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

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

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

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

MS. PETERS: Maybeth Peters. Registrar of copyrights.

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

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

MR. SPRIGMAN: Chris Sprigman, University of Virginia School of Law, on behalf of Creative
MR. ADLER: Allan Adler, on behalf of the Association of American Publishers.

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


MS. MURRAY: Kay Murray, the Authors Guild.

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

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

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

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

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

MR. CUNARD: Jeffrey Cunard, representing the College Art Association.
MS. SHAFTER: Lisa Shaftel from the Graphic Artists Guild.

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

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

MR. METZGER: Oliver Metzger, Copyright Office.

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

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

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

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

So if you do need to refer to a prior topic of discussion, just please remind us what
assumptions you're working from, or what your organization's position was if you advocated a limitation on remedies approach. Just remind us if you were favoring a cap on damages, or reasonable royalty and so forth.

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

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

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

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

The burdens of proof in litigation, such as whether, as stated in some proposals, the copyright
owner would bear the burden of proving that a search was unreasonable, versus other proposals that suggest the burden of proof might be better borne by the user.

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

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

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

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

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

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

But there are certain circumstances, and
I think the representative from Google yesterday, who is not here today, alluded to that.

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

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

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

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

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

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

MS. SHAFTEL: In the case of visual images, whether it's photographs or an illustration,
those are often used, incorporated in other works such as a website or other publication as literally to illustrate a point or an event.

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

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

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

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

But speaking on behalf of our friends at the guilds, I certainly believe that artists should have the right to injunctive relief for violations of the Lanham Act or any state statutes providing moral-
MR. SIGALL: Well, to answer your question, we’ve only consider this in the context of the copyright law and changes to the copyright law. So I believe that, at least for today's purposes, that's the purpose of this discussion.

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

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

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

So there certainly are situations where an artist may not want their works to be used in a
certain way, and in those situations, I think, injunctive relief should be available to them.

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

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

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

If it's borderline fair use, it may or may not be depending on the four factors, but it's I think the least candidate for special negative treatment under an orphan works provision.
MR. SPRIGMAN: I would echo that. We have the Lanham Act, and Passing Off Law. We have state defamation law which will address some uses.

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

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

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

For example, defining what due diligence is. Due diligence, if you were able to identify and locate the copyright owner, but you simply get no answer when you ask for a license, and if the only remedy that you have is a nominal sum and a cap such as in the proposals we talked about yesterday, then you can easily see a situation with a copyright owner
for failing to answer two or three letters perhaps, is left with no remedy at law, no damage remedy, and if they also have no injunctive remedy, it's hard to - and of course if the use that's made of the orphan work may be an extremely valuable commercial use, it's hard to see any equity in that situation, the copyright owner, they are basically penalized for not answering their mail, and in a totally confiscatory way.

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

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

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

MS. URBAN: I am going to second what Paul said on behalf of for example the documentary filmmaker who may be telling a story that not everyone
wants to hear, but is a very important story.

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

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

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

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

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

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

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

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

MS. MURRAY: I think that if you don't do something to limit the availability of injunctive relief, then requiring whether it's a reasonable
license fee, or a statutory cap, would really be rendered meaningless, obviously, because somebody could stop the use and hold up the user for whatever amount of money that they wanted.

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

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

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

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

And so giving them any kind - making the - making the situation turn on one's ability to sue in
court is just not realistic for most artists.

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

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

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

Having said that, I just want to mimic Allan's comments about, I think there could very well be a different type of standard where you've got a work that is embedded in another work, an orphan work which is embedded in another work, in which case I can't see a situation where there should be an injunction that's allowable, where you've got a work that is wholly encompassed, it's an orphan work that
you're distributing, in that case maybe there might be a situation, for instance the situation that Kay had mentioned, where you're usurping the market, you're not giving the copyright owner any chance to recoup any funds, because you're using up that entire market, well then maybe in that type of situation an injunction ought to be considered.

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

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

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

And the gatekeeper says, well, what happens if the copyright owner does emerge? Well, they'd get injunctive relief.
Well, then how are we any better off except with respect to a limitation on monetary remedies than we are today?

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

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

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

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

And why there should be a difference
between that kind of a use, and the use of a visual image, in an art historical book doesn't strike me immediately.

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

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

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

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

Most authors give their publishers electronic rights. Occasionally an author will reserve the right to put the book on the web him or
herself, and that may affect the deal. But there are
cases where publishers don't refuse to publish under
those circumstances.

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

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

MR. ADLER: I just wanted to add in
response to Jeff's comments that injunctive relief of
course is an equitable doctrine, where when a court
considering a request for an injunction is going to
see where not only the merits lie in terms of one's
legal position but also in particular is going to make
an assessment of where the hardships would lie with
respect to whether an injunction issues or it doesn't.

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

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

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

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

When you're talking here about the situation where the copyright owner emerges, I guess the difficulty is in sort of framing the issue in terms of whether the first time the fair use issue would arise is in response to the emergence of the copyright owner, or whether it's reasonable to say whether or not a person's use of the orphaned work following an unsuccessful but reasonable search for the copyright owner would ordinarily involve a declaration of some sort, or not a declaration since we were not in favor of statements of intent to use, but an understanding on the part of the user that if their purpose is to use it, and they believe that would be within fair use, whether in fact the
subsequent emergence of the copyright owner is subject to the same kinds of limitations that we would apply to remedies when we're not dealing with the situation of a use that is subject to limitations of the rights of the copyright owner under the law.

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

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

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

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

So they've done everything they can to assure themselves that the copyright owner can't be found.
After that - and I'm surprised this hasn't come up here - the user is going to be making some kind of fairly significant investment in whatever it is they want to do.

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

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

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

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

MR. CUNARD: Just for 30 seconds.

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

I had been assuming that you were referring to injunctive relief as we currently
contemplate it under the copyright law, which
basically presumes that someone is entitled to an
injunction if the work is infringing.

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

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

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

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

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

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

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

The reality is that it takes a great deal
of commitment to produce something that is personal;
that's creative; that's imaginative; that begins originally not with something that you download off the Internet, but which you start with this and with this, with a blank piece of paper and a pencil, or something, an implement of some sort, and something that comes out of your head, that comes out of your experience, that comes out of your psychology, vision even, in some cases.

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

What do you do? Somebody just out of art school who knows nothing about this, who knows nothing about the copyright act, who knows nothing about the TRIPS agreement, who knows nothing about WIPO or any of the rest of this stuff, will sign his rights away for the rest of his life for any publication that
Conde Nast may ever buy.

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

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

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

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

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

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

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

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

So to just say that they have injunctive relief somewhere down the line, that they should have
no say in how their work is used, does a disservice to artists who are already having a hard enough time to find their way in an extremely commercial society.

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

MR. SIGALL: Lisa.

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

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

As it is, today, certainly in the United States and around the world, copyright infringement is rampant, of visual images, of recorded music, of motion pictures. Known copyrighted work is being infringed at a rapid pace by dubbing, digital media, through the Internet.
And despite a number of very public lawsuits, the public still believes that anything posted on the Internet is public domain; that any book that's in a library is public domain; that if they buy a book or if they buy a CD or DVD, or they buy a poster, that somehow that because they own that physical copy of that copyrighted work that they also own the copyright, and that they can reproduce it at will.

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

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

And someone in his crew pointed out to him over the Internet this illustrator's portrait of himself on the illustrator's portfolio website, and
Saddam Hussein liked it so much that he ordered this printed on the cover of his biography.

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

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

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

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

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

    How could a user possibly identify that image and find the creator? It's very possible that...
the creator could see their image used in another purpose. Maybe, in most cases they wouldn't object to a noncommercial use such as a library or an archive, but they would object to a commercial use.

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

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

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

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

   If a reclamation takes place, and again, I think registration would be a very clear way of
reclaiming, under a reasonable efforts approach. We
could talk about what the criteria would be.

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

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

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

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

The other point that I think is worth
making at this point is, we have in copyright law,
built into copyright law, a mechanism through which
people now, in current copyright law, through which
people can prevent in most cases their works from falling into a category of orphaned works, and that is the voluntary registry that we have in the Codbury (phonetic) law.

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

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

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

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

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

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

You can take into account the concerns that Lisa brought forward. You can take into account the concerns that Brad brought forward. You can take into account the concerns that users have brought forward about the fact that they relied on orphan
status, and the court can then make a judgment on the particular facts on this case. I am or I am not going to enjoin, based on all the facts that are in front of me, looking at the hardship to the plaintiff by letting the use go forward, and looking at the harm to the defendant if I enjoin the defendant from continuing to do what the defendant has already commenced doing.

Doesn't that really solve the problem?

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

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

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

I want to step back here for a second and look at this - we're all looking at this to see whether this is a good idea or not. You presume in that that we're in court, that somebody has actually gotten to court, and we're dealing with, is this a
permanent injunction, do we step over certain steps like a preliminary to get to others. Do we take out certain steps so it makes it easier, or it makes it this and that.

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

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

And they think, well, the best way to make a cheap record is to do digital samples of things for nothing. And they find this new system that's here, called orphaned works. And because it is self serving
for them to go forward and to make a declaration that they have, yes, used everything at their - let's just say reasonableness. Let's say they have engaged in a reasonable search for everything, and they have made some kind of affidavit, and we have an orphaned works designation.

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

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

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

The person, the heir, has to accept the reality that somebody has used a work without their authority in a way that harms the integrity - and
maybe we're talking a little bit about moral rates here, not like we have any, but at least the concept - that there is the integrity of the artist being damaged, and there's nothing to do, because they don't have the resources to fight it in court, and they don't have the ability to really hire an attorney except if you go to the lawyers for the arts who will do it for free, and all that.

