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

PRESENT
MARYBETH PETERS Register of Copyrights
JULE L. SIGALL Associate Register for Policy & International Affairs
ALLAN ADLER Association of American Publishers
FRITZ E. ATTAWAY Motion Picture Association of America
JONATHAN BAND The Library Copyright Alliance
MICHAEL CAPOBIANCO The Science Fiction and Fantasy Writers of America
DAVID CARSON Copyright Office, Library of Congress
ANNE CHAITOVITZ AFTRA
JEFF CLARK Consortium of College and University Media Centers
JEFFREY P. CUNARD College Art Association
DONNA DAUGHERTY Christian Recording Studio
DONNA FERULLO Purdue University
MIKE GODWIN Public Knowledge
BRAD HOLLAND The Illustrators Partnership
ROBERT KASUNIC Copyright Office, Library of Congress
LGE KIM Cohn and Grigsby
KEITH KUPFERSCHMID Software and Information Industry Association
DENISE LEARY National Public Radio
ALEXANDER MacGILIVRAY Google
STEVE METALITZ Recording Industry Association of America
OLIVER METZGER Copyright Office, Library of Congress
PHILIP MOILANEN  Photo Marketing Association
KAY MURRAY  Authors' Guild
BRIAN NEWMAN  National Video Resources
ROBERT OAKLEY  The Library Copyright Alliance
VICTOR PERLMAN  American Society of Media Photographers
GARY M. PETERSON  Society of American Archivists
JAY ROSENTHAL  Recording Artist Coalition
ROBERT ROZEN  Director's Guild of America
LISA SHAFTEL  Graphic Artists Guild
MATTHEW SKELETON  Copyright Office, Library of Congress
PAUL SLEVEN  Health Spring Publishers
CHRISTOPHER SPRIGMAN  Creative Commons and Save the Music
MICHAEL TAFT  Archive of Folk Culture, American Folk Life Center, Library of Congress
DAVID TRUST  Professional Photographers of America
JENNIFER URBAN  Association of Independent Video and Film Makers
NANCY E. WOLFF  Picture Archive Council of America
A-G-E-N-D-A

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

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

Marybeth has been very helpful to us in many ways. As you know, we got into trouble over on the Senate side when we filed the Induce Act last year. I jokingly said that we should destroy the computers after giving appropriate warnings of those
who continue to pirate and steal copyrighted music.

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

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

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

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

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

SENATOR HATCH: No, no. I know better than that. We appreciate Marybeth. She has done a lot to help us to understand these areas and these issues. Let me just get out of your hair and I'll be
very, very interested in what you come up with. I'll be very interested in your suggestions and we'll try to do what we can to carry them forward.

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

Thanks so much.

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

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

I'm going to introduce our team and we are going to let you introduce yourselves before we start on the first of the roundtables. What I plan to do is as soon as we introduce -- we get our introductions over is turn all of this over to my very able
One of the things you love to do is have an able assistant who will take the ball forward and carry it throughout the day. I'm Marybeth Peters. Technically the title is Register of Copyrights which no one seems to understand as a title or be able to spell right. It's good that the Congress put in Director of the Copyright Office for those who might wonder what the job was.

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

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

The key people who are on this team from the office -- well, I'll start over here with Jule's
people. To David's right is Oliver Metzger and to his right is Matt Skelton. They are attorneys in the Policy and International Affairs Office.

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

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

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

Let's go around and introduce the participants. Just tell us who you are and who you are representing and where you come from. Let's start on this side.
MR. TRUST: Good morning. I'm David Trust. I'm the CEO of Professional Photographers of America and a few other photographic associations under our umbrella but PPA is who I'm with generally.

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

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

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

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

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

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

MR. MOILANEN: I'm Phil Moilanen. I'm the Counsel for Photomarketing Association International which gets about 26 billion orphan works a year.
MR. METALITZ: I'm Steve Metalitz with Smith and Metalitz here representing the Recording Industry Association of America.

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

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

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

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

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

MR. CLARK: I'm Jeff Clark representing the Consortium of College and University Media Centers.
MS. CHAITOVITZ: I'm Anne Chaitovitz with AFTRA. We're a national labor union representing television, radio, and sound recording performers.

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

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

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

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

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

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

MR. SIGALL: Thank you. Just a word about the microphones. They are important not only so that folks in the audience and everyone can hear what you say but they also are the means by which your comments
get transcribed so it's important when you speak to make sure you have a microphone on. A transcript of these two days will be recorded and made available over on our website after the proceedings.

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

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

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

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

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

On the other end of the spectrum is a more flexible approach in the sense that it wouldn't require anything affirmative of the copyright owner but it would be more like a reasonable search or a
reasonably diligent search undertaken on a case-by-case basis by the particular user to determine whether they can locate and identify the copyright owner. If that reasonable search is undertaken and completed and no copyright owner is found, then the user can go forward and that would be the signal that the work is orphaned.

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

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

For anyone at this table who has proposed that sort of system, the opening question is, "Explain
for us in your view what the downsides of that system would be." You have explained very well, I think, in the written comments what you think the benefits of a system would be but the question for those who are proposing such a system what, in your view, are the potential pitfalls and problems you might run into if you adopted that approach. That's a general theme, I think, that you should keep in the back of your mind for all comments here.

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

MR. METALITZ: Thank you. Whether you call it reasonable diligence or reasonable search or due diligence, I think there are two pitfalls that we have to watch out for. One is although I think many of us are proposing that there be a single standard of due diligence, I think we need to watch out for the pitfall.
There is a fallacy of thinking that means the same thing with respect to each kind of work. I think one thing that came through quite clearly in many of the submissions is that what is required to have a due diligent search, or a reasonably diligent search, is going to vary a lot depending on the kind of work that is involved.

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

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

I think the other pitfall, of course, is inherent in this approach is it is not quite as certain as, for example, an extremely formalistic
approach that says it depends on whether the copyright owner says some magic words at a certain place at a certain time in a certain way. If he does, it's not an orphan work and if he doesn't, it is an orphan work.

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

MR. SIGALL: Jon.

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

I agree with Steve to have a system that is highly formalistic doesn't work either because that would seem not to afford sufficient protection to the copyright owner. Any of the formalistic systems would almost inevitably make it almost too easy for the user
to use the work so that is why we think that a reasonable effort search, notwithstanding its downsides, is probably the fairest balance of the various approaches.

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

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

MR. COPABIANCO: One of the dangers I see is that if we are not careful, we might set up a system that allows basically automated harvesting of orphan works. I think we need to be very careful not
to have a system that does that. Clearly that may be
a goal of some large corporations.

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

MR. PETERSON: I would say one of the
downsides in an archives is the fact that you are
dealing primarily with unpublished works. Indeed, the
document may have an author and you may know the
author of the document. You may not know much more
than that. Then you are looking at the typical
researcher who may use thousands of these documents so you are looking at the sheer volume of search that needs to be done for these unpublished manuscripts.

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

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

I think the other issue is that when you define so specifically, especially if it were defined in statute what a diligent search is, then suddenly you lose flexibility. What is a diligent search today? We may learn in a year or in two years through...
experience that is not going to be the standard that we want to hold this by. There has to be some flexibility.

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

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

MS. LEARY: I spend a lot of my time doing calculations under Fair Use for the kinds of content that we do. We are both creators of material and copyright owners but we are also users and a lot of the stuff we do is transformative. Nonetheless, my
concern -- we do agree with a case-by-case approach.

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

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

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

MS. WAXMAN: One concern with the standards for due diligence is how it will be adapted. Again, as everyone has pointed out, one size fits
most. In terms of the visual arts it's very hard to search for images even if they are registered with the Copyright Office. I think there needs to be flexibility in that area for what steps you need to take.

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

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

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

MS. WOLFF: My train schedule and walking here didn't coincide completely. I represent the Picture Archive Council of America. It's a trade association of all the stock for the libraries so they have large databases of images.
MR. ATTAWAY: Seems that everyone agree that uncertainty is the downside of a flexible standard but I think Mr. Perlman suggested the remedy for that and that is guidelines. I think Steve Metalitz described the kind of guidelines that are needed. They should vary depending on the type of use and the type of work being used. I would suggest that the Copyright Office take a look at experience with two sets of guidelines that I've been involved in over the years. One was the All Fair Home Taking for Educational Use Guidelines. The other was the University Multi-Media Fair Use Guidelines, both of which, as far as I know, have worked pretty well. I'm not aware of any litigation over either set of guidelines. I think people are pretty happy, both the users and the owners.

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

What you are going to set up in a case-by-case system is the necessity for every potential user
to do searches. You could imagine some piggybacking rules that allow some to benefit from the searches of others but mostly searches are going to be private information not available to others who want to do searches about particular works.

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

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

For example, when you buy a house you record the title to your house and no one complains about formalism in the real estate recordation law for a very good reason, your house is worth a lot of money and if you didn't record the title, there would be gigantic transaction costs that get in the way of real
Houses have that characteristic. They are expensive forms of property so we want certainty. Well, copyrights have that characteristic, too, in a different way. I own an object. I own a painting.

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

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

MR. ADLER: Regarding sound recordings, I think that addressing the issue of guidelines one of the problems that should be looked at is the different status of the copyright owners. Certainly there is a difference between trying to find a record label, even a small record label, and an artist who has somehow regained control over their copyrights or who have never given up that control.
Add to that complexity is the issue of estates. Certainly estates of any recording artist would be hard to find so I think that maybe when you're dealing with guidelines you have to look at the status of the different parties and there may have to be more due diligence for some than for others.

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

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

MR. HOLLAND: I think it's safe to say that most artist would prefer that if their copyrights be taken, they be taken on a case-by-case basis rather than a blanket seizure. But I think that since we are talking about diligent searches and orphan designation, we have to note that a lot of the work --
I'll speak for illustrators here because I can speak from experience with my own work and knowing people.

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

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

MS. URBAN: So as been mentioned several times around the table, for film makers as well as certainty is probably the biggest issue for reasonable effort search. Those for the film maker who wants to know when to stop and when they will have certainty that they will be able to use the work. And also
because film makers are, of course, copyright holders as well and really depend upon their copyrights. They like to be sure they are found if somebody is looking for them.

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

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

One question about the suggest for guidelines and the suggestion for guidance and
discussing that the Copyright Office or someone else convene parties in different sectors. The question is how do those -- where do those guidelines ultimately exist in the law or in regulation?

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

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

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

Both of those in some way got congressional blessing although there was some debate
that one was in a nonsubstantive report and one was in
a substantive report and did that make a difference.
I would just like to add when you are commenting on
that, does congressional blessing and what kind of
blessing make a difference?

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

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

I think to the extent that we have
databases that as much as possible that they be
charged with setting up the databases and coming up
with a database that works as well as possible for
them. By the same token, user groups can set up their
own guidelines as what they think are reasonable searches and then ultimately people will try to do the best they can under the circumstances and if there is ever a dispute.

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

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

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

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

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

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

MR. PETERSON: I would suggest that what Jonathan said would work in the main but I'm not sure it would work for unpublished documents and in
archives because there really is no group to negotiate with that represents the authors of those works. In that particular case insofar as archives are concerned I'm not sure that would work.

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

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

MR. ADLER: I would first like to just thank the gentleman for that highly sympathetic view of the industry that I represent which includes academic publishers as well. When I was listening to the discussion before this about where the advocates of the reasonable search approach were asked to talk
about the downside, I sort of thought for a moment of the comment attributed, I think, to Churchill about democracy being the worst form of government except for all the others.

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

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

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

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

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

And then with respect to the issue of regulation, I think once we have seen how some of this can become devised by the private sector, I think it may make sense to codify those in regulation that seem to be clearest, that seem to be most useful not so that there would necessarily be any kind of consequence attached to whether or not you have or have not adhered to them, but more to the point that it would make them more familiar to people and get
them out to people and give greater credibility to people and being influenced by them.

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

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

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

MR. MOILANEN: Having been through this route before in 1995, the photo industry, including Mr. Trust's predecessor, Mr. Perlman, and many others, users and producers as well, did come up with some
guidelines for the photo industry. For 10 years they worked really well, I think. Got a lot of the litigation and contentiousness out of what was going on but the industry has moved on. Digital has changed substantially and made it much more difficult for people to comply.

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

I would suggest that even if you don't get congressional blessing on what is adopted, I think getting office authority where they determined that there is an industry consensus that makes some sense and they decide that there has been sufficient input from various members of the industry that they could give a blessing to an industry proposal and maybe have the authority to withdraw that if they later determine that it's not a good idea what the industry has come up with but give you some authority to give some blessings to industry proposals and maybe give notice to the world so that anybody who thinks that these guidelines aren't sufficient they have an opportunity to come in and say here is where their problem is.
Ultimately then even if obeying the guidelines isn't the same as having to obey a law, it would at least say to any court that is asked to interpret whether or not a reasonable search has been conducted. Well, you followed the guidelines and those all made sense and everybody had an opportunity to participate in drawing those up so the court would say that was reasonable if they followed them.

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

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

MS. LEARY: My Concern would be if the library has to take a role in this is that it not become some unfunded mandate on top of all of the other work that you have and then the industry, all the users and owners, come up with a set of guidelines that are reasonable.
They are held up potentially for comment or whatever out of the woodwork. People who have a very oddball idea of what they are entitled to. I think if there were going to be that level of involvement by the office, I would beg you all to make sure it's funded at whatever level is appropriate.

