that we have with CCC and that are
17 -- there are new voluntary licensing direct
18 and collective being created all the time now
19 in different countries that are facilitated by
20 the technological advances that we have.

21 And we think A) it is too soon to
22 impose an ECL structure, that we should give

1 the market time to develop and take advantage
2 of these new technologies, and B) that ECL, in
3 general, should be approached with caution
4 because it is not something that the U.S. has
5 had experience with and it would impose a
6 significant change to how our Section 106
7 rights have been traditionally enforced in
8 this country.

9 MS. CLAGGETT: Thank you.

10 MS. PENROSE: Brooke Penrose,
11 Museum of Fine Arts. We pay licensing fees
12 all the time especially for marketing uses,
13 commercial uses. Certainly, if we create a
14 mug with an image on it and the image is under
15 copyright, we enter into a negotiation with
16 the artist and pay an appropriate royalty, if
17 requested.

18 We are good actors, I promise.
19 So, we are trying to do the right thing. Part
20 of the problem, though, with collective
21 licensing agencies, and there are a couple
22 that exist in the visual arts world, ARS and

1 VAGA are probably two of the most well-known,
2 we are finding sometimes that the artist's
3 intent is not consistent with those collective
4 organizations' policies on revenue-generating.
5 And that is what they are there for. They are
6 there to generate revenue.

7 Two examples that come to mind
8 right away are we have actually been contacted
9 by artists represented by these entities
10 recently, asking where their images are
11 online. They are trying to direct people,
12 buyers, to our website so that they can see
13 examples of their work. And we have to tell
14 them well, the organization that represents
15 you is going to charge us a fee and this is
16 not something we can recapture revenue from,
17 so we are going to have to decline.

18 So, to this panel's discussion on
19 well if you can't afford it, then don't use
20 it, that is what we are doing. But the result
21 is, it is not getting used. It is not being
22 put out there at all. And the Copyright

1 Office, I think needs to decide whether that
2 is -- if that is the landscape we are in, is
3 that appropriate? Do we really want to kill
4 that stuff, if that is the alternative?

5 Fortunately, we have had a few
6 artists approach us and enter into their own
7 licensing agreements, where they say okay,
8 never mind. This organization isn't doing
9 what I wanted.

10 Another example I just wanted to
11 point out as well is we had an instance where
12 an artist wanted to waive fees for a project
13 that maybe they could have charged fees for
14 but they elected that they didn't want fees
15 charged. And their rights organization still
16 insisted on taking their administrative fee,
17 even though the artist wasn't making any money
18 off of it and chose not to. I am not sure
19 that that is an appropriate response, based
20 off of how we are taking about structuring
21 that.

22 MS. CLAGGETT: Thank you. Well,

1 I want to thank the panels. For this last
2 panel on ECL, it is obviously a very, very
3 complex issue that we are going to be studying
4 in a lot of detail.

5 Just a couple of housekeeping
6 items in terms of the last panel. We are
7 going to have a sign-up sheet to sign up for
8 the last panel for our audience participants,
9 primarily, allowing those who have not been
10 able to speak so far to be able to make final
11 remarks. So, not for participants who have
12 been able to really talk throughout the
13 two-day roundtables but for participants in
14 the audience who haven't had the opportunity
15 we will have a sign-up sheet.

16 We are going to be pretty strict
17 in terms of the time, depending on how many we
18 have participating. We are going to keep it
19 to two minutes in terms of your amount of time
20 to comment. So, we are going to use these
21 really handy sheets, which will tell you when
22 you actually have 30 seconds and then at 10

1 seconds. And then we will hold this up. That
2 means you don't have any more time left.

3 So, we just want to make sure
4 that we hear everyone. Obviously, if there
5 are not a lot of audience participants who
6 sign up to make remarks and we have additional
7 time for participants who might have some
8 final remarks, we will try to include those as
9 well. But we just want to make sure that we
10 hear from anyone who hasn't had the
11 opportunity so far to be able to speak.

12 Thank you.

13 (Whereupon, the foregoing matter went off the
14 record at 3:49 p.m. and went back on the
15 record at 4:03 p.m.)

16 MS. CLAGGETT: All right. So, we
17 are going to get started with the final
18 session and so just a couple of little
19 housekeeping things.