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

I always think of the Internet in this way. Everybody talked about the Internet being such
a great thing for culture and all of this. And yet we all know at the end of the day, who makes the most money on the Internet? Pornographers and gambling companies.

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

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

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

There is an ugly underbelly that could occur without some kind of incentive for the potential user to not use a work in a certain way. And I think having injunctive relief somewhere in the system has to be there to keep everything equal where somebody is not going to abuse and harm someone's integrity.
MS. MURRAY: I think that the solution you proposed, David, probably wouldn't do the trick. I agree with Jay that an individual rights holder who by definition probably will be the emerging rights holder couldn't afford to hire a lawyer to prove irreparable harm on those terms. So I don't think it would do the trick.

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

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

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

And constantly throughout these issues, I find that there seems to be the need to have a tradeoff between how much certainty you can build into
the process, and whether or not the process ultimately is going to treat the primary stakeholders fairly.

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

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

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

But my point was in saying that rather than turn the issue over in the classical sense to have the court decide hardship questions in the first instance, I just wondered whether it would be possible, maybe even in the sectoral roundtables that
Steve has talked about, for there to be a discussion about whether an analysis and criteria with respect to considering hardships can just be built into the rule; not simply left to the question of what a court will do, but actually in these circumstances something that would be built into the rule.

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

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

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

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

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

It's the right thing to do.

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

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

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

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

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

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

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

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

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

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

But there also would be a number of cases
in which it's not really disputed that it's an
infringement, and the question I think in our model
anyway would be, what is the reasonable licensing fee
that ought to be paid.

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

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

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

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

So we take a reasonable efforts standard
as the first question. What is my reasonable search?
I don't know. Maybe courts will add some clarity over
time; maybe they won't. Maybe I'm going to have to
post my search to some kind of website to tell the
world what I did. Posting what I did makes me kind of
uncomfortable, but I'm going to do it I guess, because the standard requires me to do it.

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

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

So that's how baroque the system can get.

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

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

But one rubric for how we think about equity is, we think about efficiency. We think about
what creates social welfare, and then we adjust here and there to try to take account of equity.

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

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

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

MR. SLEVEN: In talking about injunction, I understand where we're situated, I'm assuming - I think I said yesterday - I prefer the phrase, orphan use. I assume we are talking about orphan uses. I assume that new uses that begin after the rights holder has emerged are outside the discussion.
Again, there are line drawing problems, but let's leave those aside for the moment.

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

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

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

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

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

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

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

I'm troubled by how a court is going to weigh that, although there are variables depending on how much chance to get recompense that the user has had. So I'm not sure it's workable in the embedded system, in the situation where an orphan work is embedded in another work.
I also want to comment just separate from
this, a few people have talked about gaming the
system, or the possibility that people will take
advantage. It must be remembered: anybody who does
not make a reasonable search, however defined, is
subject to suit for copyright infringement with the
full panoply of copyright remedies.

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

MR. CUNARD: Just building on something
Paul had said, a lot of people talk about the system.
There's actually really isn't a system. What we're
really focused on is what happens if somebody actually
sues you in court? Are you able to interpose some set of facts that might limit remedies, and whether the remedies would be cap or reasonably royalty, or would be an injunction or not an injunction. So it's not as if we're talking about getting a license by filing a notice of intent to use or something else at the Copyright Office.

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

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

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

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

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

So I think, although it's important to understand the relationship between risk and certainty, if we're trying to create a regime that is more certain today, then we should come down on the side of certainty rather than letting people assess the risks as they do today.
MR. SIGALL: I think now would be a good time for a break. We've gone about an hour and 15 minutes. Why don't we take a break until 10:30, and then come back and pick up the discussion, finish this discussion off, and then we can go on to some other topic areas on this issue.

Thanks.

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

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

Brad.

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

I think the subject of orphan works, we probably ought to be specific about what we're talking about. If we're talking about archival works, in legitimate archival situations, I don't think any artist would want to interfere with legitimate archival functions.
If we're talking about direct exploitation of the kind that Jeff was talking about a little while ago, then certainly there should be remedies available, whether it avails the artist to pursue those remedies or not.

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

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

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

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

But at that point the burden would shift
to the copyright owner to prove whether that search was reasonable or not.

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

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

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

MR. ADLER: We have responded in our reply comments to the CCI proposal, which we viewed as splitting the burden in terms of initially placing the factual burden on the user to demonstrate what steps were taken. But then their proposal shifted back to the copyright owner the burden of arguing whether or
not those steps met the reasonableness standard under the law.

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

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

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

And of course I have to invoke this orphan
works provision that says the remedies are limited where what I've done is reasonable.

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

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

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

And again it came down to our attempt to front load the certainty issue a little bit, put some
serious burdens on the user to really do a robust search, and do everything they can, and possibly have that buttressed by some guidelines to help them make a robust search.

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

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

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

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

MR. METALITZ: Yes, a couple of points,
first just responding to what Jennifer said.

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

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

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

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

I agree also with one of the comments earlier that this problem will be minimized, or some pressure will be taken off this problem, let's say
that, if we have some pretty specific sectoral
guidelines worked out, kind of a benchmark that the
courts can use in trying to resolve these questions.

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

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

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

And so we did ask for some manner of
guidelines. That would be incredibly helpful. I
don't know if you could get to the level of making it
a question of law; that would be excellent. But
guidelines would I think really help ameliorate the
problem down the line of concerns of people of using the system.

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

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

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

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

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

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

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

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

MR. SPRIGMAN: So I've actually done orphan work searches. For example I was searching for the copyright owner of some articles by Leo Alexander, who was a psychiatrist who was the chief psychological
consultant at the Nuremberg war crimes tribunals, and wrote some very interesting psychological profiles of Nazis.

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

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

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

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

If a reasonable effort is actually the effort you could make if you could throw infinite resources at the effort, then that effort is never
going to be made.

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

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

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

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

MR. OAKLEY: So one of the things that librarians is good at is conducting searches. But if we're going to have sort of the burden of proof at the outset of showing that the search we conducted was reasonable, then we need a benchmark. We need to know what the threshold is that meets that reasonableness
test. So that does bring us back perhaps to the sectoral discussions of trying to define what those reasonable searches would be.

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

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

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

And another question we asked was whether you incurred any expense in trying to reach the rights holder. And interestingly, 87 percent said no, except for nominal costs, and 13 percent said yes.
We also asked them what their methods were, what kinds of searches they did. And again, this is probably very unique to the writing industry, but most of them, 87 percent, started by contacting the works publisher, and then other publishers of that author.

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

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

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

You have a photograph that has no identifying information. You don't know when it was taken, who took it, maybe even what it is, other than maybe some anonymous soldier marching off to war.
So what are you supposed to do? People do what they can, but frankly, there isn't a lot of purchase. There just isn't a lot of ways in which to sort of tackle the problem.

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

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

And then of course as Paul has pointed out, the onus is on them to have done the right search. So some measure of guidance as to what's reasonable is important. If the standard is, you have to have thrown an untold amount of money at it, and spent five years on it, these works aren't going to
get published and we'll be back sort of where we are today.

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

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

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

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

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

And the precise question I asked yesterday
that I don't think was answered is, what happens when
at that precise moment a reasonable search was done,
but then for whatever reasons, it could be shown that
the person received information about the owner after
that fact, after that point in time, does that affect
the analysis?

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

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

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

With us, I guess it would be around when
second pass pages are circulated. Even that is a
little late. I'd prefer to have it when the book is
submitted to copyediting.
But at some point, and I know you're not going to write a reg that covers the book industry. But that is the concept.

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

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

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

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

So how do you fix that? Maybe, I mean fortunately, in this litigation situation, you are looking retroactively at when the user began to rely, began to print, began to duplicate whatever it is. So
the user presumably has evidence of the timeframe of their actions. So you can go back and see when they relied.

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

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

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

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

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

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

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

   What we're trying to do is make these
works available and disseminated to the public. If
somebody is going to go ahead and use a work and not
do any searching of it anyway, they've basically
rolled the dice and taken the chance that they may or
may not be infringing to begin with. So it's not that
group of people I think we need to address this with
the approach we're suggesting, limitation and
remedies. I don't think it's that group of people that we need to be concerned about here, because they're willing to take a chance and make that work available in some form or another, and not even worrying about looking for who the owner is, because it's purposeful, or was as Steve said, honest incompetence, or whatever.

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

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

So I think the reasonable search would have to be done before reproduction or distribution or the creation of a derivative work. That would be, absent some specific direction otherwise, where I
think courts would go, in assessing this.

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

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

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

Now, again, I'm not saying that a subsequent user doesn't have to do their own search, and if facts change, what constitutes a reasonable search might change, because information about someone's identity might become available such that a
reasonable search would pick it up. So an orphan work for person A may no longer be an orphan work for person B, who makes a use somewhat later.

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

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

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

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

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

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

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

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

And finally on the question of professionals which Jay raised, I would agree that you couldn't really have a per se rule that you have to hire a professional to do this, but on the other hand
there certainly are circumstances in which users who
are not skilled may not be able to achieve a
reasonable search unless they do hire a professional.

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

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

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

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

That's all, thanks.

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

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

Now again, if we sat here, I'm sure we're
all smart enough to build an incredibly complicated
machine like say the copyright law to cover orphan
works. The difference is that the copyright law is
supposed to incent the creation of works and then give
exclusive rights so that these works can be profited
from without the danger of free riding.