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

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

Or would these guidelines have to be developed in advance of any statutory change to address the problems? Or would they be parallel efforts in some respects for those who are proposing the guidelines be developed and considered? Would this be something that would be in parallel or in
sequence in terms of the development of the issues?

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

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

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

I think the minute the office gets
involved again it just becomes a whole other ballgame
and I think it takes more time and is less likely to
lead to a quick solution to this problem.

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

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

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

There is also a lot that could be done
without statutory -- without any statutory change. I think certainly convening these roundtables, these sectoral groups, getting them together, as Mike said, these guidelines will work best if they are based on experience.

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

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

MS. PETERS: We actually do have a process by which we are going to bring them online. I think the estimate to bring them all online was something
like $35 million. We are going to segment them and actually, I think, even this year we are preparing one for the 2007 budget to start that process. I think we are going to go with the ones are most needed first and then work backwards. So, yes, we're doing that.

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

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

MR. TAFT: I think one thing that would be helpful would be a body of case studies. I mean, everyone around these tables here deal with different kinds of creators with different problems and there
are different individual guidelines for addressing the
issues of different kinds of creators. I deal a lot
with traditional performers, often anonymous or semi-
anonymous, if one can be that. It would be very
interesting to see case studies of different
approaches, what worked and what did not work.

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

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

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

MR. METZGER: I have one question for the
people who I think there were a couple of comments
saying that it might be a good idea to allow the
people who had done searches to put the results of
their searches on a voluntary copyright database. I
believe, Kay, you made that comment.

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

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

MS. URBAN: We had also suggested that the
reasonable effort search could possibly be filed
somewhere and it would include an affirmation of good
faith given that we need flexibility because, as we
have discussed around this table, what will be a
reasonable search will change. It will depend upon
what kind of media with which you're working having
people at least make the statement that they are
engaging in a good faith effort we thought would
address that problem.

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

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

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

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

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

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

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

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

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

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

Anyway, we did a list of the methods. We
asked them how they -- what steps they had taken in
their search. You could actually envision it as a
checklist actually that you could just check the
boxes. You know, contacting the work's publisher,
other publishers that published this author, the
Copyright Office, online research, directory
assistance, Whitepage.com, that sort of thing.
MR. TRUST: I appreciate the comments by Kay and Jennifer. I want to put this in perspective of a photographer, though. I think that the searches that will be conducted for the billions of photographs that are created each year, I think those searches are going to be fairly unsophisticated.

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

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

MR. CARSON: It's not clear to me what the proposal is with respect to the consequences of posting that kind of a search. One extreme I could
imagine a proposal that says if you do a search and you post your results and you show, "I did all of this and I couldn't find the owner," then I can rely on that search I don't have to retrace those steps.

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

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

As to the point where there could be one bad search on top of another, I think it would be interesting if you could do so to pull your members kind of the way we did or your constituents the way we did to find out what people are doing and what their rate of success is.
I just think this could be both a great basis for getting information among all the various sectors about how people are conducting these searches and what uses -- you know, how people are doing it and the level of success they're reaching.

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

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

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

MS. WOLFF: I think there are benefits of having people share information. I think that is going to happen anyway. I mean it seems like no one can resist sharing information on the Internet. There
are more blogs every day. I would hesitate making it part of any kind of regulation or requirement to have people's efforts put up there.

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

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

MR. GODWIN: I think in the public knowledge comments we did anticipate that subsequent users of the work would be able to piggyback on the efforts of the original search. What we anticipated was that this would be permissive rather than -- in other words, this is something that they could do but if it turns out that the original search is fraudulent or there is fraudulent information posted or if simply inadequate, then you take on that risk as well.
One of the things we want to do is unlock the possibility, say, of individual creators or reusers or transformative users to come along and perhaps piggyback on the searches of a university or the Copyright Office or whoever. We do anticipate the possibility of using that but the search that you rely on only protects you to extent that search is really a good one and we'll have to figure out what that means.

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

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

I think it all depends -- again, that is
ultimately the benefit of keeping something that is very flexible and not a statutory requirement or anything. Then completely the utility of the system is up to the people who use it and up to a court viewing it.

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

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

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

I think the context this might come up in our proposal is that, at least in general, a user who
wants to claim the orphan works status should post a notice of intent to use the work and should try to identify the work and spell out to some extent, at least, what steps have been taken to try to identify and locate the owner.

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

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

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

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

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

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

MR. HOLLAND: Yeah, I would just like to second David Trust's observation that this might work better for authors of written material than, say, photographs or illustrations for a couple of reasons.
One, a book has a specific title just the way a motion picture does. If you are looking for Charlie Chan Story, it probably has a name that everybody can agree was its name.

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

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

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

MR. ADLER: In our comments the publishers had opposed any mandate with respect to either a requirement to somewhere post the results of one's
search or for a notice of intent to use. Our thinking on the two of them was somewhat different and then sort of came to one place on an interesting point.

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

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

One of the things that I think we are also concerned about is the extent to which we are changing basic principles of copyright law. Right now, of course, when you are going to make use of a copyrighted work, there's absolutely no requirement
that you publicize your intent to do so. To do so, to have any requirement that you would do so, I think would have a very significant, creative, and competitive consequences.

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

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

While the copyright law doesn't necessarily in this area have to facilitate the competition, I think its creativity and competition go hand in hand in this sense. I think that we would want to think really hard before we would mandate in any way the requirement that people would have to disclose their intent to use a particular work for
what that might mean to people who might decide to preempt their ability to do so by doing so ahead of them.

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

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

MR. SPRIGMAN: It's nice to encourage owners and users to get together but I think one of the problems in this particular category of works is
that we have owners who are not particularly interested in getting together with users. We have owners who for one reason or another, typically because the work is not producing revenues that would merit their actively managing the property, we have owners who are not particularly interested in taking action.

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

Creative Commons doesn't think that is the solution. For owners who are properly incentivized, for owners who believe they have some interest either a personal financial interest or a kind of altruistic interest in putting their works out, then Creative Commons is there for them but this is not the solution, as we said, in our comments for the category of orphan works.
I would state the objective a little bit more broadly which is that these works, orphan works, like other works, have built on our culture and they should be available to help build our culture further. The copyright system makes works available, does a good job of making many works available through licensing where owners are readily identifiable and that is right and good.

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

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

I mean, I don't think that these are inherently antagonistic goals. I think that if we properly construct this anyone who goes through the orphan works process is going to identify the rights holder when he's identifiable. If he can't identify the rights holder, then he has a process. That is one
of the things that we said expressly in the public knowledge comments.

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

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

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

MR. ATTAWAY: I would think that the objective of this process is two-fold. One is to make the existing system work better by helping users and
owners to get together. The other objective is to create a safety valve for users that genuinely cannot find an owner so that they can use a work, particularly for transformative purposes.

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

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

MS. SHAFTEL: I can't think of any instance where professional artists would not want to be paid for their work. I say professional meaning this is our profession. This is not my hobby. This is how I earn my living.
In this day and age due to lower fees for illustration and photography, competition from stock images, it is very difficult for an artist or a photographer to make a decent living working full-time only creating their work. Most of us have other jobs that we do as well.

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

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

It's out there for everyone to use and that is still part of what our existing copyright law is. It is certainly the primary purpose of, for example, a list of potential users who are describing a use that they want to make the material for a visual artist to be able to check that list periodically on
their own free will to see if any of their works are up there since, as Brad Holland mentioned, typically illustrations and photographs a lot of them don't have the creator's name attached or a title. How do you describe it?

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

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

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

MR. SIGALL: Let me turn now to an issue
that Fritz' comment raised. There seemed to be a fair amount of contention in the written comments which relates to the question of unpublished works and whether unpublished works should be categorical excluded from any sort of orphan works system.

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

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

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

The other thing is all of a sudden we are
then moving to copyright law to privacy. Unpublished works are private. I can see private letters. If tomorrow somebody were to publish a J. D. Sallinger letter not knowing that he wrote it, he might be pretty upset because he obviously made a decision not to publish his letters.

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

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

    MR. SPRIGMAN: A couple of points. The first about privacy. We have state privacy law. We have privacy torts that can be brought for invasions of privacy that are unrelated to the copyright status.
of a work. We have that independent body of law upon which in part we can rely.

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

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

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

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

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

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

Part of that is because there's a little bit of confusion with photographers anyway what
constitutes published versus unpublished anyway. That, in itself, is a little bit difficult. Let's assume that there wasn't that confusion there. A photograph that's made today that has very little value today may have great value in five years or in a year or in 10 years based on things that change, styles that change.

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

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

I talked a little bit about the difference in some consumers. Who would be the consumer here? In the case of those who are consuming photographs, I
think that they are going to look at this and say published versus unpublished and they are going to look at some of the criteria. It's just going to have the effect of scaring them away from this process.

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

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

Do not infer from this that I do not want them published. The unpublished works that we're talking about are works in which the creators or the rights holders cannot be identified. I think there are going to be unpublished works all the time where the recording artist has decided not to put that track on the album but we'll be able to identify who the artist is or who the publisher is and go through a
normal sort of copyright negotiation process if someone wants to use those tracks.

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

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

MS. LEARY: We, too, would favor something that includes unpublished works. I agree that you really can't tell the value of what it is or what the intent of the author or creator was. I think an unpublished work, the scope of what you use and how
you use it can be kind of taken into account in the guidelines much as it is embodied in the statute for fair use.

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

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

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

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

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

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

MR. HOLLAND: If we are talking about releasing into the public domain only orphan works, only unpublished work whose authors can't be located,
then aren't we talking about dispossessing an entire class on the grounds that a few people might not object? I don't see how one can take the prerogative to do that on behalf of identified people.

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

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

Not very many of them do it for a full-time living so they are more likely to give away their work. They are more likely to give away their soundtracks and to let somebody record their music for free without claiming royalties. Many times they are not always in the situation where they can have their song published in a hymnal or have their song published in sheet music.
They are not always able to afford recording. So I think if each industry sets up a different algorithm or checklist, that the Gospel music perhaps should be a little separate. Some of the songwriters have said that themselves to me that they would like to see different types of copyright laws set for Gospel music versus other music because of what they do with the music.

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

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

I wonder if those of you who have problems with including unpublished works in whatever orphan works regime we come up with could articulate for me why you would have such an objection in the case where you don't know who the author is or can't locate the author because that, I think, is what an orphan work
When we're talking about orphan works we're not talking about works where you know who owns the rights and you can go to them. We're talking about, in fact, the case where you can't figure that out. Why do you have a problem in that case with including unpublished works in whatever orphan work regime you have?

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

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

Here I'm trying to make that distinction
of, okay, we have the larger artist that you can find and you have the labels that you can find. Then what happens if you have the artist who you really can't easily find who really aren't as accessible? Again, it is really changing fundamentally their copyright and what they've done.

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

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

MR. TAFT: The archive where I work we
have the largest repository of Native American recordings where the author or the creator may not be known but the community of interest is certainly known, the tribal council. We are very careful about consulting with tribal counsels before we publish or have others publish our materials.

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

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

The question is we want to document this tradition because it's important and we want to put it in an archive. It may come up and the question you get sometimes is, "Are you writing a book?" The answer the folklorist usually gives, unless they are...
writing a book, is, "No, this is so we can document
the tradition and place it in an archive where it will
not be lost," etc., etc.

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

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

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

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

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

There may be people here who feel that is an inappropriate thing to allow the law to protect the ability of a copyright owner to simply ignore people
who want to make use of their works. Currently under
the law that is perfectly permissible. One would
imagine quite a tectonic shift in copyright law if
there were to be some injunction against a copyright
owner simply not wanting to respond to the many people
who may want to contact them and ask for permission.

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

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

The fact that a work is going to receive
orphan work treatment certainly doesn't put it into
the public domain. That is a very important thing to
remember because when we define the purpose of this
rule making in terms of orphan works, what we had
actually said was we are talking about a situation
where we are protected by copyright.
We want somebody to be able to lawfully engage in a proposed use of the work that implicates the rights of the copyright owner when such use would not be authorized by any of the statutory limitations or exceptions applicable to those rights and the user cannot identify and locate the copyright owner.

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

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

When we get to that elephant standing on the table, which is the question of what do you do in the situation where a nonresponse in conducting one's reasonable search may simply mean that the copyright
owner chose not to respond for reasons of that individual's privacy, for reasons of if it's a corporation wanting to hold very tightly to the plans for use of those particular works.

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

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

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

MR. METALITZ: This is a very complicated
issue. The RIAA did not want to exclude unpublished works all together. In fact, we wanted to make sure that some types of unpublished works were not eligible for orphan work status. I think Jay has already referred to the problem of pre-release material.

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

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

Finally, the point that Philip made and others have, too. Publication is a very arcane and in some ways obsolete concept. Many of the precedents
flow from the 1909 Act. It is often going to be the case that you can't really determine whether it's published or unpublished.