20 One, we want to have the
21 opportunity, since everyone obviously wasn't
22 able to sign up for panels. We have tried to

1 keep the panels very varied and we actually
2 had a number of people on them but we
3 obviously weren't able to accommodate
4 everybody who signed up. So, we wanted to
5 give people in the audience an opportunity to
6 make remarks, if they hadn't already done so.
7 And then we wanted to hear from anybody else
8 who had any kind of final remarks.

9 As I mentioned before, we are
10 going to limit those remarks to just two
11 minutes, because we only have an hour and we
12 want to make sure that we do hear from
13 everyone.

14 I do need to read the final time
15 you will hear our release language, for
16 purposes of this final panel. As we have said
17 numerous times before, this panel discussion
18 is being video recorded by the Library of
19 Congress. There will be, in fact this will be
20 a question and answer period. If you decide
21 to participate in that question and answer
22 period, you are giving us permission to

1 include your question or comments in future
2 webcasts and broadcasts.

3 And at this time, I would like to
4 ask you to turn off any cell phones or
5 electronic devices that might interfere with
6 the recording of this event.

7 And the way we will progress, we
8 have a few, actually just a few names of
9 people who have signed up to kind of make
10 remarks. We, again, are going to try to keep
11 it to two minutes. And we will have somebody
12 who will hold up a sign at the one minute, 30
13 seconds, ten seconds, and wrap time frame. If
14 after we have the people who have signed up
15 and we have more time after that, then we will
16 open it up to people who can just kind of line
17 up and also give final remarks as well.

18 So, in terms of the people who
19 have signed up so far, and actually I think
20 most of them are people who had the
21 opportunity to participate but since other
22 non-participants haven't signed up, I will

1 just go through the list of people who have
2 signed.

3 So, we have Charlie Wapner from
4 the American Library Association is here. Oh,
5 he's not here. Okay.

6 So, the next and I don't know if
7 she is here, Lisa Shaftel from the Graphic
8 Artists Guild.

9 MS. SHAFTEL: Hi. Thank you for
10 is this on?

11 MS. CLAGGETT: Yes, you just have
12 to lean fairly closely to it.

13 MS. SHAFTEL: Thank you for this
14 opportunity to open this up to us. I have two
15 things I want to address. The first one is
16 there was a lot of discussion about public
17 good, public interest, public benefit. I am
18 not an attorney. I read a lot. I have
19 certainly read fair use a whole lot and a lot
20 of fair use cases. And it seems to me that up
21 until just recently, some cases in the last
22 couple of years, public interest and public

1 benefit was not a consideration for allowance
2 under fair use. I would like to read a quote
3 by Mark Halperin that he said about copyright
4 and the public interest. He said this a
5 couple years ago.

6 You can always make a case for
7 the public interest if you are willing to
8 exclude from the common equity those whose
9 rights you seek to abridge. I am not hearing
10 anyone discuss the rights of authors and
11 creators in our economic rights in discussing
12 the public interest.

13 And the second thing I wanted to
14 address was to Greg Cram and the other museum
15 and library folks who put up exhibits of old
16 work. I have done a lot of this sort of
17 exhibit design with history museums. And
18 without going into the personal stories, the
19 historians that I have worked with have told
20 me that they have never once been sued by a
21 rights holder. On rare occasions, a right
22 holder comes forward. They set aside a

1 certain amount of money to pay fees and they
2 do negotiate fees. And usually, the rights
3 holders who come forward have even more
4 information about that historical event to
5 contribute and they identify more work.

6 So, my question is you mentioned
7 a billion plus dollars. Jeff Cunard has said
8 to me \$30,000 dollars. Have any of you
9 actually ever been sued by a rights holder?

10 MS. CLAGGETT: Thank you.

11 MS. SHAFTEL: So, this is just
12 speculation or fear.

13 MS. CLAGGETT: Yes, and I think
14 one of the questions we have tried to explore
15 is that speculation of fear or a chilling
16 effect in some way affecting the people's
17 ability to actually make those works
18 available.

19 I will go to Jean Dryden of the
20 Society of American Archivists next.

21 MS. DRYDEN: That is a very nice
22 segue. My academic research has looked at the

1 copyright practices of American archivists and
2 Canadian archivists as well, when they are
3 digitizing their holdings and putting them
4 online. And I have discovered they want to do
5 the right thing. They are very risk averse.
6 They are probably more cautious than they need
7 to be and so they are sticking to the public
8 domain stuff and the stuff in which they own
9 the copyright.