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

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

It has to be a cheap system, again, cheap,
simple, formal - that's typically how we do these
things. If we don't want to go formal because we have
some deep opposition to the idea of authors having to
reveal information, then fine, we can do a reasonable
efforts proposal, but we have to be very careful to
make it quick, certain and cheap.
MS. URBAN: So in our proposal, and I think similarly in Kay's Authors Guild proposal, she can correct me, we had suggested what we discussed yesterday, the idea that you have an affirmation of good faith, and perhaps you fill out a form that in some level of detail describes your efforts.

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

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

I think the more complicated question is the one that you raise, which is, what happens if after the reasonable search is conducted the rightful copyright holder comes forward?
Clearly, if the rightful copyright holder comes forward the day after you sign the form, I don't think formalism should go so far as to say well, you can ignore that.

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

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

MR. HOLLAND: There has been a lot of attention, or there is a lot of talk about the certainty that the use would have in making use of an
orphaned work. But what I'm concerned about is the
certainty that the rights holder has that his work was
protected under copyright law.

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

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

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

And in that situation, shouldn't there be
some provision that where you found that the - that
the publishing company has forfeited rights, that the
work has been orphaned, shouldn't there be an opportunity for the author of that work or their estate to reclaim rights? Otherwise you're taking away rights from the author on two occasions, once when he's forced to sign away his rights in return for work, and second, when the work is given to the public because the people who bought his work didn't care enough about it to maintain the copyright.

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

MR. ROSENTHAL: Let me respond to what you just said, Brad. I think whatever else the harms that may come to artists from inequitable bargaining power with large publishers, if the artist has signed the rights away to a Conde Nast or a Time-Warner, and the work of art was published in those journals, it is much, much less likely to be an orphaned work than if the rights had reverted, because everyone knows where to find Conde Nast and Time.
So I think you have other problems that you have articulated, but orphaned work law isn't exacerbating it in those cases.

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

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

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

MR. ROSENTHAL: Following on a point that Steve just made, I think the issue of certainly publication or prepublication is the moment where you have to determine whether a search was reasonable, I'm
wondering if there shouldn't be an ongoing responsibility as well, and the thought of requiring some kind of a notice that is placed on the work, that there is an orphan work incorporated within this new derivative work might be something to think about, because some people already do that. Publishers do that with certain copyrights that they can't clear. They say, we can't clear this. If anybody knows who owns this, please contact us. I have seen that numerous times in books, and it might be something again to make everybody deal in good faith. Just a thought.

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

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

Those are the ones that give users the most concern about going ahead and using a work in this situation.
A question I have is, is there any room for those kinds of remedies to address in a reasonable efforts search system, to address abuse of the system either by owners or who purport to be owners of orphaned works and show up later and say that was my work when in fact it wasn't; or users who purport to say they've done a reasonable search and it's just a pretext and there's really no evidence of that search at all.

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

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

But again, the way you formulated the question is a big puzzling. In the absence of being able to prove that there's been a reasonable search, and the plaintiff not being able to prove that it is unreasonable, the full panoply of remedies is available, including statutory damages if appropriate formalities have been complied with.
So I think we're only talking about a situation here where the search is reasonable, and then - so it was presumably done in good faith, and it was done competently. So then the question is, should there be statutory damages? In mean in some sense the cap that we proposed is a kind of statutory damage that replaces the statutory damage provisions that are in the current copyright act.

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

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

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

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

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

Is that the question?

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

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

Similarly here, either someone who with the requisite bad intent falsely claims that they had
made a reasonable search before making the use, or someone who after the use is made, and perhaps if there is a notice on the work or in some other way it's come to their attention, in any case they falsely step forward and say, I'm really the author.

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

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

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

If we adhere to that analogy, and do not
make any other changes, then attorneys' fees would be available to a defendant under the same circumstances as they are now, and I don't see any reason to change that one way or the other.

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

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

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

MS. MURRAY: Well, attorneys' fees in most
cases would probably vastly exceed the reasonable license, never mind a cap. So we favor the elimination of attorneys' fees unless there is a case of abuse.

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

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

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

If on the other hand you deny attorneys'
fees to plaintiffs, and I think frankly very few lawsuits are every going to be brought, because under any market licensing scheme, it's going to cost more to determine, to have your lawyer make an argument about what the market rate should be than what you're eventually going to get.

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

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

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

MR. ATTAWAY: I think I found something that I can agree with Chris on.
I think the best way to prevent abuses on the users side is to require reasonable compensation if the true owner shows up.

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

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

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

And in those circumstances, unless you have attorneys' fees, I can't imagine what the incentive would be for the copyright owner to be able to make that exchange, the reasonable search or the reasonable licensing fee when the copyright owner
emerges, actually work.

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

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

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

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

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

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

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

   Or there is a litigation over the question of whether or not $30,000 is or isn't a reasonable
number for purposes of determining whether or not attorneys' fees should be paid.

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

MR. ADLER: Can I just respond to that?

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

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

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

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

And I think we discussed yesterday at great length why in many instances that is going to be
wholly inequitable.

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

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

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

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

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

I think, our attorneys' fees proposal is not intended to award attorneys' fees when the user
has acted - has made whether you call it reasonable or
good faith offer of market value, even if the court
says, this is the Picasso of photos, it's worth a lot
more, if you're acted reasonably, the idea is not for
attorneys' fees to be awarded.

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

If it's not an orphaned use, full
attorneys' fees are available already by definition.
It's outside the orphan works exception. And I think
- I see David looking very puzzled - courts do this
all the time. They say you can get attorneys' fees on
issues one, three and five, not on issues two and
four. It's a standard show me your time sheets and
let's assess how much time you spent on the issues for
which attorneys' fees are awardable.
MR. SIGALL: Let me just get a point of clarification from Paul and maybe Allan.

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

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

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

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

I have not abandoned my work simply because somebody can't find me. I know a lot of people who came into the illustration business, earned a living at it for five, 10 years, in some cases did incredibly good work, but couldn't make enough of a living at it that when they turned 30 or 35 and they
wanted to have a family, they took a real job and gradually drifted out of the business.

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

MR. SPRIGMAN: I want your banjo.

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

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

MR. KUPFERSCHMID: I just want to follow
up on what Paul was saying, and Jule, your follow up
question to Paul and Allan, and to be clear, and to
reiterate what the comments that AAP and SIA and AAUP
filed. It talks about attorneys' fees and court costs
being incurred as a result of quote unquote bad faith
on the part of the user.

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

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

MR. SPRIGMAN: I think we'd all agree that
it would be bad if we assigned an orphan works system
that did no useful work at the end of the day, right?
And the reason all these comments are important is, they get to this issue of damages and attorneys' fees and presumptions that make litigation either very expensive or relatively inexpensive, right?

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

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

So here's the data. The Copyright Office collects registration data every year, and if you graph that registration data, one thing you notice is that it's been rising from 1910 to 1991, it rose and rose and rose. The economy grew. People created more and more works. The population grew. The expressive output of the country grew. And the Copyright Office gets more and more registrations as a result. That makes a ton of sense.
Okay, then suddenly in 1991 the number of registrations begins to fall, and it keeps falling, and by 2000 registrations have declined about 20 percent from their peak in 1991.

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

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

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

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

So again if the central point here is that the works we are seeking to free up are works that don't produce much economic value in their current
form, then we had better have a cheap simple system to
do it, or the system will exist but it will do
nothing.

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

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

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

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

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

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

MR. SPRIGMAN: Chris Sprigman from
University of Virginia law school representing Creative Commons and Save the Music.

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

MR. HOLLAND: Brad Holland representing the Illustrators Partnership.

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

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

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

MS. SHAFTEL: Lisa Shaftel, Graphic Artists Guild.

MR. ATTAWAY: Fritz Attaway, Motion Picture Association.

MR. SIGALL: Okay, on this last topic we're going to be dealing with international issues. And I think we've touched on it a little bit in
previous topics, but we haven't looked at it specifically. This is the overarching international framework for copyright, which has direct bearing on the kinds of things you might do to address the orphan works situation; the question of what international copyright rules might limit, how they might limit what we could do as a matter of solving this problem or addressing this problem, and how that interplays with the types of mechanisms we would choose to help resolve this problem.

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

The second major issue is how the limitations on exceptions - or the requirements for exceptions and limitations to copyright embodied in one place at least, TRIPS Article 13, would affect the solution that we might come up with and what parameters we were required to operate under or within in coming up with a solution.
The other two subtopics that we've identified are the question of whether, given the analysis of those first two topics, whether excluding foreign works from an orphan works system is appropriate or something that should be considered to help avoid international issues that might come up, or any other ways that we might address international copyright issues that might arise from such a system.

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

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

So those are the four main areas. I will start with a question related to the formalities issue, and the Bern Convention, which is this: If you went with a reasonable search approach, and through
either sectoral roundtables that came up with guidelines or common law developments in the courts it was determined for, let's say a particular sector of copyrighted works, photographs or illustrations or something like that, it was determined essentially that registration in a voluntary registry, an author's failure to do that would almost always result or very likely result in a designation of the orphan work, designation for the purpose of the system.

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

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

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

MR. SPRIGMAN: So I think the answer to your question is, in my view it's very unlikely that
it would raise an issue of Bern or TRIPS compliance.

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

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

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

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

For example if you do not register your work, you are unable to get statutory damages for the
period - for any infringement commencing before registration actually occurs.