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

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

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

MS. URBAN: I don't want to repeat a lot of what has been said about the complexity in figuring
out what is published or unpublished but we discussed this at length in the film maker's group and we came on the side of not excluding unpublished works from any kind of a solution largely because it's a great historical benefit of being able to use a large variety of works that may be unpublished such as home videos or letters or old photographs which we have already discussed here.

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

I think in working under public knowledge -- well, first of all, I want to underscore what Allan said. I think even though it may be confounding to talk about orphan uses, I think, in fact, that is what we are really trying to drill down to which is in particular instances where you have a transformative or other kind of republication use and you do whatever due diligence is to identify the rights holder or the owner or the creator and you can't find them, you want
to be able to go forward with some certainty as to what the outcome of that choice is going to be.

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

It seems to me that one of the questions that you have to ask yourself is the consequences of orphan works designation. I know this is really another topic but the consequences of orphan works designations. There are restrospective consequences and prospective consequences.

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

MR. HOLLAND: Since Vic has pointed out the elephant on the table, I would like to just make
a comment on it. If the actual purpose of copyright was to facilitate dissemination, then I don't know why we need the copyright law in the first place since dissemination would be possible without a copyright law. Isn't the purpose of copyright law to set limits on dissemination?

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

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

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

That is a huge issue but we don't -- just because we can look at an orphan work and say we can't find the person that produced the orphan work, there could be information in that work that would be an unwarranted invasion of personal privacy and archivists are concerned about that. I think we should take that issue off the table insofar as
archives are concerned because that is a big issue for archives on a daily basis.

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

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

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

MS. CHAITOVITZ: As you know, of course, I don't favor including unpublished works but if we
were to do so, I think you could then create maybe extra hurdles because, first of all, I think for unpublished works if it's fair use, you've got that already and that's enough. But if not, perhaps you say, well, you can publish an unpublished work if you are able except if you know that the creator -- whether you can identify the creator or locate the creator obviously is necessary.

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

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

MS. LEARY: I really don't think that has to be set out in a statute or the regulations because there is a very substantial and constantly increasing body of law about invasion of privacy. I mean, that's the area -- I do news as well -- that we worry about with news-gathering torts and if you are exploiting
somebody's likeness or you are exploiting a so-called
right of publicity because you are tapping into some
sort of creative content they have created.

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

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

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

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

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

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

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

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

MR. BAND: In fact I have.

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

If the proposition here is that there should be more, let's say, cost to a user if in the subsequent time that you determine, whether this is published or unpublished in the orphan works context, if there is an added cost to that user, if you want to
call it additional damage for an unpublished work as opposed to a published work, I think that is worth looking into.

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

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

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

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

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

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

Anyone here would agree those would have historical or even aesthetic value but it was his choice to burn those things because, as he said, he didn't want people to realize how hard he had to work to make it look easy. That was his choice. If I do a drawing in a sketchbook that somehow becomes published, it may preclude my ability to publish it myself because if it gets put out into the public
domain -- I have been corrected on at least two occasions for saying that once a work is on the Internet it's in the public domain.

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

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

I'll say that the Authors' Guild agrees largely with Allan's comments that most published authors who use other works are not fiction authors who need to use works for nonfiction, biography,
history, and the like.

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

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

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

We had recommended that there be no injunctive relief available to an emergent copyright
owner because of the fact that could cause great inequity to a user who has relied upon a good faith reasonable search that failed to locate the copyright owner. I mean, the example is if you publish a run of 50,000 books having incorporated somebody's work and now the owner comes forward and wants to conjoin all of those works, we think that would be inequitable.

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

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

I would like to turn now to the question of registries in the whole system and the question of many people have suggested that voluntary registries, copyright owner information, ownership information and contact information, could be developed and could be part of a reasonable search system in the sense that one place you go, a necessary place to search but not a sufficient place to search, might be registries like
the one we maintain at the copyright office or copyright registrations but other either public or private development of registries of information, maybe even on a sector-by-sector basis.

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

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

In the eight years since that has past we have received let's call it zero notices of information attesting to that fact and making that clear. There is some concern here that, you know, the prospect people say registries will be developed but
it may not actually happen and then the question is
how do we make sure that it happens and that that
information is accurate and useful.

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

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

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

Over 185 plus years of American history
that we had a coverage system that had a registry that
had formalities that had to be complied with to either
gain or maintain a copyright, you see that a lot of
works didn't produce for their authors the kinds of
benefits in the coverage system that would lead the
authors to gain or maintain rights.

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

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

Now, a registry will work if after a
period, and we propose 25 years in our proposal, where
rights holders don't have to do anything and during
that 25 years they can gain some understanding of the
likely value of their works. At the end of that time
if they think that the copyright gain is worth the candle, if they think the copyright benefits them economically or in some other way, maybe a privacy interest, they can register.

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

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

They are earning 30,000 a year. They are managing because they are one and two and three-man shops. Mostly one and two-man shops. They are managing a 1,000 images a week from the weddings or
the portraits or whatever that they just shot. It's not that they think that their products doesn't have enough value to warrant registration.

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

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

It's that the idea of a registry on top of copyright registration, the idea of a registry would never fly in professional photography and the idea that if for some reason it was a mandatory registry that we would be stripping them of their rights as copyright holders is just inconceivable. It could not
They have a right as a creator. Just because they don't take the time to submit in a registry -- by the way, that being said, we do believe that registries are a great idea but they have to be voluntary. You cannot make them mandatory registries. It doesn't work for photographers.

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

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

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

MR. COPABIANCO: Okay. For example, in our group, Science Fiction and Fantasy Writers, we polled our authors and said, "This registry exist. If you want to be included, send us an e-mail." The majority of our members did choose to participate in this registry and they are now incorporated in the
I think it's quite feasible to do something like this and I would like to see it done. Whether the author's groups themselves are brought into to do it or whether it's something that would be done under the aegis of the Copyright Office, I don't know, but it's something that should very definitely be looked at.

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

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

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

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

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

MR. HOLLAND: I wanted to add to this because one of the underlying assumptions in many of these submissions that we've read is that somehow if the work isn't registered or isn't an active play,
that it's being considered worthless by the author.

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

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

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

The other thing is that new technologies can open up commercial advantages that were never dreamed of when the work was done. For example, G.
Clay prints right now are offering photographers and illustrators and fine artists opportunities to do prints on demand that would never have been available at the time when much of this work that is being considered for orphan status was being done.

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

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

MS. URBAN: Film makers position as being both copyright holders and users of materials for transformative works put them in the position of really wanting this proceeding to end up in a place where copyright holders have every ability to be found, users have every ability to find them, and if users cannot find the copyright holder, they will have some measure of certainty in using the work.
For that reason what we did was proposed as a multi-pronged approach, one part of which was reasonable efforts and one part of which was a voluntary registry which would allow the copyright holder their ability to be found for the works to not be orphaned if that was their wish.

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

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

In particular, to get statutory damages. There are other reasons as well. As I listen to comments around the room, I actually hear a consensus that voluntary registration -- nobody disputes that voluntary registries are useful.
On the issue of mandatory registration when we look into that issue, it was very hard for us to figure out a way or figure out a version of mandatory registries that did not at least raise questions about compliance with Berne Convention prohibitions or formalities.

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

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

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

But I just wanted to respond to some of the comments about registries basically with a polite...
reminder that for over 185 years from the founding
copyright statute in 1790 up to the Copyright Act of
1976 we had a copyright system that premised both the
creation of copyright in a work and its maintenance on
formalities, registration for a big part of our
history, notice upon publication, recordation of
transfers although that was not a condition precedent
to or subsequent to copyright.

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

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

We require the owners of houses to tell us
who they are because we know that by putting burdens
on those owners we gain a lot in social welfare. We
make a much more liquid and much more efficient housing market.

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

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

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

MS. MURRAY: Yeah. Just one other problem with a mandatory registry is that it would in an
unfair way affect individual owners of copyrights as compared to corporate rights holders. Oh, yes. You're shaking your head no but having worked at the Authors' Guild and advised many authors over the last 11 years, we have a lot of people who failed to renew because their original publisher registered the copyright.

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

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

I think we really need to be clear about
it because I could absolutely endorse a voluntary registry of authors, basically a phone directory. Beyond that I have serious problems.

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

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

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

You don't duplicate your house and you don't sell the right to duplicate your house and you don't sell the rights to duplicate your house. That is really not an accurate analogy here. As far as
registry goes, it has always been completely financially untenable for illustrators, visual artists, and photographers to register individual images.

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

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

In addition to that, this big list certainly for visual artists could serve the dual purpose of subsequently being used as the beginnings of a database of a licensing agency and graphic royalties agency for visual artists in the United States which is desperately needed. Creating this
list actually has a dual benefit for everyone involved.

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

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

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

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

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

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

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

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

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

MR. COPABIANCO: Well, first of all, the
information appearing in this list would in no way mean that the person doing the search had conducted due diligence. They would have to check with the author and other sources to make sure that the information was correct and it wasn't somebody who was jumping this claim.

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

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

I'm not going to pile onto Chris on his overall point because I think it has already been stated. There is a lot of history that he is swimming
upstream against so I don't want to add to that burden. Getting to your original question about how do we give people incentives to participate in this voluntary registry. And then your second question, how do we give them incentives to be accurate in what they say.

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

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

The other possible answer to your question about accuracy, I think it was mentioned that the
registry could serve other functions in certain sectors, not just being informational, "Come and put up your information about what works you have authored."

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

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

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

I think we should be trying to find some incentives for people to participate and participate accurately in these registries but I don't think we
should make it a condition of a remedy because, again, I think you start getting into the Berne questions that his organization so wisely concluded would make this not very enticing.

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

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

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

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

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

I think what everyone else is saying let's
have a voluntary list. A person can look at it and if
the author is not on the list, then there is a
reasonable chance that it's an orphan work and maybe
he has to do something else. I think really it's
almost semantics.
The difference between those two positions is relatively slim because it could very well be as a practical matter if there is a good registry out there and I have a work with no identification on it, I'll go to the registry or try to find some way of figuring out who it is.

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

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

The other thing is you don't necessarily -- the whole point of an orphan work is you probably don't know who the author is so you need it to be by work so that then you can then try to locate the author because if it's all indexed by author, it's not
going to help somebody determine who is the author.

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

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

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

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

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

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

For those who are going to do a responsible search, voluntary registries become just another major tool for doing that. If all the efforts in the three areas of guidelines, search database, and voluntary registries are properly coordinated in terms of their public accessibility, they could be very useful. We were talking earlier about you are going
to have a lot of suspect searches, things that were
done in bad faith or with minimal efforts or just
ignorance and lack of skill.

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

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

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

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

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

One of the things that is a huge issue for
us and it would be for anyone that you set up, is
current contact information because as of a date
certain somebody comes in and tells you something and then they don't always update it. I think it's an interesting idea where you start talking about unique identifiers. There is a lot of work that is going on with regard to uniquely identifying works. You all have been doing that type of work. But you are suggesting all authors.

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

The filings that one has to do to own a home is limited to the number of homes one may buy in a lifetime which are so few that the paperwork usually requires a certain concentration of energy. Artists who have to do work or photographers who have to do enormous volumes of work on short deadlines, often 24 hours or less, really don't often have time to do all the filings that would be necessary in the kind of registry that you are describing and artists don't have the money to put on the extra staff that it would take, while ironically a lot of the large corporations would be able to staff up to handle maintenance of
The object that Creative Comments has been fighting against, the hording of copyrights by large corporations, would actually not be affected by this kind of registry but the ownership of copyrights by small rights holders would be. A lot of us think that artists missed the boat in 1978 when copyrights were given back to most of us who were formally had to give our copyrights to clients.

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

Basically we've gotten no response but we have made a specific proposal that did include persistent object identifiers that would be embedded in the work that would carry not only the contractual - I mean would not only carry the name of the author
but the contractual information that could then travel with the work and report any usage back to the copyright bank.

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

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

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

Second point is, you know, it's not just small creators who are at stake here in building our
culture. It's people who don't even ordinarily think of themselves as creators or artists. I'm thinking now of the bombings in London recently. All over the Internet now are people's photos taken with cell phone cameras down in the subways.

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

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

MS. WOLFF: Orphan works doesn't replace fair use. If someone is doing an article about what happened because people use cell phones and gave a few examples, that would clearly be an exemption under fair use. I don't think we need to make rules just based on that. There is the Internet now which makes reproduction perfect and easy so I don't think we can historically look at how people treated their
copyrights in the 1700 and 1800 as we do now.

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

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

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

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

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

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

I want to thank everyone for a very good kickoff to this session. I think the discussion is very helpful and productive and cordial so it was a good start for us to get a better sense of some of these issues. We will be back here at 2:00 to start on the second topic, Topic 2. Thank you.
MR. SIGALL: Okay. Let's get started with the second roundtable on Topic 2. For the benefit of the new members of this roundtable and anyone who wasn't here in the morning session, I think it would help to go through and introduce all of the participants again just so everyone knows who they represent and where they are coming from. I'll start with myself. I'm Jule Sigall, Associate Register for Policy and International Affairs at the Copyright Office.

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

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

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

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

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

MR. SPRIGMAN: Chris Sprigman, University of Virginia Law School on behalf of Creative Commons
and Save the Music.

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

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


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

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

MR. MOILANEN: Phil Moilanen.