10 So, that is easy. That is the
11 slim pickings, the low-hanging fruit.
12 Eventually, they are going to run out of
13 public domain stuff and stuff they own. Also,
14 user demand is demanding more recent stuff.
15 And also, the whole idea of instead of items,
16 whole collections is becoming far more
17 important.

18 And yes, every work has a mommy
19 and a daddy but we can't find the mommy and
20 the daddy because they are ordinary citizens
21 that wrote to governments, to universities, or
22 family papers.

1 Searches for owners have been
2 costly and often futile. And when located,
3 the few we can, they are thrilled. They are
4 absolutely thrilled. They don't want money.
5 Hey, we are on the internet!

6 And for archivists, the prospect
7 of damages is scary and will chill
8 digitization projects, I think. The prospect
9 of licensing fees is unrealistic for
10 inadequately resourced organizations. So, I
11 am very happy to hear that ECL generally
12 excludes unpublished stuff, which is most of
13 our holdings.

14 And as Mr. Perlman said, I gather
15 he is tired of us whining about being poor.
16 You don't get a pass just because you are
17 poor, but archivists are always making hard
18 choices. We never have enough money. So, if
19 the choices don't digitize and don't put it
20 online, I think we are doing a great
21 disservice to our users because many people
22 believe that it doesn't exist if it is not

1 online.

2 And I want to raise that issue of
3 the public interest and the public good that
4 is served by archives. To support all those
5 good things like transparency and
6 accountability or even if you have an
7 anniversary to celebrate. If stuff isn't
8 there, you are going to be really ticked off
9 and whining that nobody saved it. Well, it is
10 archivists who do that.

11 So, thank you very much.

12 MS. CLAGGETT: Thank you. Next
13 we have John Sadowski from Wikimedia.

14 MR. SADOWSKI: Hi. So, first I
15 want to say we are grateful for the
16 opportunity to participate in these
17 roundtables and get the unique viewpoint of
18 the Wikimedia movement. So, I have two points
19 I want to briefly discuss, based on
20 discussions we have heard here in the last two
21 days.

22 First, I want to emphasize that

1 we want any reforms to minimize burdens on our
2 volunteers who contribute to our projects.
3 And these range from high school students to
4 preeminent scientists to people from foreign
5 countries, including developing countries.

6 The amount of burden in any
7 reform will affect how we are able to use
8 these orphan works in the pursuit of our
9 educational mission. Any reform that imposes
10 large burdens, such as an escrow fee, or that
11 doesn't limit or remove monetary remedies for
12 nonprofit educational use, would likely
13 prevent us from being able to use them
14 altogether.

15 Secondly, we have heard a lot of
16 discussion on fair use as a vehicle for orphan
17 works reform. So, I want to comment on that.

18 Since our goal is to provide
19 material that is freely available, the
20 Wikimedia projects make very limited use of
21 fair use. In fact, our internal criteria for
22 non-free content are much stricter than the

1 law would allow for. We only use works under
2 fair use if no freely licensed equivalent
3 could possibly be created.

4 So for example, we generally do
5 not host non-free photographs of living
6 persons or existing buildings because a free
7 equivalent could be created by a volunteer
8 taking a photograph themselves. So those
9 dealing with orphan works solely be expanding
10 fair use, is unlikely to allow us to benefit
11 from these works.

12 So, thank you.

13 MS. CLAGGETT: Thank you. And
14 that actually concluded the list of who had
15 actually signed up. So, if there are others
16 who would like to speak briefly, please make
17 your way to the microphone and you can speak.
18 But you can just come up one after the other.

19 Thank you.

20 MS. PRAGER: Hi, thank you. I
21 hope you all had a productive day today. I'm
22 sorry I couldn't be here. But I wanted to

1 come back because something has been weighing
2 on my mind.

3 I think it is of utmost
4 importance that we separate digitization out
5 from orphan works. Digitization is about
6 taking mass works, digitizing them, and making
7 them available.

8 Orphan works, on the other hand,
9 are about copyright protected works for whom
10 an owner is hard to find or cannot be found.