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

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

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

And so for those works, you get the notion
that these works are not sufficiently valuable enough to exploit through the expensive mechanism that the copyright law currently provides, which is infringement, damages, lawsuits, customized licensing. These are all very expensive ways of exploiting works. They work very well for commercially valuable works. They work not so well for other works.

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

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

This is not to say that some authors won't make mistakes. Some will. Some will choose to register works that frankly can't be exploited
effectively through an expensive property rule system. Some will choose not to register works that will frankly be best exploited through a property rule system, and they will default to the liability rule. And if you're worried about that, you can design a recapture provision like the ones we talked about in yesterday's and this morning's session, a recapture provision that allows people to cut off prospectively uses of works where those works turn out to be valuable.

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

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

MR. METALITZ: Thank you.

In response to your question, Jule, I think that there would be issues under Bern, at least
for non-U.S. works. In the situation you described, which was that your failure to register in a voluntary registry meant that you were almost always deemed an orphan, I suppose it might be different if you could show that almost all works in a particular category were in fact registered there, and I suppose at some point it becomes a de minimum issue if one out of a million isn't.

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

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

To me that's a good reason for - if we are to move towards statutory change for an orphan works system, that's a good reason to make the first step apply only to U.S. works. That way we avoid the question, which I think are serious questions, about
whether the kind of system we're talking about here, even one that involves a reasonable efforts approach, and one that involves very sharp restrictions on the remedies that are available, I think this does raise questions under our international obligations, not necessarily insoluble questions, but we can avoid those questions.

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

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

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

MR. FEDER: I think it's regrettable to prejudice American works while seeming to favor foreign works. Although I'm speaking mostly really on behalf of foreign artists, American artists are of concern to me as well.
Bern Article 5 Subsection 2 says, it's very short, quote: "The enjoyment and the exercise of these rights shall not be subject to any formality," unquote. It doesn't say, good formalities are okay; bad ones are not. It doesn't say convenient ones are okay.

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

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

But it is - they did not - had they known, they did not choose to spend their time filling out forms, sending in fees, and so on, thereby protecting their works.
They may or may not have been cognizant of the Bern Convention approach, which is that works are protected from the instant of creation.

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

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

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

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

Quote: We have made every effort to
obtain permissions of all copyrighted and protected images. If you have copyright protected work in this publication and you have not given us permission, please contact us.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So that was the basis for the proposal that we discussed yesterday. I guess we're going to
come later to the inclusion or exclusion of foreign works, a topic on which I have quite a bit to say.

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

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

So we can certainly inform the president and the Congress on that, and of course that's the principal job of the Copyright Office. But at the end of the day it doesn't matter what academics think, what all sorts of other people think, fundamentally the first call on this is what the Congress and the president have said, and at least with respect to the one data point we have in Section 412, they've apparently concluded that some sort of formality and
condition with pursuit of remedies is not inconsistent with 5.2.

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

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

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

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

The failure to register, I'll say again,
not only takes away statutory damages, but takes away the possibility of attorneys' fees. And think again about the realities of litigation that we've been talking a little bit about today.

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

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

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

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

I wonder if you have any observations about how the arrangement that is ultimately negotiated relates at all to the license fee that
would have been charged up front if in situations, in a book they may have 50 illustrations, if they can find 40 people and there is a license fee negotiated, how does that compare when the other 10 or some of the other 10 come forward after publication? Can you generalize about that?

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

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

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

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

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

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

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

Sorry.

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

I think with respect to - most of Ted's organization's clients are known. I think most of us have heard the names he mentioned. And that would be
also true of VGA. The starting point of any due diligence search is going to ARS and VGA. There is a standard rate card. You’ve got to be a pretty bad scholar, historian, researcher not to start with the principal collecting societies if what you are interested in is 20th century or now 21st century art.

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

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

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

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

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

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

MR. SPRIGMAN: So a couple of responses. I don't regret the absence of statutory damages and attorneys' fees. I celebrate. I think that - no, I
understand - I think that the reason for statutory
damages and attorneys' fees being limited for
nonregistration is a lingering and I think eminently
sensible desire on the part of the United States
policy to incent registration for reasons that are
pretty obvious.

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

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

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

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

And so they do not - the inducements to
register that I think work very well for valuable,
commercially valuable works, do not work particularly well for commercially less valuable works, which to pick up on a comment by Jon Band yesterday, might be very valuable in other ways. They might be valuable culturally. They may be valuable historically.

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

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

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

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

And their system has worked for 120-some-odd years since Bern in the 1890s.
MR. SIGALL: Let me just skip to the third subtopic, because I think we're at a point to talk about that.

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

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

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

And if both those things are the case, then shouldn't we try to devise a system that creates an incentive to — for owners to organize in collective
management organizations in a way that essentially
ythey serve a function of not only collecting and
distributing royalties, but essentially they become
the searchers for copyright owners, in a sense that
folks like members or others go to these organizations
and say, we want to use these works, and the
organizations are the ones trying to find the
illustrators that Brad represents, or others, and say,
these people are using these works. Let's get them
together.

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

So if anyone has reactions to that.

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

By the way, what we try to do, we maintain
a registry - and I'm not in favor of registries as a
requirement for orphan works, don't get me wrong - but
we have one of about 40,000 names, and if somebody
comes to us and looks for an artist, not on our list,
and if we have that information, we do make an attempt
to keep information on nonmembers, we very happily
give that to the inquirer, but we don't always have
such things.

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

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

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

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

MR. SPRIGMAN: Okay, so collecting rights
societies obviously have a big role to play, for
commercial artists. And I think it is true to my
observation that this is done better in Europe than
it's done here.

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

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

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

Now with respect to the issue of why is
this a problem, orphaned works now versus before, I
think it's pretty obvious. We've gone through this
huge transition from an analog to a digital world.
And that transition has enormous implications, and one
of the biggest implications is that it absolutely
transforms the economics of publishing.
It's not like traditional publishing houses are going to disappear, but their role is going to be different, and there is going to be other kinds of publishing operations that operate digitally and operate in a much lower cost environment.

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

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

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

And in that world, the orphaned works problem become a real problem. Europe is going to have the problem too. It may be that the European mindset is a little bit different, and typically I'm
an admirer of the European mindset. In copyright, I think it's a little bit muddled.

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

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

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

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

This is almost the opposite of orphaned works. There's no system in the United States willing
to find those authors and to indemnify Copydan against false claimants.

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

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

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

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

We sent the proposal to them along with a flowchart of a copyright bank and how the entire thing
would work last October. And we've been sent a letter thanking us for our patience, and waiting for a response.

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

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

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

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

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

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

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

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

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

MR. HOLLAND: Then use a disclaimer, use
them and have the disclaimer. That solves it.

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

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

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

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

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

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

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

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

MR. CUNARD: The problem is, we're dealing with the copyright law as we have it today. And the copyright law as we have it today draws not distinction in terms of rights as far as I understand it between a Haitian artist, Picasso's estate, or a photographer who was doing photographs for a yearbook
in the 1940s, that's what we heard yesterday from all
the people representing photographers.

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

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

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

We can as you mentioned, Jeff, try and
deal with the situation - I guess I look at it this
way. We're trying to sort of smoke people out. And
in the sense that if you create one way to incentivize
folks in Brad or Lisa's group, they may not think that
this is the best way to go, they may object to this,
one way is to create a orphan works system that says
to the illustrator, if you don't start getting part of
a collective, if you don't start participating in that
way, you might suffer the consequences of being lumped
in with the batik printmakers who are taking a lot of
abuse in this proceeding, you may be lumped in.

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

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

So the question is, maybe you can identify
that group that your group wants to make most use of
in the negative, in the sense they're the ones who
have not managed to join a collective organization
like the one Ted operates or the one that Brad is
envisioning. They're the ones who haven't done that,
and in the sense that if your group - people in your
group are trying to search, they search those places that exist, and if they can't find them, that's most of the way there, that's most of the way to a reasonably diligent search, and you try to define people in the negative.

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

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

So I think Steve had his hand up.

MR. METALITZ: Just an observation, that the discussion over the last few minutes, which I find really fascinating, helps to underscore the importance of approaching this, a lot of this anyway, on a sectoral basis. Because the answers are going to be quite different depending on the different kinds of work.
I understand that Jeff and Brad, they're both talking about visual art works, but if you talk about, you have submissions in the record, for example from ASCAP and BMI, that assert that the number of orphaned works in their sector would be either zero or vanishingly small. I'm not asserting that it is zero, but it is certainly much smaller, especially if we did this in a stepwise fashion and started with U.S. works.

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

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

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

And that's just not true. So Save the
Music again is an organization devoted to the preservation of Jewish culture, and especially Jewish cultural music. We got ASCAP's comments, and we kind of chuckled, because we've never been able to find information about a work that we wanted to license through ASCAP or BMI. And in fact we went through our current list of things that we wanted to license, the search results are zero for those collecting rights societies.

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

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

So this is enormously important to our own understanding of our history. This world that Save the Music lives in is orthogonal to the world, for the
most part, that ASCAP, BMI and the RAA live in. That is the problem.

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

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

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

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

MR. CUNARD: The differences, though, are
between coverage and sort of due diligence and searchability.

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

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

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

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

And I've searched, but obviously the trails, the search trails are long since overgrown. How do we deal with those people who are outside the established systems of ASCAP, BMI, Sound Exchange,
ARS, VAGA, the would-be illustrators partners, partnership. We're going to search every single illustration ever created in the United States.

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

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

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

Okay, sounds good.