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

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

MR. MacGILIVRAY: Alexander MacGilivray of Google.

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

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

MR. NEWMAN: Brian Newman with National Video Resources.

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

MS. CHAITOVITZ: Anne Chaitovitz with AFTRA.

MS. KIM: Lee Kim with Cohn and Grigsby.

MR. BAND: Jonathan Band here for Net Coalition.

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

MS. SHAFTEL: Lisa Shaftel, Graphic Artists Guild.

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

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

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

MR. CARSON: David Carson, Copyright
Office, General Counsel.

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

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

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

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

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

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

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

MR. BAND: I guess I'll kick it off. I suppose the downside is the scenario that was discussed in the previous session, the Steven Spielberg scenario, or I guess someone else before was talking about where a song was used and then it turns out to -- an orphan song is used and then it turns out
to be a smashing hit or something. There is the possibility of a huge windfall occurring to the user so you could have a serious injustice.

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

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

MR. TRUST: It sounds pretty reasonable.

I know that what we recommend for those who use our material which is to a great extent orphan works is that they do put money aside in escrow on the chance that a creator will be found. I can see some kind of standard for escrow accounts with this added stipulation that if something becomes a smash hit, of
course, then you are liable to pay out more than that limited amount. Something like that might work.

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

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

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

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

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

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

    MR. CUNARD: Staying on the topic of what
the defects are, even though we promoted the idea of a cap, is that the amount is set so low essentially it's confiscatory. No one is actually going to bother pursuing $100 or $500 and it essentially is like a limitation or exception de facto.

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

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

MR. SIGALL: Does anyone have other thoughts on the question of cap on royalties, not just those who are proposing it?
MR. MOILANEN: As those who were here this morning heard it already, there's 27 billion photo images made each year at 78 cents apiece is what we're talking about on average. Certainly there are many photographic works worth far more than that and the vast majority are worth practically nothing except to the people who shot them.

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

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

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

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

If the person has done a reasonable search, it's an orphan work. The owner doesn't know or doesn't care. When you are calibrating risk, you can afford a little higher than normal cost if that's the upside of damages on the .1 who shows up because on 99.9 you've ended up paying nothing for the use so you build in sort of a range of potential costs based on that assumption. I don't think it's unmanageable.
MR. HOLLAND: I would be happy to let Vic speak for me. In fact, if you speak for me, I'll just second whatever you say. I think that if we allow government -- if we allow any of these archives to set a fee below market value, what you are doing is creating a government-sponsored royalty free archive that is then in competition with every professional and government is, in effect, interfering with free market exchange.

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

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

But there is a third way to do it which is, again, ask the author to send a signal what is
this worth? If they don't register it, the market value is less than the cost of complying with the formality and that means that you can have a proxy, a very ready proxy for what the expected market return is of this work. You can use that proxy to set your license price. So, again, there's a price signal. A registry would be a way of basically sending a signal to the market of what this work is worth.

Mr. Kupferschmid: Well, certainly there is evidence in the Copyright Law and elsewhere that a certain level of uncertainty is necessary and appropriate in certain circumstances in order to reach a fair result. I think that is what we've got going here which is why a cap really doesn't work, especially if the values we've seen proposed so far, I think, of $100 and $500, I think fair use is a great example of that which is there is a certainty related to fair use but at the end of the day the fair use provision is supposed to come out to a fair result and fair use.

There is also ample examples in other laws. Most notably, I think the Patent Law which requires courts on occasion to look at and determine what the reasonable market value of a particular patented invention ought to be in certain
circumstances. It's not like the courts haven't done this before or couldn't do it.

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

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

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

Now, in general terms I guess the uses are
going to fall into two categories. One is uses where there really is a market for that type of use and, therefore, it should be relatively easy to determine what the market rate would have been. Under, for example, the RIAA proposal it would be relatively easy for the user to deposit to escrow that amount so that it would be there if the copyright owner came forward. At some point perhaps that would revert back to the user.

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

For those instances where there isn't perhaps a ready market, I think in a sense the system is kind of self-correcting. If you think about, let's say, the display of a work in a museum exhibition, and I'm not talking about a Picasso or a Van Gogh here, but perhaps some ephemera or something, perhaps folk life material and so forth, maybe there isn't a market value for that or it's extremely low but, in that
case, the user would have to deposit nothing or a very small amount of money and really doesn't risk that much exposure.

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

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

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

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

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

For example, if it turns out that the reasonableness aspect of the reasonable or diligent search has some sort of a good faith element in it, one could easily see that this would paradoxically create an incentive for people to try to gain that good faith elements if they realized that by being able to actually characterize something as an orphan work, when it is not really an orphan work, they might
be able to obtain the benefits of limited remedies on
the part of a copyright owner emerging which would not
only include the capped or fixed fee but possibly the
elimination of injunctive relief as well.

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

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

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

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

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

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

If you couple that with a system where you make escrow payments in every case, isn't that going
to be extremely inefficient? That you will never have
the owner show up and you will have people making a
lot of escrow payments for people who only 2 percent
of the time will show up. Anyone who thinks that
escrow payments -- they could react to that and
correct me if I'm wrong. That would be helpful.

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

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

MR. METALITZ: Jule, I think that is a
very good question. There is an efficiency aspect to
this but I think you are making a couple of
assumptions here. You have laid out the assumptions
but one of them is accuracy assumption. Accuracy in
this context doesn't necessarily equate to the
copyright owner not coming forward later. It's one
thing to say we have a pretty good system and most
people that can't reasonably be located -- in most of
these cases the person can't reasonably be located.

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

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

But we won't really know that until we've
got some experience with it and it could be that
RIAA's proposal was that any legislative change in
this area probably should be sunsetted and, therefore, there would be some built-in time to look and see. If we set it at the right level, maybe not very many people have come forward and maybe escrow would be less important.

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

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

MR. SPRIGMAN: The alternative is not a totally free use. The alternative is a use without the possibility of injunctions, or perhaps with the possibility of injunctions later under certain
circumstances. I don't favor that but that is at least a logical possibility, a use for which you pay.

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

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

People will make mistakes around the edges but people will be properly incentivized to register. On the whole if you see that a work has not been
If you think people are basically rational, that is a signal that works lacks the kind of market value that would make the gain, to repeat myself, of copyright worth a candle.

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

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

Third, I can't contemplate a system that doesn't pay -- at least the user eventually pays the cost to the copyright owner for stepping forward and
claiming either that the value is not -- that the
original escrow license payment isn't up to where they
think the value is or just to go through the process
itself. I think there is -- I don't like to see the
burden, the cost put on the copyright owner to step
forward.

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

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

Every day everybody in this room deals
with business transactions in which they want to avoid
risk and they do it by one simple thing, insurance. It seems to me that paying a reasonable royalty up front is the equivalent of paying an insurance premium.

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

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

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

If we assume in most of the rest of the cases the user will be good for the money when the owner comes forward, you are requiring 100 percent of users to post an escrow for the few users who might go into bankruptcy in the meanwhile and won't be good for
the money. It is, in effect, a tax on a use which I think the premise we're here for is the use is of value to society but the owner ought to get paid.

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

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

On top of that, having gone into an archive and done the research to dig out the documents that they want to include in their work and then to have to pay a tax on each use when the great grandson of the writer of that anonymous letter is never going to come forward or whatever, it doesn't make sense to
me. Lastly, it's not a free use. A lot of time and resources go into a search for a rights holder. Whether it's in time or money it's fair to put a value on that and not just call it free and taking advantage.

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

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

The other thing in there is that it's sometimes difficult to tell the difference between public domain work and an orphan work so you will end up having people escrow when they think something is an orphan work or maybe an orphan work when it is, in fact, a public domain work. You will end up having
people to start paying for the use of public domain works.

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

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

The idea that you would just say orphan works have a certain value and that value ought to be determined by that seems to me to be misrepresenting the nature of these transactions and works against those who have to make their living producing this
work in the first place.

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

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

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

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

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

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

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

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

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

It makes a system that would otherwise, I think, be relatively uncomplicated a lot more complicated than it really needs to be. So I just don't think that there needs to be this escrow account.
if we are going forward with the assumption that not too many copyright owners are going to step up and demand to be paid.

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

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

My concern is we are trying to make transactions work smoothly and efficiently but also maintain balance and fairness. Where I see the problem where there is too much burden on the artist is if the artist does come up in these percent of
occasions the ability to collect the fee in an
efficient way because my experience with trying to
collect actual damages because in 99 percent of the
case the burden, not the expense, of registering
photographs is too great.

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

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

MR. BAND: I would like to offer an
example that I think exemplifies a lot of what people
have been talking about, the problems with an escrow
system. The Cornell Library has an archive of 300,000
photographs relating to labor relations. These are
photographs of workers and working conditions and
strikes and so forth. A lot of it is old and of indeterminate age.

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

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

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

It might be different if you are just
going to be doing -- again, in the Spielberg situation you could imagine an escrow could work but certainly when you are dealing with large scale archival type digitization projects which is what a lot of libraries and the Library of Congress is interested in. An escrow system is completely unworkable.

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

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

Well, for library preservation purposes the photographs that Jonathan is talking about most libraries are really not in a position to pay anything. The value would be essentially zero or some nominal amount, a very nominal amount. With regard to the escrow, I wanted to echo Paul's comments across the table about the inefficiency of such a system.
To my mind that makes this kind of unworkable as a statutory change. One of the things I think we need to do here if we are going to have a successful system is keep it simple. If we start setting up new bureaucracies and new requirements, I think we fail that test and the escrow is an example of that.

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

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

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

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

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

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

MR. BAND: I'll be brief other than to say two things. First, I sort of agree that the notion of paying amounts into escrow essentially resembles a kind of confiscatory tax given that virtually all of
the monies paid into escrow are likely to go to people who are, in fact, not copyright owners.

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

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

If you know that the copyright owner's reasonable license fee is going to be $5,000, that exhaust your budget and you will choose almost inevitably another work. The comments in this proceeding are replete with examples of that.
After the fact there is no mimicry of a marketplace mechanism because the work has been used and a user, to use John's phrase, is faced with a copyright owners who is coming out of the weeds who says, "Well, it turns out that you used my work. I am Picasso and the amount [or I am a famous photographer] and the amount that I typically charge is $10,000," which essentially will make the work entirely unprofitable and expose the user to very substantial risks.

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

MS. SHAFTEL: The value of licensing fees for illustration has always been determined by market use and how the client uses it and the extent of use and the budget of the client of that project. The Graphic Artist Guild has published a book for over 20 years now called "The Pricing and Ethical Guidelines" which contains a wide range of prices that illustrators, graphic artists, and various sorts of designers working in all sorts of fields charge for licensing of their works.
These rates are determined by bi-annual surveys. The information already exist and has been out there for over 20 years for what the fair market value is of illustrations in different usages. It is completely unacceptable for a potential user to be permitted to use an orphan work without having to pay for it.

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

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

Therefore, the creators know that there is
one location, one escrow account that they can look for with one clear record, not a buckshot of different escrow accounts held by users all over the place of different amounts of monies.

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

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

MS. URBAN: Thanks. I actually got messed up when we were talking about the limitation of liability caps. I hope I can fold them both together. I want to bring back to the discussion the gatekeeper issue because I think it's very important here as well. Whether there is an escrow fee or there is a
cap on liability, one is more efficient and one is less efficient.

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

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

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

MR. METALITZ: Thank you. I just want to come to the defense of my battered orphan, the escrow
idea. Again, just to put this back in context, and I think Jennifer's comments I could react to that, too. This is not escrow versus a cap. Escrow could apply whether the measure is a cap or the measure is reasonable royalty.

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

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

Again, I think, although Oliver asked us at the beginning, or Jule mentioned that we shouldn't
go back to the due diligence standard, I do think this is kind of linked with the due diligence standard. If we are going to indulge in the assumption that the vast majority or only a tiny handful of copyright owners will come forward, let's make sure we have a due diligence standard that makes it more likely that prediction will come true.

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

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

Second, I think calling the thing an escrow fund is putting a rabbit in the hat that doesn't belong there. An escrow fund sort of suggest
1 that it's going to go in there temporarily and then
2 it's going to come back out maybe, or even probably,
3 to the person who put it in there. The way I see the
4 thing working it's going in there. If it's coming
5 out, it's going to authors or some author's
6 representatives. I think if you get away from using
7 the word escrow, it may help.
8
9 MR. SIGALL: I skipped Phil. I'm sorry,
10 Phil. I skipped you. I had you on the list but
11 crossed you off too early.
12
13 MR. MOILANEN: That is all right. The
14 discussion points out the enormous difference between
15 various types of organizations and users. David's
16 members of PP of A take a portrait of a person and
17 maybe they charge them $50 for it. It could be any
18 number. It could be $500. The customer scans it and
19 asks for a reproduction on a four by six sheet for
20 which the photo processor charges 12 cents.
21
22 They do that 27 billion times in the
23 course of a year. They are all not David's photos.
24 Some of them might be. But if you just had a 1 penny-
25 per-shot royalty you've got $210 million to fund
26 everybody else's royalties so maybe that's the
27 solution to the problem. That's per year so it would
28 be self perpetuating. But the problems you run into
the user, the homeowner, the consumer is the one who really owes the royalty.