11 The digitization issue can be
12 dealt with through a takedown procedure that
13 can be created so that let's say you have a
14 mass digitization of the archives. You put it
15 up. If there was a takedown provision that
16 could be added to the law, hopefully, to say
17 hey, we don't want that up there because it is
18 ours and you didn't have it, that is one way
19 of dealing with that area.

20 But from a use perspective, for
21 commercial or noncommercial usage of orphan
22 works by a particular user, whether it is a

1 film maker, or a compilation, or a magazine,
2 what have you -- we may need some guidance on
3 what is a reasonable search. I mean not may
4 need -- we do need guidance on what is a
5 reasonable search. And again, it is a
6 different issue. So, I am hoping that we can
7 address that moving forward.

8 Thank you all very much.

9 MR. FURLOUGH: Hi, this is Mike
10 Furlough. And thank you again for having us
11 today.

12 Earlier today I identified myself
13 as the incoming Director of HathiTrust. My
14 day job, until May, when I actually assume
15 that role is Associate Dean for Research at
16 Penn State University Libraries. So, I just
17 wanted to address Lisa's question about
18 special collections digitization, museums,
19 exhibits, and being sued.

20 I oversee an active digitization
21 program. I oversee a special collections
22 library. And I would say no, I don't know of

1 many instances where or any instances where
2 someone has come along and sued because that
3 kind of educational context work has been made
4 accessible online.

5 However, we are living in a
6 climate that allows for a great deal of risk
7 aversion. We have risk aversion being
8 encouraged today, even with explicit threats
9 of lawsuits against libraries. So, I think we
10 have to recognize that while we do -- we are
11 becoming less risk averse around certain kinds
12 of uses, we are still in a climate where there
13 are certain organizations that don't represent
14 the parties that are usually at issue around
15 orphan works who are out there making threats.

16 So, that is all I have to say.

17 MS. CLAGGETT: Thank you. I
18 think somebody else wants to come up.

19 MR. SEDLIK: Hi, Jeff Sedlik from
20 the PLUS Coalition. And we are neutral on
21 orphan works legislation. We just serve in an
22 advisory and support capacity to our members

1 who are museums or libraries or archives,
2 creators, distributors of images, users of
3 images. But we do hear from our members as to
4 what their concerns are.

5 And of course on the museum and
6 library and archives side, we hear that with
7 respect to injunctive relief, which is what I
8 am going to talk about here, we hear
9 significant concern about the liability posed
10 if they move ahead with making use of an image
11 in a book or in a display and injunctive
12 relief comes along and they have to stop. How
13 do they pull the books back or what fees are
14 they going to face in terms of reasonable
15 compensation? It becomes a very difficult
16 concern and almost obviates the benefit of
17 having any orphan works legislation passed.

18 But from the creator side, what
19 we hear is they are afraid of three different
20 issues. One is objectionable use, which is,
21 let's say, competitive use. The photograph
22 takes an image, somebody finds the image and

1 begins to use it on a poster or use it in some
2 sort of advertising, et cetera, some type of
3 commercial use in competition with the
4 creator. That is an issue.

5 Usage for a political or social
6 causes that would not otherwise be allowed
7 under fair use, and I won't get into that
8 here, but let's just say using a photograph
9 not to comment on the photograph, not to
10 parody the photograph, but just in general,
11 and the creator finds that particular use is
12 objectionable, whether that is a cause that
13 they don't agree with et cetera.

14 And then you have issues of
15 violations of whatever the new orphan works
16 amendment might be. Something like an
17 insufficient diligent search might not carry
18 a significant penalty, whereas a false
19 diligent search should carry a very
20 significant penalty.

21 Issues such as claiming
22 authorship or ownership of a work that they

1 are using as an orphan works should carry a
2 significant penalty.

3 Failure to pay reasonable
4 compensation, if reasonable compensation is
5 defined, should carry a significant penalty.
6 And there should not be any form of
7 re-licensing involved, once you clear an
8 orphan work to say I have cleared this. Now,
9 everybody can use this orphan work.

10 That is what we heard from our
11 members. Thank you very much.

12 MS. CLAGGETT: Thank you.

13 MR. CRAM: I am Greg Cram from
14 the New York Public Library.

15 One of the questions this morning
16 in the first panel was about intent to use
17 applications. And I wanted to highlight
18 something in the Library of Congress'
19 submissions on the orphan works issue. And
20 they were talking about how they posted a
21 number of images online under unclear rights
22 status. And they were able to get a number of

1 helpful suggestions from the public about
2 fixing their metadata.