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

The non-presence of certain works in well
known databases like ASCAP and BMI again takes you a long way there. And the question is, if you have a standard that says, not being present in these databases helps establish that point, you may incentivize people in Brad's group or Lisa's group or some of the others to become part of those, or to just stay on the sidelines in that sense.

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

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

The first question that I have comes from the first part of the three-step test, which is, the first prong is the WTO dispute panel in 2000
identified, it has to be certain special cases.

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

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

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

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

We've been over that.

The second point, though, which I think is
also important, is that even if you get to Article 9.2, TRIPS Article 13, and the so-called three-step test, it is far from clear that that three-step test is in fact a three-step test.

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

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

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

They're talking about a compulsory license, or free use. Compulsory licenses, or some limited use of compulsory licenses, are specifically allowed for in Bern by virtue of that, separately,
TRIPS. And this article is really a limitation on the use of compulsory licenses, gratis compulsory licenses.

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

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

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

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

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

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

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

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

MR. CUNARD: So I have a few thoughts.

First, I think the WTO panel decision is one data point, one massive almost unreadable data point, but a data point nonetheless, and was one obviously that was decided in a circumstance I think radically, almost 180 degrees different from what we're talking about here.
We're talking about some work where people had in fact normal exploitations of work that were ongoing and had been ongoing for several years, and they were being sort of pared back. We're talking about something potentially quite different here.

And second, with respect to the panel decision and its view on special cases, if you look at what it said, and you look at what Daniel Gervais (phonetic) says, there are sort of two ways in which you can think about a special case. One is that it is clearly defined in national legislation, and narrow in scope and reach. And I may disagree here with Ted that certain and defined doesn't mean with respect to a actual particular work or set of works. It means particularized or narrowly circumscribed with respect to a particular application, and here, as we've described it, it's a very narrow, narrow, narrow set of circumstances, where the copyright owner's rights would be circumscribed.

And second, the panel I think intimated that it was possible that special purpose could be read by reference to a sort of special legislative or a national or a statutory or a public policy purpose,
and of course that's really the genesis of the copyright office's notice that under U.S. law it really makes some sense to have these works which are truly orphaned find their way back into the commonweal of discourse, which seems to be in fact a very legitimate public policy purpose. I also don't think we should ignore, although Professor Ginsburg dismisses it, the idea that a limitation on remedies is not really a limitation or exception in the way that we have referred to these things in U.S. copyright law.

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

MR. METALITZ: Just a couple of observations.

Certainly to the extent that the orphan works regime is clearly defined, and the due diligence standard is well defined and I guess I would say rigorous, that helps the case that this is a special
case. That was one of the points that Jeff made. The fact that, at least we've heard many times, and most recently from Jeff but others have said it and we've said it, that there are certain sectors in which there will be very, very few orphan works, certainly I think is some evidence that it is not the situation where everything has equal potential to be an orphan work.

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

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

I guess the final point I would make, which I've made before, is one way to take a little of the tension off this question is to apply this to U.S. works, and I say that even though from the perspective as the recording industry's user, it would probably make sense for it to be applied to all works, because we may want to use non-U.S. works whose authors can't be found or identified.
But for other reasons I guess we'll get into later, this is one reason why it would probably make sense to start just by dealing just with U.S. works, because then you don't have to confront this question.

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

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

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

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

So I just wanted to bring that up.

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

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

MR. METALITZ: Well, I think to echo what Fritz was saying, to the extent that the system provides in that circumstance for the copyright owner who comes forward to, even if they're not able to
enjoin further ongoing use is what you're saying, even
if they're not able to enjoin that, if they are able
to claim compensation that is equal to what the
reasonable licensing fee would have been, it would
certainly ameliorate at least the impact on the normal
exploitation of the work.

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

Now obviously they were never given a
chance to refuse based on the facts here. But had
they been reached, and had they agreed, they in theory
would have come up with the same outcome.

So I think that would at least weigh in
favor of the argument that this doesn't conflict with
normal exploitation of the work.

If in fact they get nothing, or they get
only a nominal amount that doesn't bear any relation
to what the market might have produced, then you might
have a different situation.

MR. FEDER: I think it very much depends
on what happens after the work has been exploited. It
seems to me if no author shows up, then the user of
course is likely to continue to exploit the work
without having to pay a fee.
And by the way, this is tangential, but the Canadian system, if I understand it correctly, would have obliged the user who couldn't locate the work to deposit a fee, a fixed fee, probably a modest fee, with the CCB, and then they would distribute it to the artists as the artist does appear.

This is something, as I pointed out before, that the collecting societies are prepared to do and do do in different European countries.

So one scenario is that nobody shows up to claim interest in the work so it continues.

Another is when the artist shows up, and what do you do at that time? Do you negotiate for the future?

Logic would say yes. Now the artist may not want the thing to be on the market, and that is a little bit like that the old NIE and restoration, you had to decide what to do on the basis of the artist showing up and making a claim.

There is an issue of course as to whether it's possible to make a deal which involves a retroactive payment as well as a future payment.

And the third, but it's the most dangerous thing, is there should be no piggybacking on the first use. In other words, a second or third or fourth user
should not come along and say, because the first person cleared the rights, I can now use that clearance and go on and make exploitations.

But I think the marketplace tends to resolve these issues. I think it's an important fact.

MR. CUNARD: I think it is intuitively appealing to say that where the copyright owner is unlocatable, and is not exploiting the work, that the exploitation of the work by the user does not conflict with the normal exploitation of the copyright owner.

That seems to be intuitively appealing. I realize others wish to poke holes in that intuition, but to me that just seems like a matter of common sense.

The question is whether or not when the copyright owner comes forward, there is a conflict then between the users continued use and the normal expectations of the copyright owner.

And to be sure there may not be agreement for the reasons we've all talked about here, but there would be a sort of limited set of remedies of one sort or another that would be made available to the copyright owner, and I accept for the moment and for the sake of argument that a reasonable license fee would be more appealing from a three-step point of
view.

But I don't accept for the argument that a cap approach is necessary inconsistent with Bern in these circumstances.

MR. TAFT: As someone who doesn't really know the international law on this, I wonder about the concept of normal exploitation, especially as applied to traditional cultural expression.

Normal exploitation might be in a completely noncommercial context, and how does that relate when a commercial entity wants to use some piece of art from a traditional cultural expression.

MR. METZGER: For Chris I think I understood you to say that there would be a difference between a compulsory license and a limitation on remedies.

And I'm just trying to understand, under some of the systems contemplated here, what would be the difference between a compulsory license and a use without permission for a fixed fee?

MR. SPRIGMAN: Both the Stockholm revision statement and the single WTO panel dispute, the 110.5 panel dispute that dealt with this, both deal with compulsory licenses that are set for a fee of zero, okay, gratis uses.
And the difference would be, at least under our proposal, that we are trying to use a real market mechanism, not some false or unreliable market mechanism, like a judge looking I don't know at what to try to figure out what a bargain for exchange would have looked like.

We're using a real market mechanism, which is a signal sent by the user about the commercial value of a work. And that signal I think the Copyright Office data suggest that that signal is pretty robust.

We're using that signal to set a price, and we're pricing a default license at that price.

Now what would the price be? You can think of the price of the default license, the fee that gets paid to the rights holder, as a cost of complying with the requisite formalities.

So the requisite formality in the first instance would be registration, and then keeping your address up to date, or your contact information, or nominating an agent to handle this for you.

You could come up with that price, and if a work was expected to return below that price, the person would basically choose the default license. If the work was expected to return above that price, the
person would choose to use the formality and retain all their remedies.

And the point there is, you actually get a market mechanism. That sends a price signal. And the compensation you would get from the license is actually the closest thing you can get to a market rate.

So I also think that cap damages, capped at a certain level, would be acceptable under Bern, but I think that the default license system is a better system because it makes use of the information we can actually get.

I think that copyright arbitration panels come up with a market price. I think they come up with some notion of equity. But the market, typically, equity is kind of a subsidiary concern. It's supply and demand, and that's typically what the economy runs on, and that's what we're trying to provide.

MR. SIGALL: Can I ask you a follow up question clarifying? I want to make sure I understand your position, especially with respect - because much of your position I think hinges on the notion that failure to register is a signal by the copy owner of the value of the work.
So let's take a specific example from a Supreme Court case. The documentary television film, what was it called, Crusades in Europe, produced - about General Eisenhower, General Eisenhower's memoirs from World War II, it was produced and exhibited on television in the '50s and '60s.

It was not renewed in 1978 or so, or somewhere thereabouts, and therefore fell into the public domain, which allowed the company, Day Star, to repackage it and avoid copyright issues with respect to the case that went to the Supreme Court.

I guess I'm understanding your position to say the fact that it was not renewed in 1973, say, for example, was a signal by the creators of that work that their work was worth less than $10 or however much it was - cost to register at that point.

That's what we should, the marketplace should conclude about that activity?

MR. SPRIGMAN: Right, so the way to look at that example is to say, as economists would, that in any regulatory system error is endogenous, which means basically that individuals will make errors, but we rely on incentives to properly incentivize classes of people. And you can deal with individual error within our proposal. I'll get to that in a minute.
But the real question is, for 95 percent of rational individuals, will they respond to incentives? And the evidence that we see in the historical data suggests that, yes, they do respond to incentives.

And we see that today. There is no requirement that you register your copyright, and yet thousands and thousands of people a month, and corporations, do, because they have valuable properties, and they wish to have the very important remedies of statutory damages and attorneys' fees available to them. And so they take advantage, they invest, in that protection, because it's an investment. It's an investment of money and time. Not a large one, but it's an investment.