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

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

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

MR. SIGALL: Let me ask a question about
the reasonable royalty standard. I think Jeff is right to point out that you are engaging in something of a fiction or, at least, a hypothetical exercise in trying to determine what a marketplace rate would have been after use has been made because you don't have the ability to -- the user and the owner don't have the ability to either deal or not deal and set a price that way.

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

Another question, and correct me if I'm wrong on this, but it would seem in many cases -- not all but in many cases of orphan work use, the user, for example, someone who is putting together a documentary film or a nonfiction book, or a museum exhibition, has a pretty good set of comparables at their disposal, mainly the other transactions they
might have actually consummated in the marketplace where they found an owner or they found the author and they have engaged in a transaction. They may have the best set of comparables of anyone, even better than the owner might have in terms of trying to argue what the value of that transaction is. Does that give users more certainty over what a reasonable royalty would be and what their liability might be down the road if the owner surfaces than you might at first initially think given that reasonable royalty is somewhat undefined in the statute?

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

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

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

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

MR. SIGALL: Apart from the mechanism of how it's going to be determined, I want to get back to
anyone, especially those in favor of a cap, how they
would react to my point about access to information
about comparables and whether that reduces the
uncertainty or not.

MR. NEWMAN: Not necessarily that idea. The problem as a film maker is that often those
comparables, those benchmarks, are nonexistent and it
depends on the type of work. If you are getting a
work that is owned by Warner Brothers, it's very
different than what you are going to pay to get a work
that is owned by an individual film maker.
And it's very different than what you are
going to pay for an amateur piece of photography.
It's very different depending on a variety of factors
so there are no benchmarks to put up against within
our field that you could say are always reasonable.
Then you get into a case-by-case approach which we
feel is just too cumbersome as a system.

MR. BAND: I agree with those comments. I think for many of the kinds of works, probably the
vast majority of the kinds of works that most of the
people who want to use works will encounter, there
really are no benchmarks. Sort of the thought of an
arbitration proceeding is sort of like you just
imagine endless CARP proceedings. Again, it would be
great for attorneys in private practice so I appreciate that suggestion.

I just think it would be a nightmare for users and, frankly, for the copyright owners as well.

What I guess I don't quite understand is if for a lot of these photographs the fee anyway is $100, $200, $300, then why is a cap of $100 not unreasonable especially if it's certain they would get it? That seems to me to be much more preferable than an arbitration proceeding.

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

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

I have an idea, a range of what it's going to be. I don't need to avoid risk to the penny. I
need to avoid risk to the $10,000 value or more. Given over the course of the number of our books, yeah, I may have one or two bad results but that will even out over the course of many uses. I would not have a problem. I am here advocating an orphan work statute because that would make me much more comfortable in opening the gates wider to authors who want to make use of orphan copyrighted works.

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

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

MR. HOLLAND: I was somewhat confused by Jeffrey. Maybe I misunderstood it but I was confused by what it appeared to sound like, the concept that you would determine a fee after the work has been
used. Is that what you were talking about?

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

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

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

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

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

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

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

Of course, there are exceptions here and there. I think again it is a false hope that we think that there will be sort of a schedule of marketplace
rates that trade associations will promulgate for
every kind of work that possibly could qualify as an
orphan work.

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

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

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

If you want to know a commercial use, you
can go to any number -- if you are talking about
professional photographer, there is any number of sites and any number of commercial large photo libraries where you have the price calculator. It's not that hard to do. I don't even think that it's anything comparable to a CARP proceeding if you want to determine a license fee for many types of commercial uses.

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

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

I mean, Jeff's comments are, I think, right on in that there is no organization of, say, Yiddish folk singers who have a manual of prices. Even if there were, I think there is a pretty sharp limitation regarding the usefulness of those prices.
One thing contracts do when they are negotiated before a transaction is they allocate risk.

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

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

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

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

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

MR. ROSENTHAL: First of all, I do agree that your concept of reasonable royalty rate based on some kind of benchmark of what the industry has been paying on similar things is a viable way to go. I certainly agree that we should differentiate commercial from more historical and archival works.
I really do understand that position but for commercial use. I think as a fundamental issue here certainly from the creator's standpoint and that is that it is certainly simple and easy and efficient not to pay into an escrow account. No doubt about it. But it also takes a lot of incentive away from a copyright owner to step up to the plate at the end of the day to be able to really go down that road to contest anything and to claim anything.

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

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

I think if we get back to what we started
about the beginning, we're talking about the presumption of an absent owner, of an orphan work. That is what you said as the guidelines at the beginning of this session. When you don't have that person and you are setting reasonable royalty on a nonexistent market, you are creating a fiction that is not a market-based system.

I agree it should not be called an escrow. It should be called a tax and a burden on the creator. I also feel that we are presuming, of course, that we want to find -- that the majority of us want to find the rights holders and that we are doing a reasonable effort search and all these things that have been talked about earlier. Presuming it's an orphan, we should try to make a system.

Right now the system is not working and we should create a system that is not as erroneous on artists who want to use these works and want to create new works. So far the proposals about the types of ways to determine an escrow account have been more erroneous and burdensome than the current system we have. That is why we have called for something else.

MR. METALITZ: I think the answer to your question about comparables, we have heard a lot of information about comparables, about benchmarks that
depend on variables of how it is being used and by whom. At the time that this issue would come up after the work has been used and the right holder has come forward, most of those variables are no longer variable. We know who used it, what they used it for, how many copies they made, whether it was hanging on the wall or on a tote bag. It would seem to be in some senses easier to apply the benchmarks at that point.

Having said that, I think we also heard that there is a lot of variation from one sector to another here. There certainly are some areas where it might be very difficult to establish benchmarks. Even in the area of archival collections, a collection of 300,000 labor relations photographs does have a value for many purposes. The value may already have been ascertained and that may be the basis on which you could calculate some type of royalty rate.

Given that there is a lot of sectoral variation, I think this is another reason why addressing some of these issues on a sectoral basis through roundtables of people who create these kinds of works and people who are interested in using them might be a good way to go.

MR. BAND: Couple of points. One is, just
building on Jeff's point from before the break, there really does seem to be a bit of an asymmetry here between the kinds of owners and the kinds of users. I think a lot of the users who are in the room really aren't interested in making use of the kinds of materials that the owners here are currently representing.

There is that asymmetry and we need to recognize that. I think that leads to a second point that actually Nancy Wolff was making which was talking about how sort of the noncommercial uses are the exception. It started to make me think what is the exception and what is going to be the norm.

In many respects I think as a practical matter the vast majority of uses of orphan works will probably be either noncommercial or quasi-noncommercial, a library, a museum, or let's say an institute. A company like Google working with a library or a museum, something of that sort. That will be the normal.

The kinds of commercial uses of orphan works that people have been talking about, that will be the exception. If I'm doing an ad campaign, it's hard to imagine why any person doing an ad campaign in their right mind would use an orphan work.
The risk to me of having to hope that if
the owner pops out that I would be able to prove to a
court that I did a reasonable search, it would be so
much -- again, if I'm doing a big ad campaign, why
wouldn't I just hire an artists or go to a stockhouse
or just do something where the rights are clear.

I just can't imagine why anyone, or even
Spielberg. I think we can come up with those
hypotheticals but I think that is exactly what they
are. Those are hypotheticals. They are exceptions.
The office when it's sort of coming up with its
proposal should be focusing on what is the norm. I
think the norm is sort of either noncommercial or
quasi-noncommercial uses.

People are probably talking about archival
uses and the commercial uses. Even though they may
occur, I think those can be the exception so the basis
framework makes more sense to have a cap and then
maybe have the reasonable royalty for the exception as
opposed to the other way around.

MS. CHAITOVITZ: I keep hearing and it
just keeps sounding to me like the users are wanting
not the ability to use the work but the ability to use
the work free. I mean, they keep talking about,
"We're concerned about certainty and damages and the
gatekeepers."

Yet, if there was -- if they conducted their research and found out that something was truly working, and then they could contribute a market rate into let's call it a license fund, not an escrow fund, because they are paying the license fee, and you could get a comparable market rate. We've heard all kind of people talk about comparable benchmarks.

It would depend on the type of work and the type of use so that noncomms would be different from -- I mean, I beg to differ with you. I would consider Google, which sells advertising not really the same as the library. I would think that would be more of a commercial rate. So you could get that.

You could contribute it into a fund. Then it would be easy for the artist or the creator later to come forward. They should have to go federal court. They wouldn't have to do anything like that. No fees, no cost. They just make their claim to the fund. There is certainty. If they've done it right, they have made their contribution and they are not liable for damages, they have all the certainty and the artist doesn't, you know, have any cost to go forward. It seems to me that there's a fix. The fix isn't free though.
MR. OAKLEY: I appreciate that Steve is reminding us of the opportunity to look at this on a sectoral basis because I just wanted to mention that universities and libraries are far more risk adverse than Paul's situation which he described to us before the break where he has a fairly significant budget for doing the permissions and making decisions along these lines.

If we go to university counsel and ask about something like this and find out what the risk is and there's some undefined market value risk, then the answer is going to be no and it's going to be as simple as that. A lot of the projects that universities and libraries would want to undertake will be shut down because of the risk adverse situation there.

MR. SIGALL: Okay. Let's move on to the next section because I want to get to this question because it's an important one. It goes back to a comment, I think, Lee made before the break. I would like to now turn the focus away from payment obligations that a user of an orphan work might have to any other obligations that they might have to undertake in order to make use of the work.

I see this as sort of the terms and
conditions of their use. Among the suggestions we've
gotten in the written comments and things that were
discussed this morning were they are obligated to file
a notice or some affidavit or some affirmation of the
fact that they have made a search, for example, and
maybe turn over the contents of that search or a
description of that search.

There was a suggestion, at least in some
comments, about putting a notice on the work that
they've created and the use that they're making of the
orphan work, that they are, in fact, invoking the
orphan works system or that they are making use of
orphan works within the work that they've just
created.

What other conditions or steps does the
user have to take separate and apart from any payment
or liability that they are incurring to make use of
the orphan works provision, specifically notice to the
others that they are using it in the form of
registration, of their intent to use or their use, or
marking the work in some respects. Comments on that
approach.

MR. OAKLEY: Consistent with the principle
I mentioned earlier of keeping it simple, I would
prefer to see us avoid too many requirements that have
to be met before you can take advantage of this. On the other hand, it does seem to me that one of the things that could come out of a study of best practices in different sectors is that it might turn out that in some sectors that's a good idea of reaching it.

But then it's done on a targeted basis directed in the area where it really would make a difference. Again, I think I would do it on the sectoral basis and looking on a voluntary basis that would meet the needs of that particular segment of the community.

MR. ROZEN: Speaking on behalf of screen writers and movie directors, we have come at this from a little bit different perspective. We believe, and we filed our comments, that in the case of orphan motion pictures that there ought to be an extra step involved, that the user would have to contact one of the credited directors.

Well, there's only one credited director, or one of the credited writers to the film. When I say credited, it's something that's put right in the motion picture, but to seek license to use the film to exploit it for whatever purposes it may want to exploit it.
The reason we have that different perspective, of course, is that while we are the creators of the film, the authors of the film, we don't hold the copyright and it's of tremendous concern within the industry among screen writers and directors that if there is a case of a copyright holder, perhaps not a member of NPAA, not one of the major studios, maybe an independent producer, if there is a case where that independent producer cannot be tracked down, or maybe the copyright holder, independent producer is out of business, maybe there's been mergers and they can't be located.

Tremendous concern among screen writers and directors as the creators of that work that somebody will use that work and exploit it in some way in a process that they don't approve. We base this desire to be part of this process and to make sure that we have control over the use of so-called orphan works.

It really emanates from the contractual rights that we have that are established through collective bargaining and through direct contracts that screen writers and directors have in addition to the collective bargaining rights with the copyright holder that established creative rights and economic
rights in the film, as well as broader rights, moral rights established by the Berne Convention.

I'll just throw that out there as something that is a bit of a diversion from what the discussion has gone -- I guess the interest that other participants have here but something that is very important for us.

Let me also add to that that the system that we have -- the process we've devised or recommended in the comments recognizing that there is a great interest in making this process as easy as possible. We suggest that you contract either the screenwriter or the director, the Writer's Guild of America West and the Director's Guild of America can be conduits for helping to identify and locate the screenwriter and the director. The ability to claim that license only last for the lifetime of the screenwriter or the director.

MR. SLEVEN: I would like to agree with Bob's comment that there should be no prerequisites to orphan use assuming, as I said, we do a due diligent search to qualify for orphan use. I think a notice of use does not serve any purpose. You can put a notice of use into a registry of these notices and that does nothing unless the owners undertake the burden of
searching that registry of notice of use to see if any
of their works are listed.

The vast majority of the works that are
posted there no owner is going to be listed because if
you knew the owner, it would be much less likely that
it was an orphan work in the first place. In many
cases no title is going to be listed because many
orphan works are not the kinds of things that have
titles.

They are letters, they are photographs,
they are things that were created not for commercial
exploitation as titled movies or books or songs. I
think it's a formality that will not serve any
purpose. I think the better approach there would be
-- this could be done either by the copyright office
or on a voluntary basis -- voluntary registries of
owners.