3 I think that is probably the
4 better solution than requiring libraries and
5 archivists to submit to the Copyright Office
6 or someone else a specific list of items they
7 would like to make available. And for us, we
8 digitize a number of items every day. It
9 would be really difficult for us to keep up
10 with that amount of digitization, if we are
11 required to tell the Copyright Office or tell
12 someone every day this is what we are planning
13 to digitize.

14 MS. CLAGGETT: Thank you.

15 MS. PENROSE: Just a quick
16 comment because it wasn't address earlier
17 under remedies. But I think it is also worth
18 looking at Section 506 and maybe defining that
19 if someone has completed a due diligence
20 search, that that would exempt them from being
21 found of a willful infringements. I think
22 criminal penalties need to be looked at as

1 well because that is certainly a deterrent for
2 something that could cross into that area,
3 even after a diligent search.

4 MS. CLAGGETT: Thank you.

5 MS. O'KEEFFE: Hope O'Keefe for
6 the Library of Congress. Correcting the
7 record from my learned colleague here, the
8 materials that the Library had posted online
9 were not subject to copyright. They were
10 things that had no known copyright
11 restrictions.

12 Nevertheless, we put them out for
13 tagging and crowd sourcing and have made 5,000
14 changes to our catalogues based on crowd
15 sourcing. And we have corrected our metadata
16 and it is, as Barbara Natanson talked about
17 yesterday, a terrific way of de-orphaning
18 materials if we can find a way to do that.

19 MS. CLAGGETT: Thank you.

20 Do we have any other final
21 remarks or comments before we close?

22 MR. CAPOBIANCO: This is Michael

1 Capobianco, Science Fiction and Fantasy
2 Writers of America.

3 And I just wanted to emphasize
4 that what we would like the Copyright Office
5 to do, if the problem of orphan works is that
6 the authors cannot be found, we would like the
7 Copyright Office to work on ways to make
8 authors findable. And that seems like a thing
9 that is within the Copyright Office's purview
10 and it would be a lot easier than changing the
11 law.

12 MS. CLAGGETT: Well, and I
13 certainly -- we certainly heard a lot about
14 that today. We did have one panel about
15 registration, and private registries, and
16 public registries, and things to do to improve
17 the registration system. But we also have
18 actually a whole separate kind of initiative
19 with the Copyright Office is undergoing right
20 now to try to help improve the registration
21 system because that is something that,
22 obviously, is a huge factor in this

1 discussion.

2 MS. ROWLAND: I would like to add
3 something about that really quickly. For
4 those of you who weren't here yesterday, part
5 of that equation is the recordation system.
6 And they are having roundtables later this
7 month in California and New York. So, it is
8 on our website, if you are interested in that
9 issue.

10 MS. CLAGGETT: Yes, we encourage
11 those who -- because I think the recordation
12 is also something that was mentioned. So, if
13 you have an interest, certainly please sign up
14 to participate in those roundtables as well.

15 Any other final comments before
16 we close down our roundtables? No?

17 All right. Well, we want to
18 thank all of the participants, both the panel
19 participants, as well as the audience. You
20 certainly gave us a huge amount of information
21 and a lot of things to consider. We will
22 parse through all of the information. As I

1 said before, the actual roundtables have been
2 videotaped. So, they will be available on our
3 website at some point and we have given you
4 also the opportunity, if there were issues,
5 new issues that have been raised that you
6 would like to respond to in writing, we are
7 accepting additional written comments.

8 We don't expect though, or
9 necessarily want you to merely reiterate what
10 you said in your first set of comments. But
11 if there is something unique that was raised
12 in the roundtables that you really want to
13 respond to, please feel free to use that
14 opportunity to file additional written
15 comments.

16 Thank you very much.

17 Oh, and one final thing. For
18 those who were participants, please, if you
19 have not already done so, take a copy of our
20 permission and release form and sign it and
21 give it back to us because we can't post that
22 for everyone until we get all of those

1 permissions back. Thank you.

2 (Whereupon, at 4:22 p.m., the
3 foregoing matter was concluded.)

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