So okay, properly incentivize your rational person. And then how do you deal with error?

Well, in our proposal we try to deal with error in two ways. One of which we talk a lot about, the other I talked a little bit about yesterday.

The first way of dealing with error is, don't make the formality immediate. Wait. We suggest waiting a quarter century for most works. Allow people to understand what their value is.

You're not going to deal with the orphan
works problem in full, but you're going to reduce the risk of error individual cases.

The other thing that we talk about a little bit is this possibility of reclamation. If you turn out to be wrong, you can cut off future uses prospectively by complying with the formality.

You may in fact not be able to cut off the use that was made before you registered, but that's kind of life. That's a necessity for the system to work.

There is one other thing that I think is worth saying, and that is, that our experience with formalities was lengthy. We had almost two centuries of them. But we had formalities under the old regime of paper and nail and you know copies on carbon paper.

We are living in an age where a system of formalities can be made very cheap, very efficient, and in fact, largely privatized, so the collecting rights societies, they collect enough information where they can format it properly and feed it into a registry. I can happen like that.

And for creators that aren't in a collecting rights society, businesses could compete to solicit their information as well.

We have competition in the Internet domain
name space, and registration has gotten easier, and it's gotten cheaper.

So this is the model. And the idea is, we are using the market mechanism where we can find it.

MR. SIGALL: I guess - I understand the point about error. But what I don't understand is the point that you can conclude something about the value of the work from the failure to register.

Imagine the situation in 1976, where you have both the seller and the buyer of that particular work completely ignorant of both the copyright law and the current situation in the Copyright Office with respect to the renewal of that work.

It seems impossible to me that if they negotiated to make VHS, maybe a Betamax version of that work, for sale to the consumer, that if they came to a conclusion that a reasonably fair price for the license to do that was $10,000, I don't understand how that - that seems to be completely at odds with the notion that the value of the default license should be somehow pegged to the value of paying - of not registering or registering.

I guess I don't see that - I'm trying to understand how that's an argument against the use of a reasonable royalty approach, or as a measure of
fixing the value that the user should pay for the use
of the work.

MR. SPRIGMAN: Okay, so the argument
against a market or a reasonably royalty approach is
that there is neither a market nor in most cases
reason, there is just a few guesses as to what this
might be worth.

The author comes in saying, I'm Picasso,
and the user comes in says, no, you're Joe Schmoe.
And the value is set somewhere between Picasso and Joe
Schmoe, but there are no principles or test that tell
you how to do that.

The argument that a decision whether or
not to comply with formalities suggest something about
prices, the argument is not that it suggests exactly
what the work is worth, because that's a bargain for
exchange; we only know that later. But it suggests a
threshold. It suggests either that the work is above
a threshold or below it.

And the threshold is the value of the time
taken to educate oneself about and comply with the
formality, and the actual expense of complying with
the formality. That is the threshold.

Now the case of a videotape, people put
idiosyncratic values on things. So it might be, I
don't know who owned that, Time-Warner? Okay, it might be that Fox made a mistake about what they thought it was worth. That ended up being a Lanham Act case because of that mistake they made.

But it may be that they made a mistake about what that was worth. It may be that they screwed up and just didn't think about it, and they let it fall into the public domain. That will happen too.

If you make the formalities simpler and more straightforward, and keep the rules simple, that will happen less. You will push the rate of error down, but you will never get rid of it, and there will always be error.

And so you come up with mechanisms to try to remediate error as much as you can. That is the 25-year delay, which gives people time to think about it and get educated.

And you come up with mechanisms even after they make the error for them to vindicate as much of their right as they can. That's the reclamation idea.

But again, the concept of the copyright law as it applies to orphan works is, can we free up some of these risks for good valuable socially valuable pieces? And we could spend a lot of money
and a lot of time on a complicated system, and we could still get error. We're going to get so-called market licensing fees that are either above or below market. There's going to be error in the system, no matter what system you pick.

MR. FEDER: You cannot reinstate formalities without incurring the great displeasure of the WTO and the rest of the Bern members. I mean there is just no question about it.

I mean the formalities as they were so long practiced by the United States, some of which still survive, are really a dead letter as far as our Bern partners are concerned. It just won't fly.

MS. SHAFTEL: I'm pretty much surrounded by IP lawyers, and there is a lot of legalese going around, and I'm visualizing a lot of ivory towers.

So I want to throw out a little reality check for those sitting in the ivory towers.

I know how many people are members of the Graphic Artists Guild. I have a pretty good idea of how many people are members of the Illustrators Partnership and the other organizations within their coalition.

I read a really interesting statistic a couple of months ago out of the blue that the IRS for
2003 recorded that some 120,000 people claimed that their profession was an artist.

We don't have 120,000 members in the Graphic Artists Guild. There are a lot of people out there who are, at least to the IRS, claiming that they are artists, whatever that means to them, however much of their income is from that, who are not going to join an organization; who are creating works that they are not registering.

The information about copyright has been out from quite some time now, certainly since 1976, the requirement for formal registration has been dropped.

I didn't learn any intellectual property law in my so-called professional program in arts school, right through a master's degree. And as much effort and time as the Graphic Artists Guild and the Illustrators Partnership and other organizations put into educating our members in artists about copyright, the hordes are not registering.

And it's not because they don't think their work is valuable. They either, as Ted said, do not want to be part of that system, don't think they should have to be, whether they realize it in that sense or not believe in their moral rights of the
inherent ownership of their work, and do believe that
their work has intrinsic value.

And just because I don't have a client for
something that I create today, or a nearly final
sketch that I create for a client is rejected because
they decide they want something else doesn't mean that
somewhere down the road there isn't a client who's
going to come up who describes to me they want exactly
what's sitting in my portfolio from a couple of years
ago, and I can pull it out, tweak it, and it's worth
the market value of what that usage is that that
client is going to use it for.

And yes, of course, Pablo Picasso is going
to command more money than my niece. That's obvious.
And it also has to do with usage. And as I discussed
yesterday at least for illustration and graphic art
and all the related fields, there is some
documentation of the range of fees charged by artists
that has been documented for the last 20 years in the
Graphic Artists Guild pricing and ethical guidelines.

The information is there.

I also want to define some misconceptions
that a lot of Americans have about what is an artist
and what is art. And I hear this said in this room
today, and I hear this all the time. You say the
word, artist, to a person, and I get this. What do you do for a living? I'm an artist. And the immediate thought that people have is the smock, the beret, an easel, a canvas, oil paint, and a little brush, tickle tickle and I'm making paintings and I'm selling in a gallery.

The number of Americans that actually do that are about this many. The number of Americans who do that who make a living selling those paintings in a gallery are about that many.

There used to be two different terms - fine artists and commercial artists. And fine artists and commercial artists both resented both of these, because the implication was if you were a fine artist your work had no commercial value. You were doing it for the love of making art.

And if you were a commercial artist, well, it wasn't fine art work, you weren't a real artist.

So now we have this generic term. We have politically correct. We have new words now for everything. We are graphic artists, one who creates graphical works. And any artwork, whether it is fine art, whether it is folk art, whether it is an illustration, has commercial value.

A painting can be scanned or photographed...
and then reproduced.

An illustration that is created digitally in an immediately reproducible format obviously can be reproduced.

Chrissy Tenter (phonetic) who Brad mentioned who heads up the Australian reprographics rights royalties organization, told me that she is oddly and inadvertently found herself in a situation of actually acting as an agent on behalf of the aboriginal artists in Australia. And it has become very popular in Australia to use aboriginal artwork, those patterns, those designs, in commercial reproduction of clothing textile patterns, what have you, and those artists never registered their copyright, and in many cases aren't traceable.

And she is inadvertently found herself in a situation of negotiating usage rights on behalf of that work, and returning that monies to aboriginal tribal councils.

So that batik block print that maybe was produced as a one off for a sarong could possibly be commercial art, and there is nothing to say that the original illustration, perhaps, that was done on traditional media doesn't have a separate value as a work of fine art unto itself, aside from its value to
be licensed or reproduced.

MR. CUNARD: So the position of Brad and Lisa is, I've found the picture of the batik in a book, and I want to use it in a book that I'm doing, studying images of batik art or indigenous folk art around the world.

The position of Brad and Lisa, as I understand it after two days is, you should not be able to do that because you cannot find the artist, period, end of story. That is your position.

MS. SHAFTEL: That's not what we said at all.

MR. CUNARD: That's what I'm hearing.

MS. SHAFTEL: No, what we said was, we both agreed, after due diligence search.

MR. CUNARD: Which is going to be hard. So if the image was created sometime between 1940 and 1975, in Indonesia.

MS. SHAFTEL: If the search was in good faith, and Ted gave the example of a disclaimer, for lack of a better legal word - correct me if I use the wrong one - that can be attached to the publication, which says, sorry we tried, if you turn up come contact us, we'll pay you.

That is the best case scenario, but what
we are concerned about as creators is that there is no free lunch. Any time a work is used there should be payment made, and that keeps the integrity of the whole legal principle of copyright intact. You must pay for usage, even if there isn't an individual to be paid; you must pay for usage.

Because otherwise works that are truly orphaned are free, and that devalues other works where the creator does exist.

So in my example, the great grandson of the grandson of the person – purported grandson of the person rings me up after my book has been published by Abrams, by some major commercial publisher, and says, that was an important batik print of my grandfather, who lived on such and such an island. Please pay me $10,000. And the book has only sold 1,000 copies at $20 apiece and has made no money.