I don't believe owners should be required
to register or file anything but those who think their
works may be orphaned and want to be found can create
through their industry organizations writers or
photographers or whomever to create registries that
would be part of a good reasonable search under
appropriate circumstances.

As far as the second possible
prerequisite, notice on the work, I also think that is problematic because often you don't know you are making an orphan use. You have something, you do a search and you cannot find the owner. It may be PD. You're not sure because you don't have enough data.

You may even think it's borderline fair use. Maybe yes and maybe no. You are comforted by the fact that you made a due diligent search so even if it's not PD and even if a court would find it's not fair use, it's an orphan work. Now you are stuck with what do you put on the book or on the movie or on the website, whatever you're using.

You don't know what status you're using it in. What you know is you have tried your best to find the owner and you couldn't and you have an obligation to pay the owner when the owner comes forward. I don't prerequisites beyond that serve any purpose.

MR. TAFT: I would like to reiterate something I said this morning in terms of those orphan works which can be associated with a particular group which are part of, to use UNESCO's term, the intangible cultural heritage of a particular group, especially indigenous groups.

I think it is incumbent upon users to notify those groups and get permission from the
community or constituency. Again, this is going to come up perhaps later on tomorrow in terms of international issues, but certainly the WIPO world, intellectual property organizations looking at this kind of question.

To an extent how can we use these essentially orphan works that are tied very closely to a particular culture or group? I would say to keep on the ethical side, if not the legal side, is worth maintaining touch and keeping contact with those groups that have an interest, a cultural interest in a particular creative work.

MR. MacGILIVRAY: I think one of the things that is important, to us at least, is that we want to be able to contact the copyright holder and to contract with that copyright holder for whatever value the copyright holder in particular would like to place on the work.

One of the things I would suggest as a requirement on the users of works is that they check with this voluntary correctable registry every so often, some reasonable number of days, and if they cease using a work and instead contact the copyright holder for the permission to use that work if, in fact, the copyright holder has declared that they are
findable, that this work is no longer an orphan.

MR. PERLMAN: I'm not a fan of the filing of intent to use but I think that when a use is actually being made, there needs to be some kind of a recordation in a central registry of the fact of the use, the user, and a copy of the work that is actually being used because, for instance, in photography Nancy was talking about Text Scout and other companies where image recognition software is now becoming a viable technology.

Otherwise, if you don't do that kind of a recordation, any owner of a copyrighted work that has fallen into the orphan work category has to go out and sort of search the world to see whether every single one of his or her works is being used somewhere.

MR. BAND: I agree with Paul and Bob with respect to the unnecessary formality of any intent to use a formal statement. I think the likelihood that any of the millions, if not billions, of possible orphan works that will be searched regularly on a six-month basis by people who may not know that they have any relationship to the work is so low as to be not worth the trouble.

Furthermore, I think it is much more likely that when the work is actually used in a film,
in a book, it will then come to the attention of the rightful copyright owner who may be the heir of the original author or artist. That is a much more realistic way, I think, in which people will be apprised of the rights that they have.

A further problem with the formal intent to use approach is that inevitably there would have to be some period of time that you would set aside for people to have this work appear on a registry before it could be used.

It is certainly true in journal publishing and I think even to an extent in book publishing that sometimes rights clearance by authors doesn't actually happen until very close to the publication deadline. If, in fact, you end up having to wait sort of a six-month period before you publish the journal article or publish the book, that is, I think, a substantial disincentive.

This, though is tied to the idea that appears in the CCI comments which was that perhaps there should be some sort of notice on the work that the work was orphan. I am sympathetic to the views expressed by Paul and also by the AAP in the reply comments that perhaps this kind of a requirement is a deviation from current practice and is really
inconsistent with the kinds of obligations publishers
would like to undertake.

I hear that point. I think our purpose in
suggesting it was to create a sort of more openness,
more transparency as to actually who does own the
rights and the work, that there, in fact, has been
some sort of search made so that subsequent users
could come to the publisher and see what the status of
the work is and then from that decide what kind of
search they themselves need to make.

Paul raises a much larger and more
interesting and provocative question for publishers
which is when works are used that are used under the
fair use rubric or in the public domain, what should
their sort of captions be? That is a subject that we
should leave for another day.

MS. CHAITOVITZ: Our comments requested
that before you make use of an orphan work you have to
file an intent to use. I think this serves a variety
of purposes. One is users can check them to find out
if their work is being used. Not every -- I'm sorry.
The copyright owners can check them.

In the last century there have been a lot
of mergers and acquisitions so what started out, you
know, you could say was in a record catalog or was in
a publishing catalog now may be orphan just because
the trail runs dry. You can no longer find out who
owns it when, in fact, it's a huge multi-national that
might have the resources to check the intent-to-use
list.

The other thing is that it would permit
the negotiation before the use. I mean, the same
people who complained about the potential damages
after the use because of a switch in the bargaining
power once something is already used are the same
people who are now saying, "Wait and they will find
out after it's used." Well, if it's after it's used,
then your bargaining power has already switched and by
posting an intent to use you would then have the
opportunity to engage in market place negotiations
before the use.

MR. BAND: I agree with what Bob and Jeff
and Paul were saying about these sort of empty
formalities and bureaucratic burdens. Victor said
something that actually intrigued me. I'm not I agree
with the notion of a registry, sort of after-the-fact
registry.

I'm not sure that would be very useful but
I could imagine maybe a requirement even that any use
that is being made that on that use or in conjunction
with that use you do have contact information so that
the author or the owner can contact the user and make
it easier for that author to contact the user to say,
"Hey, this is my work."

Then we get into whatever the remedy phase
is but at least to lower that barrier to make it easy
for the owner to find the user. I'm sort of thinking
along the lines of what is required in the DMCA with
respect to -- you don't necessarily have to have
something that detailed in terms of an agent for
service of process and all that kind of thing but it
might be -- the contact information might be a useful
idea.

MR. METALITZ: I wanted to rise to the
defense to the concept of the notice of intent to use
which, by the way, had a lot of support throughout
this -- in many of the filings here. Jamie Boyle had
a filing on this from the Center for Support of the
Public Domain at Duke which I thought was worth a good
look.

I think we are making a lot of --
indulging a lot of assumptions here about how this
system, which does not exist at the moment except in
our fevered imaginations, would actually work. I
agree that there would be many cases in which having
the user post a notice of intent to use is not going
to make any different in terms of alerting the
copyright owner. I think there may well be some
situations which it would be useful.

Jeff said that this involves copyright
owners who have no knowledge of their relationship to
a work. Sometimes that will be true but there will
also be many copyright owners who know damn well that
they own a work. They just don't know that other
people can't reach them or can't find them in order to
obtain a license.

They may have a different idea, for
example, if the ability of people to search
inheritance records and they know that Dad created a
lot of valuable copyrighted works but they don't know
that they can't find the son or daughter. This may be
a way for them to find out if somebody wants to use
their work. There could be a lot of other examples
along that line.

I think what Bob said right at the outset
of this section is also worth coming back to. Such a
requirement for a notice of intent to use is going to
be more useful in some sectors than others. It may be
more useful, for example, when the duly diligent
search turns up the name of the copyright owner but
the user is not able to contact that person.

That is kind of a subset of orphan works. Perhaps a notice of intent to use will be confined to or directed to that subset. I think the bottom line is since we don't know how this system is going to work.

We should be kind of taking the extra mild to avoid the kinds of problems that Jeff and Jonathan were talking about earlier, the problem of having to post hoc figure out how this deal would have worked out if the parties had been able to reach each other. let's give them another chance to reach each other. Even if it only helps in a few cases, I think it's probably worthwhile.

It would also have some value after the use commences as was previously stated. It seems to me this would have some value. I don't want to overstate it. Perhaps it shouldn't be a universal requirement but I think it certainly has a role to play in this system.

MR. ADLER: I can't imagine anytime where I would ever say that Steve has overstated a case but I think that in this instance the informational value and the benefit of these types of devices I think is clearly disputed if not discredited. I would just
again want to suggest that what also should be weighed
gainst that and discounted further in terms of the
value here is the fact that in the case of a notice of
orphan works the likelihood of that being
misconstrued.

It's nearly 30 years since Congress
determined that basically for work to be protected
under copyright it doesn't have to go through some
form of process of being stamped by some official in
order for it to obtain protection. Yet, the general
public today I think is still largely unaware of that
fact and still generally has questions about whether
or not unless they see a little c in a circle or
unless they see the word copyright and something on it
a work, in fact, is copyright protected.

I think that given the risk that we are
going to have in this area, that people not as close
to this process as we are will despite all warnings,
all explanations, believe that a work designated as we
use that phrase as an orphan work creates a permanent
status for that work that follows that work in
whichever way it's used that many people will likely
misconstrue as being related to that work no longer
being protected by copyright.
I think that risk given the very limited or at least disputed informational value of such a notice would argue against it. Again, I would say with respect to a notice of intent to use, I did read most of the proposals that people have made where they suggested an advocated for that and most of them came attached with a time frame.

Notice of intent to use and then wait for six months or wait for four months or something like that. Again, I just want to point out that under copyright law there is no requirement that anybody inform anyone else of their intent to use a copyrighted work outside of the issue of obtaining permission to do so.

I think that in this environment given again the expectation that in the vast majority of cases you will not see a copyright owner emerge. The issue of having to give several months of public notice of your intention to use a particular kind of work with your identity and with some degree of information about how you intend to use it can be very detrimental to the creative ability of the people intending to use it and again in the competitive process of those people who are attempting to use it.

I just wonder whether if we establish that
as a rule here, even if we were to argue that it's only for this very limited orphan works process whether we would be then taking a first step on a slippery slope in some other context of copyright law is going to establish a precedent to argue that there needs to be a notice of intent published when someone intends to use a copyrighted work explaining who they are and what they intend to do with that work. I think it would be a great mistake to go down that road.

MR. MOILANEN: Thank you. The notice of intent particular reemphasizes the wide diversity of the different kinds of users that are out there. Photoprocessors generally turn the stuff over within 24 hours. Most of them are not known and only a few of them are probably ones that people are actually interested in but if you are going to try to comply with the law, you've got to do it with all of them because you don't know who the owner is on hardly any of them.

MR. KUPFERSCHMID: As far as the intent to use and some type of registry for, I guess, use, if you will, I think it seems to be that we have gotten past the hurdle of -- I don't hear anybody suggesting that, at least, if there is such a database or list of
intent to use or users, I guess, that it wouldn't be
mandatory that the copyright owners search that
because that would be a TRIPS violation.

It would be a tremendous burden on
copyright owners, especially small copyright owners.
It would be very difficult to figure out some works
what they are being called, what their title is, what
the author's name is, a whole bunch of different
reasons.

I haven't heard anybody suggest that it
would be mandatory that the owners actually search so
I think what we're talking about is a voluntary
database or possibly mandatory for users to file some
intent to use but not mandatory for the copyright
owners to actually look at that.

Given that it wouldn't be mandatory for
the copyright owners to look at it, I just don't know
how -- forgetting about legalities but in the
practical world how or whether that's going to be used
at all. Despite all of this I think there's an
inkling in me to see what the foundation is here, what
the rest of some kind of limitation on remedies
approach or whatever approach is taken here looks like
before we decide an intent to use is a good approach
or not.
Generally we think it's not a good approach whatsoever for the reasons I just outlined. In addition to those reasons there's also the push and pull you have between the burden you're placing on copyright owners and the frequency by which you are going to publish these intent to use statements or notices or whatever they are.

If you are publishing an intent to use statement, let's say, every quarter or so, presumably then there is going to be some waiting period. It might be six months and it might be even a year which is really unworkable, I think, for users of this system to wait that long as other people have mentioned here.

If you take the opposite approach, which is to say that you have the intent to use publication, let's say it's published on a continuous running basis for maybe a week or so and the waiting period isn't very long, let's say it's a week or maybe even a month, you've got a tremendous burden on copyright owners to actually look at this.

In any respect they are likely not to do it anyway. At the end of the day, I think the practical application of an intent to use just isn't going to work. I think there are also issues that
have to be considered that hadn't been mentioned here
like statute of limitations issues like if you file an
intent to use what does that mean?

That is just an intent to use. That
doesn't mean you are actually using it. Does that put
the copyright owner on notice of some sort? That is
an issue, I think, that at least has to be talked
about and considered before something like this is
adopted.

The one teeny benefit I can see here is
that it's possible that -- we've mentioned this in our
comments, that where you have state entities who are
using orphan works and they file these intent to use,
perhaps that filing of an intent to use might be a
waiver of their immunity or might be used as a waiver
of immunity -- I'm going to try every opportunity I
can to get this in -- a waiver of their immunity
perhaps because I know there were some issues doing
that on a registration form.

Maybe that is the only possible benefit I
can see at this point. Like I said, after we get an
idea of what the parameters of some type of limitation
here we might have a better idea whether there are any
benefits whatsoever of an intent to use system.

MR. SIGALL: I want to put a little bit
more because both Keith and Steve have mentioned we don't really know what the system will be so it's hard to comment on it. I'm going to throw this out there and I'm going to put it out there with the caveat that it's been in my brain for about five hours.