So the Brad/Lisa view of the world is, the person should be able to go to court and get an injunction against the publication of that book, get attorneys' fees, and if I don't – unless I pay the $5,000 – that as I understand is your proposal?

MR. HOLLAND: Yeah, if I can just speak for myself for a second, I'm reminded of the fact that of all the people who would love to have a Van Gogh
painting hanging in their dining room, very few of them would probably want to have him over for dinner because of some kind of scene he might make.

I don't understand the disdain of users who say they're having difficulty clearing the rights from artists for self help efforts by artists to find means of clearing their rights for users.

We're basically like a neighborhood watch organization that has gotten together to try to find some way to police our neighborhood when the law isn't exactly doing the job.

Now I - the examples that you have given of folk artists and so on, I have great respect for, I've learned a lot from folk artists. And I don't think that the case that we're making here as artists is much different than those folk artists would make if they were here in our place.

I don't know that they would want to be patronized by people who say that their work is basically worthless and therefore should --

MR. CUNARD: I didn't say that. As you know, I didn't say that. No one would be publishing an entire book about it, somebody's life, somebody's work, somebody's career, is going to be based on republishing it.
I'm saying precisely the opposite. I think it's important to understand that that work has as much validity and as much dignity as the work of your membership and as the work of Lisa's membership, and those people should be entitled to be paid.

The question is, how much do you pay them when there is no market rate available, as there is for the work that you and your membership create?

MR. FEDER: I would just pick up on some of the things Brad said.

It seems to me that there is a market rate, but you've postulated a guy in Bora Bora as the grandson of the original batik maker who is going to get hold of a lawyer, an intellectual property specialist in the state, going to get him to demand a very large sum of money, and it's going to take the time and effort to track this. It just doesn't happen that way. Real life is not that way. It is not that way in almost every case. It's very exceptional, the person will actually go to court.

And why won't they? This is true of our European members and American members. Because they know it's a nightmare to go to court in the United States on copyright questions. It gets dragged out. There are so many provisions in American law,
especially those that survived from before 1978, and have to do with formalities, that it drives these people insane.

And even when they have money, like the Matisse, they don't want any part of it. And what they will do increasingly is, they'll try to bring an action if possible in their own countries, where the law is more favorable to them.

I'm talking about things that are distributed not only in the United States but abroad as well.

MR. TAFT: Yes, I want to go back to what Lisa said about 120,000 people saying their artists. In fact that's the tip of the iceberg. It's really everybody. We're all creators in one way or another, and you never know if something you create, whether it's an email or a song you sing, will somebody - if it's been recorded - become of value.

And there's just no way until that particular item is used that you can put a value on it.

And I hate the thought, for instance, Chris, what you were saying, that those of us who are not even in that 120,000 are somehow left out because they would have absolutely no idea that what they are
considering is - will ever have any value.

And again, I bring back the case I brought up yesterday, the arrangement that Poor Lazarus sung in the film, "Oh Brother Where Art Thou?" by a prisoner from the 1950s or whatever.

Now there is a good chance that that would have been a orphaned work, and the prisoner would have been out of luck. After the film came out, then went to the producer and said, I want some money for this, he may have been out of luck, under certain regimes, Chris, perhaps what you were talking about.

Fortunately, he was found before, and he got a check for six figures or five figures, something. He got a good check for singing that song.

So I guess that's my concern with sort of having some kind of cutoff for those who don't consider themselves as artists, who don't consider their creativity to be of value.

MR. SPRIGMAN: Yes, again, I agree with Michael's predicate, which is that we are all in some sense creators. I mean the stronger version of that is that creativity is just becoming more and more dispersed, and people are able to get their creativity distributed in more ways than before. And that's important, and it's good.
And then I don't agree with the subsequent point, though, that there is a danger of being left of it, it being the copyright system.

The copyright system is not a lottery, okay. Just like very few people hit the lottery, very few people hit the lottery with a creative work as well. This is the domain of exceedingly few people. Most people don't make money from their works. Not all artistic works have a market value; exceedingly few do.

They may have wonderful values in other ways, important values culturally, academically. But many works do not have market value.

So the question is, if these works are not being exploited through the copyright system, and there is no revenue being recovered by the vast majority of works through the copyright system, then what do we do with them?

And any system that is expensive and expends a lot of money deciding what to do with them is a system that won't be used.

And this whole discussion about litigation, the costs of litigation and the costs of coming into U.S. court I think makes the point exactly, that if you design a system that depends on
litigation, expensive litigation, people get very little relief.

MR. SIGALL: I guess on that last point, I guess just for argument's sake to take a contrary point on this, the prospect of very expensive litigation for both sides, owner and user, may actually prompt them to sit down and avoid that litigation in some respects.

I think much of the discussion between Jeff and Lisa could in part boil down and be resolved to the question of, when the owner resurfaces, what are they entitled to receive?

If you have a system that essentially they could not receive an injunction against the continuing ongoing use, and that they were entitled to some compensation, it may come down to the question of what the statute says about what that level of compensation is.

And the question, I think, is, you have to look at it in terms of whether, if you say that the compensation is capped at a certain amount, what that does to the question of expense and uncertainty in the minds of the parties who are considering litigation, and what that does to their incentives to avoid litigation.
I think I've heard some people say that if the cap is too low, it prompts some people to do what I think the AAP is trying to avoid in their submission of saying, the user saying I'm just not going to pay you at all, go sue me in federal court for the $500 I might owe you. I'm just going to completely let you - so sue me approach that some people might take in that circumstance.

The question is, would - the task is I think to try and pick a statement of the amount of compensation that doesn't push either side to avoid, I mean in the question of marketplace rate, you hear it from Jeff and others, you say it's a marketplace rate, that prompts the owner to put a hold up value in front of the user, saying, $30,000, that's my reasonable rate, here's my evidence of it's reasonableness, and so therefore, I am going to sue and I don't really care what you say. I'm going to ignore your reasonable counteroffer, in the other construct.

And the question I think in part, and I think generally, is if you can calculate, if you can calibrate and state a level of compensation that tries to give - I don't want to say it this way, I guess, but create uncertainty, enough uncertainty that people
will actually try to avoid litigation by coming to reasonable fair results outside of litigation.

That might be the goal and the hope that you have, and it's a question I think of trying to avoid at least other statements of the value, or other statements of the amount of compensation that would prompt litigation one way or the other, or not encourage that settlement.

So at least from what I take from the discussion of the past couple of days, that's one way to try to address the question, try to resolve a lot of the problems.

There may be other practical questions about actually getting paid that amount, and how you do that. That's at least the way I view part of our task, is to try to deal with that in that way.

MR. METALITZ: I know we've gotten very far afield from the international issues, but I just wanted to emphasize what I heard from Ted and from others here as well, which is, as a practical matter, once you have a situation in which the user and the right holder are in contact, you're often able to - very often able to arrive at some negotiated solution, because a lot of things would have to fall in place for Jeff's nightmare scenario of the $30,000 demand.
from Indonesia to come into play.

So I think that means that in what we hope will be a small percentage of cases in which due diligence does not enable someone to locate and identify the copyright holder, in the small percentage of that small percentage in which the copyright owner then comes forward, I think you are right to focus on what is the background, what is the default we want to have there that will most likely encourage them to reach a quick amicable solution at some level.

My view is that it is probably best to say that if they can't decide, if they can't decide then someone will have to decide what the market rate would be. That's what they're trying to do, and didn't succeed for whatever reason. And while it will be difficult in some cases, maybe there weren't any books published about Indonesian batik last year, maybe there was one published on Malaysian textiles, and maybe there was one published about - there was a compilation recording of Indonesian Gamelan music, and maybe there was enough play - and there were some actual licensed transactions in those works - maybe there is enough evidence to be able to come up with that.

So in the very rare, hopefully exceedingly
rare, case in which this does have to be litigated—and again, I would urge that we think whether in cases where infringement is not really in dispute, or authorship is not really in dispute, finding a quick administrative way to do this, I just think this is the best we can do to try and create the situation that you're talking about.

MR. SIGALL: Another thought I had yesterday, and I don't think I expressed it here, was that maybe part of the system is in addition to creating a record, and users creating a record of their reasonable search, at the same time that they do that, it would seem anyway in many cases it would not be hard for them to also create the record of what a reasonable payment might be for that use. Because in many cases they'll be clearing rights to similar works. They will probably be in the exact same context. It would seem that you will have a variety of results in clearing your rights to a particular book for example or a documentary film. You'll have works that you found the owner. You'll have works that the owner says you can use it for free. You will have works that the owner says you pay this much.

So at the same time the user creates two records, a record of their reasonably diligent efforts
to find the owner, but also a record that they've paid
this much for these works. They haven't paid at all
for these works. These were provided for free. And
they sort of create that record in the event, that's
part of the insurance that they're obtaining in the
event the copyright owner arrives.

They can ideally present this evidence to
a surfacing copyright owner and say, look, here's what
I have. I have a very clear record of making a
diligent search. I have a very clear record of the
kinds of payments I have made, including the fact that
for all of these works that I used I didn't pay
anything, because I'm a library or I'm an archive. So
I think I have a very strong case of zero royalty
here.

And ideally you would have copyright
owners who could take that and would react to that in
a way that doesn't say, that would forestall the
$30,000 demand or forestall the threat of litigation
over a $30,000 demand.

So that's at least the concept, I think,
that might be — that you might encourage users to make
those kinds of recordkeeping and those kinds of case
building in the course of doing their search.