I don't think everyone from the Copyright Office on this panel has even heard it. Some people have and some people haven't but I just want to throw out a potential way that a notice of use could be implemented and then just to get comment and reaction to it because I think it will help us get a sense of what potential benefits might be from the system.

It plays, I think, off of a suggestion made by the Author's Guild in their comments that it would help keep the honest reasonably diligent searcher honest. I think the concept would be that if you did a reasonable search, after you complete that search you file something that certifies that you have done a reasonable search.

One thing that we didn't get to in the morning session that I think may be beneficial in the sense that it fixes a point in time at which the person did the search. When we are going back later when the copyright owner might show up and you are trying to determine whether the person made a
reasonable search or not, you can look back and have
some frame of reference to assess that reasonableness
because one question might be when was the search
done. Was it done before the use or after the use?

It may get difficult to assess the
reasonableness of a particular search without a fixed
time frame. You would file that notice at the point
after saying that you have made this reasonable search
and that you intend to use this work. I think like
many people have mentioned, you would have some
waiting period, 90 days, 45 days, 30 days, 6 months,
something like that. Let's say it's just 90 days.

From the point of filing it to the point
of the 90 days, I think the user would receive
essentially almost all the benefits of a limitations
of remedy scheme. For any reproduction or
distribution that they made within that time frame
that would be subject to limitations of the remedies.

The one thing they may not get from that
point, and we will get into this tomorrow a little
bit, is the ability to make ongoing use of the work if
the owner shows up within that 90-day period. That
doesn't happen until that waiting period is over.

You have some time there for an owner to
come up and say, "Wait a second. That's my work. I
don't want you to use it anymore. I want an
injunction." That owner cannot come up and say, "I
want statutory damages." They probably have them
registered so they couldn't say that but, "I want
actual damages," and the like.

They would only be entitled to whatever
limitations on remedies might be available like a
reasonable royalty or cap damages or the like. If the
waiting period elapses, then at that point the user
gets the benefit of both the limitations on remedies
and whatever would appear to be from the written
comments a fair amount of support for an ongoing use,
a prevention against injunctions for their ongoing use
within the ambit of the use that they are currently
making.

It would kind of allow -- I think, at
least, one benefit of this system potentially, maybe
not, is to maybe help address the unpublished work
situation in the sense that someone who files this
notice in the 90-day period if it turns out that it's
an unpublished work where the author does care about
it coming out for creative reasons, for privacy
reasons, they could come in and get a full injunction
against the use and stop the use and the ongoing use.

But if they wait too long then they lose
that ability if they wait through the statutory waiting period that might be set up. This would give some chance for the owner to come in and essentially have almost full rights with respect to the user. But if they wait too long, then they are back in what I think most people are talking about with respect to limitations and remedies and some sort of provision to protect reliance, interest, and ongoing use.

The other thought behind this which, again, I'm not sure if it makes any sense, is that it would give the publisher who is about to go to market with a work, it would give them the ability to go forward with the work after filing the notice of use before the period ends comfortable that if the owner shows up on the last period they are not going to get hit with statutory damage or some big damage award for that. But it would give them that ability to get started on their production of the work and dissemination of the work.

Then if the period elapses as it might in almost every case -- in 99 percent of the cases, then they get the full benefit. That is one potential way to do it. Like I said, it has in theory entirely only and I'm open to all kinds of suggestions and discussions about whether that would work or whether
that would fail.

MR. SPRIGMAN: So in our proposal we thought that the notice of intent to use had a limited role and it basically aligns with what I heard you say which is in the case of unpublished works where we thought for various reasons a registry was going to be difficult, we set up some time limits and then we suggested a notice of intent to use being a kind of key there.

I think that is a possibility. Now, I just want to make one note, though. On an abstract level what is a notice of intent to use? It's, in fact, a registry so you are registering something that is in itself potentially going to be a separately copyrightable work in many cases.

This is a use of a registry and the interesting thing about this particular registry is it basically imposes about the same burden as a registry on the original creator but it does much less useful work. I'm not saying it doesn't do any useful work.

I think it does and that's why in the case of unpublished works I was in favor of it. But the fact is once you've accepted this kind of ex post registry the ex anti-registry, the merits of that, again, jump out at you because it uncovers more
information about the value of the original work in question.

If we are going to burden someone, best burden the person upon whom the burden produces tremendous benefits. Again, I agree with your kind of limited use of what you just articulated of the notice of intent to use. I think it's mildly beneficial, at least in the realm of unpublished works. But, you know, given if you have a categorical approach, if you define orphan works, at least for published works based on registry information, you don't need it.

MR. MOILANEN: I think it's time to debunk one of the myths that has been kind of floating around this entire process. With rare exceptions individual creators cannot afford to file a copyright infringement suit. Even where they are eligible for statutory damages and attorney's fees, they can't afford to bankroll the out-of-pocket costs.

So if you are talking about filing an infringement suit or any kind of a suit where the relief is going to be an injunction, there is absolutely zero possibility that at least unless you are Corbis or Getty or somebody like that, you are going to be able to afford to actually achieve the illusory relief that would be built into the system.
MR. METALITZ: I have to think more about what you have proposed, of course, and the specifics but I think it touches on one way to approach this. As I said before, it may be that this notice of intent to use is going to be more useful in some sectors than in others and maybe more useful in certain kinds of works than with others.

Another way to approach it is that our proposal was that it should be a requirement in order for someone to claim orphan work status to show that they had filed a timely notice of intent to use. Another approach would be to provide incentives for doing that without making it a binary "you're in or you're out" type of determination.

As I understand it, this would be an incentive for someone to file a notice of intent to use but it wouldn't determined whether or not they otherwise -- there's a lot of ways in which that could be structured. We haven't gotten into questions such as you has the burden of proving that your search was duly diligent and so forth.

There are certainly ways that we can think about encouraging or giving users strong incentives to file a notice of intent to use without necessarily making it a mandatory requirement in all cases if they...
wanted to claim orphan works status.

MR. BAND: Would you consider as part of this idea that -- what I heard is that the notice of intent would not only say intend but it would also include some description of the search and the belief, under penalty of perjury or something perhaps, that it was a diligent search and so forth. This goes maybe to Steve's point.

Would there then maybe be a presumption of not validity but a presumption that it was, in fact, a good faith search that would then -- again, this gets to the point that Steve was making about incentives. Maybe it could be a voluntary system but then you give the user the incentive to do it by giving him this benefit of saying, "Well, if you do this filing, then there would be a presumption that it was a reasonable search."

Then the burden would shift in litigation if that ever happens. I agree with Victor it will be very rare but if there is litigation, then the burden would shift and it would be the owner's burden to prove that was not a reasonable search.

MR. SIGALL: I haven't thought it through enough to answer that question but that is the kind of thing that I think may be more the subject for the
panel for Topic 3. That's the kind of thing that you could do, and you may have to do. If you don't make it mandatory you may have to do that to encourage people to do that.

One of the other thoughts behind this was related to the question of let's say you do a reasonable search and then two months later before you started the use you discover while searching for another work the owner. Not that the owner comes up and tells you who it is but you discover the owner.

You encourage some reliance efforts and reliance interest based on your original search. One of the questions that we had talked about within the Copyright Office was what do you do in that kind of situation, which isn't really a subject for this topic but that is the other maybe beneficial use of this type of system to maybe create a presumption like that and cut off your obligation to do the search from that point forward in those cases.

MR. OAKLEY: I see where this idea has a certain appeal, particularly after the 90-day period and you get ongoing permission. On the other hand, I'm thinking back to Jonathan's issue that he raised of the $300,000 item repository.

I think about having to file such a
document on each of 300,000 items and the burden seems pretty significant, particularly if we anticipate that no one or one person might come forward out of the group. On a cost benefit basis I'm not sure it's worth it. Therefore, I have some pretty serious reservations about the notice registry ahead of time again.

MS. WOLFF: In thinking of the notice of intent to use, I see that either there will be a big burden on the millions or hundreds of thousands of small creators and artists and then I see a whole industry where they all have to pay someone like if you own a trademark where you have to pay someone to start searching to see if anyone is using something. I don't know if that is an added expense and burden yet again on a smaller creator that may not make it that workable.

MR. SLEVEN: My reaction to your suggestion is it might have some benefit, and I'll talk about the potential benefit in a minute but I think the harms that I mentioned earlier outweigh any small benefit.

I think about a 90-day period as somebody said before, and it's often true, that rights clearance issues often start later in a process after
a work has been close enough to fix that the author knows what material he or she wants to include in a work.

Then you start searching rights. You have to undergo your diligent search before you do the filing that you're hypothesizing. So you've taken that time and then you have another 90-day period after that. That is quite a long stretch before you can practicably make use of the orphan work and take advantage of the statute.

Now, different people, different industries will have different reactions to having limited damages but still being subject to an injunction. As a book publisher I'm not going to take a risk of -- I'm not going to put it between the covers if the book has a likelihood of being enjoined 50 days later just as we are starting to sell copies and after we've printed X thousand copies.

I don't mind if the owner comes forward and pays them but if there's a risk of an injunction, I'm going to say, "No, I've got to wait until after that period." So for I don't think a lot of benefit you're really imposing a time burden on uses. As far as the benefit, you mentioned it might remedy the unpublished.
Only, I think, in a small number of cases because the model that I see often on unpublished uses is I don't know anything about it. Somebody is doing a history of some town and the local library has a box of photos.

It's a photo of a soldier marching off to World War II. It doesn't list the photographer on the back. I have no clue who the person is. What's the search? What does the notice look like? Who is it going to benefit?

Maybe I don't use it and maybe I do use it because it shows the pride the town had in the soldier or whatever it is, but I don't think -- that's one example but that replicates over and over in my experience a "we've got no clue where it's from" archival historical document or image that has editorial value.

MS. MURRAY: Yes. I guess a distinction should be made between what we had proposed which was really a database just setting forth affirmations of diligent search and the steps taken in which to find the owner of an orphan work and this idea of filing notices of intent to use.

I mean, I think Allan makes a very good point that you don't want -- anybody who is in a
competitive industry doesn't necessarily want to have to publish what they are doing. I think there is a distinction there. I do think there is a lot of benefit to having this perhaps voluntary database setting forth the steps taken in doing a diligent search.

I say now perhaps voluntary because I see that 300,000 documents or items where you don't necessarily know the title or the owner would be a little bit onerous but at least in some sectors I still think it would be very beneficial in doing things like creating industry standards or, at least, publishing industry standards within various sectors of how a diligent search ought to be -- a duly diligent search ought to be done.

You know, I think we also have some problems with this notion of forever foregoing injunctive relief, particularly in the idea that you were describing, Jule, because, again, I think somebody pointed out rightly that users -- I mean, owners, particularly individual owners, are not going to be searching this database on a constant basis, particularly if they are owners who are obscure and may be difficult to find, or owners of works that are obscure.
MR. BAND: Following on Bob's point, maybe
-- and, again, just sort of thinking off the top of my
head. Maybe the way to make a system work for a
voluntary system and you would have not only the
benefit of no injunctive relief after a certain point
but maybe also no damages. Then that would really
create a safe harbor. You are doing this notice of
intent to use and then there is a reasonable quid pro
quo that goes along with that.

MR. ROZEN: Following along those
comments, maybe we could see it as a continuum of
responsibilities that you would have to give you a
continuum of rights or protections or protections from
liability, I guess. The more you do, for example,
signing up for registry, giving a notice of intent
would give you greater protection and you can design
it that way based on that.

The other thing is I think it makes a lot
of sense to separate -- in all this discussion it
seems like we keep coming back to 300,000 photographs
and to the World War II picture that somebody has
found in some library somewhere. I think it makes a
lot of sense to separate and have different standards
or different requirements by sector, by the type of
copyrighted product that you're using.
MS. KIM: With regard to your thought regarding filing a notice of intent to use as to an unpublished work, I feel very strongly being that my father was a writer, very prolific, and he had over 50 publications. He wrote every single day, you know, pretty much until the day he died and he has many unpublished works.

I can't help but wonder that if there is this kind of mechanism put into place, will that erode at all the strength the author's or copyright owner's copyright protection with regard to unpublished works in view of the safe harbor or limitation of remedies when someone actually files such notice?

MS. MURRAY: Right. I was just going to say that I do think if you do set up this notice of intent there could be a lot of abuse of the system, particularly somebody was at least suggesting that alone would constitute the diligent search or lead to a work being designated orphan if somebody didn't come forward after the notice was filed so that's another thing.

MR. METALITZ: I would agree we have to make sure the notice of intent to use tail doesn't wag the orphan works dog here. As the discussion on this has progressed, it sounds like all you have to do is
file this notice and then in effect, as our colleague from this morning was saying, the work almost seems to be in the public domain at that point.

I think we need to step back and I think the idea that in some sectors for some types of uses this would be very useful. I think in Lee's example perhaps it may well be that having a notice of intent to use would be very helpful to her in ensuring that her father's works were not used under the claim that they were orphan works.

I think there is still some marginal benefit to this and I think it should be a tool that should be used where appropriate but I don't think it should take the place of the due diligence that really all of this comes back to. I would be very concerned if, in fact, it kind of has a way of circumventing that.

MR. SIGALL: Let me ask a further question related to that, the question of another obligation that might be imposed on a user. The question is is there a continuing obligation on their part to search, to do a reasonable search and get back to the question of what happens when after doing a reasonable search they might get information that identifies the owner, not necessarily from the owner coming up.
One of the suggestions, I think, from the museum written comments was a fixed term for this orphan works -- they proposed an exemption but this orphan works limitation, if you will, given to the owner, five years, seven years, so that you do a reasonable search and then after five years you have to do it again. What are the thoughts related to essentially a term provision for this limitation that will be granted to someone who completes a reasonably diligent search and you can't find the owner. Let's go to Jeff, Anne, Chris, Alex.

MR. CUNARD: Although I understand the merits of that approach from a museum in mass digitation perspective, I think it's a completely unworkable approach with respect to people who publish in hard copy. If you publish a journal or you publish a book, it is out there and is going to be published for a long period of time.

If you publish a journal in hard 'copy today and it's now being made available electronically, for example, through JSTORE, it is just infeasible to think that either JSTORE or the journal publisher is every five years going to be doing a search of all of the works that were contained in all of the issues for that period of time.
It would be an impossible burden and I think it's a nonstarter approach as far as I'm concerned except maybe with respect to a particular subset of works that are available on the web where it's very easy to do these searches and it's easy to take them down.

MS. CHAITOVITZ: Well, again, representing both the original creators and the creators who want to use it and to use these works and looking for a balance, one of the things that I would be concerned with if that were to happen would be the new creation. I mean, all of a sudden if it's a record that had a sample in it, you're then perhaps limiting its copyright term to seven years.

I mean, you're destroying -- because they are using in a derivative work. They are sampling it through their new creation or it's something that appears in a movie, they have to go back and reedit the whole movie. That just wouldn't be feasible to require such a burden every seven years and it would impose upon the new creator's ability to exploit their copyright.

MR. SPRIGMAN: I would agree with that and expand it a little bit more. Works that have significant commercial value now are largely
registered so the orphan works that we're talking about, the ones at the moment, don't. If a user uses an orphan work and transforms it in a way or sets it in another context that gives it significant value, I don't see why the original owner couldn't then claim rights in the work by registering it. Okay?

He may not have rights against that particular user but he may have rights respectively against everybody else. That create the opportunity for both the original creator and the follow-on creator to profit because the follow-on creator may create a market for something that the original creator can then continue to exploit.

I do think that, again, the use of orphan works will sometimes, if we're lucky, create our opportunities, if we do this correctly, for original creators to actually profit in the future from their folks even if they are not profiting from them now.

MR. MacGILIVRAY: I guess the big question there depends on what the diligence is. If the diligence is something that can be done automatically, it can be done by a machine at a set of times, then something like that wouldn't be the biggest problem in the world such as checking some sort of voluntary registry.
This will be different for different types of work. It may be much harder to do it for photographs absent some sort of way of understand what a photograph is. Certainly if something like that could happen, I do think there is a way you could do these types of checks. Then the question is just what happens when you do your second diligence check and you find that the work is there.

For a user like us, we are the minority as Jeff said. We would be willing to then contact the copyright holder and talk with them about whether we should be able to still make use of that work for other users like the one Anne suggested. Maybe that's not feasible.

MR. ADLER: I just can't imagine why you would want to build in a periodic uncertainty into this process because what it would mean is whatever term you picked, if you said five years, three years into the process people who are considering any kind of a deal with the orphan user -- the user of the orphan work would now, of course, have certain worries and concerns about what their deal is going to mean two years down the road. It just seems to me that in the interest of trying to settle rights and settle permissions that that type of an approach would be
very unwise.

MS. WOLFF: I think for works that are used transformative, for example, a song that is sampled or a clip or an image that is put into a documentary or film, that the reasonable license fees should satisfy that problem. I think maybe I was misunderstood earlier. I think there are lots of not-for-profit and noncommercial uses that are very big of orphan works.

I think the situations where you are actually going to find a user will be more frequent in more the commercial type uses. I think in those situations paying a market value licensee solves the problem of both. You get paid for your actual use in the song, and that's historically very easy to figure out what you get paid for a sample.

The use of a film clip or a still in a documentary or movie is very easy to figure out. And then you haven't prevented the movie from continuing. You haven't prevented a song. You haven't prevented a documentary and we haven't built in a lot of complications.

MR. METALITZ: I think this leads to a discussion of an issue that we have talked a little bit about, but not very much, which is should orphan
work status apply equally to all uses. We've talked about different types of works and different types of users.

You can see a scenario, for example, in which somebody does their duly diligent search and finds that they can't identify the owner of a piece of audio visual material. They include a 10-second clip in their documentary.

A few years later they say, "Maybe we should just do a remake of that movie. Let's just create a derivative work based on that movie. We only used 10 seconds in our original one but let's just do a remake. We've already determined that we can't through due diligence locate the copyright owner or communicate with him or her."

The problem is, of course, that the stakes are then much higher for the absent copyright owner and it really leads to the question of whether -- first of all, having a notice of intent to use would help in the situation because it would define what use was intended to be made and might guard against the abuse of getting your toe under the door and then taking over the whole house.

But it also raises the question of are there certain uses that shouldn't be eligible for
orphan works treatment. Are there certain uses that
so totally occupy the field and take the entire value
of a work that perhaps we shouldn't following this
procedure at all. I don't know what the answer to
that is but I think your question kind of raises this.

We thought about this problem first in
terms of piggybacking. User A does a search. Five
years later should User B have to do his own search.
I think the answer is yes. Here you're saying User A
did the search. Can they rely on that five years
later or five months later to do a totally different
use than what they originally intended. I think that
raises some troublesome questions.

MR. BAND: I guess I'm going to go in the
same direction as Steve and then flip it and go in the
opposite direction which is, you're right, there are
very different kinds of uses and conceivably different
remedies perhaps should flow from those depending on
the circumstances so I could see a situation, let's
say, if the use if purely digital.

Again, let's say going back to the Cornell
example where you digitized the 300,000 works and they
are all up on the web and then one person shows up and
says, "My father took that picture," and they are able
to show it. Maybe if you almost like a notice and
take down, going back to the DMCA, you take it down and that should be the end of that. There should be no remedies because you have, in essence given the person an injunctive. They have gotten injunctive relief but you shouldn't be liable for any damages in that situation.

In other situations where you can't do a notice and take down but let's say a book has been published, then again injunctive relief wouldn't be appropriate because you have relied on it reasonably but then maybe you should pay some nominal damages. It seems again different kinds of uses might lead to different kinds of remedies that would be fair for everyone.

MR. SLEVEN: Steve raised what I think might be one of your hardest questions. I'm not sure whether you wanted to address it now or within the rubric of tomorrow morning, consequences of owner reappearance. Namely, for the original use following a diligent search, what constitutes that use? What permutations? Do you want to do that now or tomorrow?

MR. SIGALL: We are running out of time. You can give me some thoughts tomorrow maybe as a preview to what you might think and we can pick up the discussion tomorrow. I think it does bleed over
between the two issues.

MR. SLEVEN: from our standpoint, one possible solution would be when rights are in ordinary practice recleared. For instance, using again -- I hate to be parochial but using the book business which I know, when we do a hardcover of a book and due whatever diligent search under an orphan work statute, do whatever rights clearance, whatever we do, we then will include that in the paperback book and in the audio book and in the e-book without reclearing it being understood that the rights that we've cleared the first time are supposed to cover that.

We will also license foreign licensees, etc., without a reclearance process. However, if we sell rights or the author sells rights for, I'll give an example, a movie version, the movie producers would typically reclear. I think that is the correct line. You can't have -- you have to have a research every printing or every paperback or trade paper and mass market and audio. That's a preview of a difficult issue.

MR. SIGALL: I was told by Beth it sounds like Section 201(c) of the Copyright Act. As that caused any controversy? I don't know.

MS. MURRAY: Just adding onto what Paul
said, you know, he works for a great publisher that is very responsible and he is a gatekeeper. However, it is in pretty much every trade book contract that I've seen and probably most other kinds of publishing contracts I've seen the onus is on the author to indemnify the publisher for liability of any sort and to warrant that they've gotten all the permissions.

They have the right to publish what they deliver to the publisher and also to actually pay for and get the permissions so I think that would be very onerous for individual authors to have to look again later once the book's been published for an owner of an orphan work.

MR. HOLLAND: This may be a subject for tomorrow, too, but I have been thinking -- it keeps sticking out as something that is not resolved in all this. We keep talking about positive incentives for users and how can we make it easier for users and what incentives can we give them to use more work and so on.

Most of the people who are copyright protected right now don't really understand much about copyright. All they know is that they know they will have copyright for the rest of their lives. If we change this law so that orphan works are available, a
lot of people will still think their work is protected
and they don't have to do anything.

How you go about notifying an entire
community that the law has changed and that their work
may be available? It seems to me that whatever system
you build in you need to build in some positive
incentives for creators to start monitoring their
copyrights on an ongoing basis.

MR. NEWMAN: It's been touched upon but I
would just like to reiterate from the film maker's
perspective that any secondary follow-up like that
would ruin the system for me as a film maker because
my work can be pulled off the shelf. As a distributor
I wouldn't want to purchase that work either to take
out so there is no -- I mean, it doesn't seem workable
at all.

Now, I do think if a right's holder does
surface, they should, of course, be able in the future
to profit from their work but that shouldn't in the
life of the work that it has gone through whatever
processes and whatever system you've put in place. If
it's possible that it's going to be able to be pulled
off the shelf or stopped from distribution in some
way, then it's not going through this whole process to
begin with as a film maker.
Of course, I don't know if this is for today or tomorrow but there should be some look at the piggybacking issue. Our feeling is that they should be some kind of secondary -- you know, that work is not orphaned forever and never claimable again. People should still have to do some reasonable effort search and all that can be addressed but it should definitely not be hanging over your head after you have created a work that might have used an orphan work in perpetuity.

MR. SIGALL: Paul.

MR. SLEVEN: Just one more complication. I don't know if this is the right rubric but to bring to your attention in response to piggybacking the litany of uses that I just mentioned may well be by different users. Kay is exactly right. It is the author who does the search and the publisher and the paperback publisher and the audio book publisher and the electronic book publisher who then rely on it.

When we talk about piggybacking, I feel strongly that an unrelated use should not be able to per se piggyback on what the author did. But if the author's publisher and the publisher's licensee cannot piggyback, then the system breaks down for any industry, any type of use where there is -- on the web
you've got the ISPs and everything. All of them need
to rely on the individual diligent search for each use
which is why I think at AAP we like to call this
orphan use, not orphan work.

MR. BAND: I think the notion of a search
needs to be reasonable under the circumstances. I
think that goes to piggybacking so it would seem to me
that if you are doing -- you have the hardcover
version and then the paperback version and then the
audio version. For the same publisher to rely on his
previous search from a month ago or two months ago,
that seems completely reasonable under the
circumstances.

On the other hand, if I'm a film company
coming two years later, for me to rely on your search
I don't think that's -- I don't think that's
reasonable. I think at that point I should have to do
my own search or see what you did and maybe rely on it
to a limited extent and then do at the very least
update your search. It seems to me it would be per se
unreasonable for me to be able to rely on your search
from doing something completely different.

MR. CUNARD: I am going to say that we
agree completely and the whole scheme of art
publishing, a scholarship in many other areas would
break down entirely if you had to reclear rights every time there was sort of a new edition of a book. Frankly, the use is the use of the work in the book.

It isn't a separate copyrighted work just because it goes into paperwork or just because it goes into trade. I feel very strongly similarly that there shouldn't be piggybacking per se and that basically each subsequent new user if it wants to rely on this orphan works provision needs to do a sort of reasonable due diligent search itself.

What we said is, of course, if there is sort of openness and transparency with respect to the first user's use, a national place for the subsequent user to go would be to go to the first user and see what they've done and then build on that search as the search tools improve over time.

MR. METALITZ: There is a difficult balance to be struck here because if this whole process is successful, I think one definition of success for this whole process would be increasing skill of searching for -- increasing the general level of skill searching for copyright owners.

Also, as several people have said, Jeff most recently, the tools are always improving so that you can't assume that someone who is not findable and
locatable now will be not findable and locatable a
couple of years from now. At the same time you
obviously have some stability issues in the chain of
distribution and so forth. Perhaps the way to deal
with this is not that this would affect orphan work
status but in terms of the remedies.

Again, we both talk about this but the
available of injunctive relief you don't want to have
a situation where you could enjoin the paperback
because six months later the search tools have
improved after the hardback came out.

But that doesn't necessarily mean
certainly not going forward but there may be other
elements of relief that would become applicable then
because now with improved tools it's easier to find
this person.

MR. SIGALL: Okay. We are almost out of
time. I think most people have had a chance to speak
their mind on these issues. I know I'm out of
questions, for today anyway. Why don't we wrap it up
and the continue again tomorrow for those who are
going to be here tomorrow on the third question of
what we do when the owner resurfaces.

Thanks again for another good panel. A
lot of good discussion. Very helpful to us in trying
to at least identify the issues that deal with if not
resolving them, at least at this point so thank you.

(Whereupon, at 4:54 p.m. off the record to
reconvene the next day.)