The last part of the international thing
that I wanted to get across, or discuss and bring out, was the question of whether - I think Steve has proposed it, and I think Jeff has expressed an interest in talking about it - of excluding foreign works from this system for at least an initial period, and just to get the reactions of those around the table to that proposal, and the pros and cons of that approach.

I think Jeff had --

MR. CUNARD: Well, I know you skipped over the third part of the TRIPS test, and I want to say that I don't believe that the schemes that are proposed here would unreasonably prejudice the legitimate interests of copyright owners, and we could go into that in writing at some later date.

I think with respect to foreign works, actually the vast majority of works created in the world are foreign works. That should be obvious.

The vast majority of works that are orphaned works are likely to be foreign works. I mean there is no question about it. It is absolutely a core element of not only U.S. culture and history but global culture and history to work with works from around the world, whether it's native Americans who happen to be located within the 50 states, or native
Americans who are located just north of the border or just south of the border; whether it's art historical scholarship involving artists who were born in Europe and moved to the United States; whether you're filming a documentary of World War II and you're using a photo taken in France of the GIs marching ashore at Omaha Beach, it would be a woefully pathetically incomplete view of a solution to orphan works only to focus on U.S. based works.

And that leaves aside the question, which is not unimportant, raised by Steve, which is, how do you know if a work is truly orphaned, and you can't even identify the copyright owner, how do you know whether the photo was actually taken in Normandy by a French person who was brought back to the United States, was painted by someone who was in an internment camp in Europe, or was painted in the United States after they came - were free. Those are some intractable problems, but per haps don't apply to some subset of works that are clearly American.

MR. OAKLEY: Well, I certainly understand why Steve proposes the idea of doing this in two parts, to try to deal with the area that is relatively certain, which is our own people first, and come to the more difficult question later.
But I think, as Jeff says, that would really be inadequate. And it's important once we're engaged in this process to try to push harder, and try to think it through, and try to get a more comprehensive solution.

Certainly the need is no less for foreign works. The same problems must exist out there, particularly because they haven't had formalities for such a long time. There's no doubt a lot of works out there that are not being exploited.

In particular from the library perspective, substantial parts I don't have a number, but it's got to be at least half of library collections must have come from foreign jurisdictions, and library initiatives in terms of preservation, that many libraries are now undertaking, would like to include those, and if we don't include those, then our efforts are inadequate.

And it's going to be divided into the same two parts. People are going to have to do half now and half later, and it will be quite inadequate.

And so it seems to me that a solution that excludes foreign works is really only half a solution.

MR. METALITZ: Well, I think I'm making
progress here. Jeff thought my idea was pathetically incomplete, and now Bob says it's at least half a solution. So the trend is good.

Let me just offer very briefly three reasons why -- although I agree, it's an incomplete, it's not a very satisfactory solution - three reasons why it would be the best first step to take.

One I've already mentioned, which is that it just avoids these questions about compliance with Bern and TRIPS, and I think some experience under an orphan works regime might shed some light for example on how special a case is this. It might shed some light on how it impacts the normal exploitation of a work, or even legitimate interests of authors. We can make a lot of abstract pronouncements about it, but maybe we will know more after we have some experience.

The second reason is that, again, coming back to something I said yesterday, and others said as well, if one of the goals - and I would say the paramount goal of this process is to try to reduce the population of the orphanage, increase the level of information about the whereabouts and the identity of right holders and bring them together with users, we have a paradigm here in the U.S. that we may make progress on that with an orphan works system, but
there is no reason to think it would have any such
impact outside the United States.

I mean we don't know, or at least Jeff
probably has clients that do know, but most of us
don't know much about the database of Haitian painters
and how that can be brought online and made more
accessible to people who want to make use of Haitian
paintings.

When we bring our works together, I think,
in sectoral roundtables, if that were to happen, I
think we would learn a lot more about how to find
copyright owners and authors in the United States, and
much, much less about how to find them outside the
United States.

So it is not clear to me that - and you
know, the standards of due diligence would be much
harder to formulate, I think, on a worldwide basis
than it would be on a U.S. basis.

And the third reason quite frankly is I
think we have to be looking at this with an eye
towards what other countries may do in similar
circumstances.

This orphan works issue is, people have
pointed out, is not unique to the United States, and
I think we have to be concerned about how if we bring
foreign works into an orphan works regime and lay out a path for users to make use of foreign works without obtaining permission, and for a very limited compensation to the right holder, we have to be concerned about how other countries will treat U.S. works in a similar regime.

And I think the care and attention and effort to cast a broad net that this proceeding represents, and I think also the goodwill that we've heard to a great extent around the table for the last few days may not be present in other countries, which may approach this much less transparently, and in a way that provides much less input for all the interested parties.

And you end up with a situation where people in most countries are given a path to designating what's an orphaned work and thereby making a free or uncompensated or virtually uncompensated use of it, I think then we have a lot to be concerned about.

So again, I think those are three good reasons why, although there are a lot of problems with excluding foreign works, I agree with that. It leaves a lot of the problem unsolved. I think it's still the most prudent way to proceed.
MR. FEDER: This proposal about orphaned works, it is important to point out, is essentially a unique United States proposal. It's not as if all the European countries have comparable things on the board, or practice orphan works as we've been discussing them.

The closest they get, as I mentioned before, is, a society may receive money for artists who have not been located, but they then will distribute the monies to the artist. But there is no notion that the works of these artists has fallen into some orphan unprotectable kind of domain.

The mere notion of orphan works contributes to the dissolution of the Bern Convention as we know it, and Bern is meant to protect copyrights and not to contribute to their loss.

So I just - it will not be tolerated on the part of our partners. I think they're going to have to feel that retaliation of some kind is in order. I'm sorry to say that. And the copyrights that deserve protections of American works will be under pressure in a number of European countries.

There is one other thing I want to mention. It goes a little bit far afield in a way, but if I may. And that is that there is orphan users
as well as orphan works. And I'm talking about those people who use works without the permission of the creators, perhaps on the basis of their being unlocatable, and exploit these works. They're very, very difficult to track by societies. We've tried to do so in a great many instances, and they are often untrackable by virtue of their being essentially fly by night.

It would be ludicrous for us to ask the government to compensate creators for the loss and illegal taking of their works by such people, totally ludicrous.

But it's no less ludicrous for the government to sanction the unauthorized taking of creative works by the users on the mere claim that the users couldn't find the creator in question.

And once again there is a system for users to employ works without the permission of the creators. It's called, for noncommercial works, for a user, commercial works it's analysis, market analysis, risk analysis.

And thirdly, I talked about the use of the disclaimer. I think those three things are more than adequate to cover the whole spectrum of what we're talking about. And orphaned works is just extraneous
as far as I'm concerned. Everything that should be
done is already available to users.

MR. SPRIGMAN: Well, that last part just
blinkers a lot of what was said earlier here today
about the entire part of our culture that is orphaned.
And this process has produced hundreds of comments
detailing cases where works are orphaned. So
obviously fair use, and collecting societies and risk
analysis are not taking care of the problem.
Otherwise we wouldn't have all these hundreds of
comments.

But I want to go back to the idea that
Bern binds us. I don't think Bern binds us. And in
any event we here in the States have our own copyright
tradition, which is distinct in some ways from the
Europeans.

And people overblow this. They say that
we have a utilitarian tradition; the Europeans have a
natural rights tradition. And this is deeper than we
probably want to go at the moment, but I think our
traditions, both ours and theirs, are mongrel. There
is no purity to either system.

We strike a somewhat different balance
between the interests of authors and the interest of
the public in access. The Europeans strike a somewhat
different balance from us, but we're both striking a balance.

European copyrights are not perpetual, so they have utilitarian aspects to their system as well, and that's all to the good.

So in other instances where we in the states decide that there is some important policy objective in intellectual property laws, we have no hesitancy in patiently, respectfully, pressing these views on our European friends.

The Europeans have a different regime than we do for example with respect to software patents. And I know for a fact that there are both on the government level and in the private sector there are people working to align the European regime with ours.

And that's our policy. Now what we're talking about here in the orphaned works area is a policy that would better balance the interests of users with the interests of creators for this category of orphaned works.

If we have some convincing to do, we should start doing it. This is an issue that has come up perhaps first in America, because our culture, our vibrant culture, our wired culture, is producing a lot of uses of orphaned works, and is bringing this
problem up.

But the Europeans are going to get there. And when they get there, they are going to see some of the same policy issues that we do, and we should start talking to them now.

In the meantime I would not exclude the majority of works, which are foreign works, from this system. I think we can be protective of their works, and when we lay out the policy, whether it's a reasonable search policy or a finality based policy, I think we will be able to convince them that this is in everybody's interest.

MR. HOLLAND: In response to the hundreds of letters that you're referring to on behalf of people concerned about orphaned works, I would point out that we put together on very short notice, and we had to create - we had to create our own network, because one didn't exist in February. We had to put up a website to reach people by mass email, and to try to locate artists who there were no existing websites to find, there was no existing list of artists to find, we had to create the list from scratch.

In that short period of time, in a matter of a couple of weeks, we found over 1,500 individual artists who took the time to express their own concern
about this orphaned works issue, and that includes 42
artists organizations, I think 20 of which come from
overseas, from collecting societies as experienced as
Copinar (phonetic) and artists associations like the
Association of Illustrators in England.

So this does concern people in other
countries. And the - this idea that - one of the
things that I think Creative Commons has done is, it's
tried to describe all artists as a species of users.
I know that in speeches, Professor Lessig has talked
about how all art is based on art of the past. That's
not necessarily true. Collage is a form of art, but
creativity is not a form of collage. Creativity is a
much more complex things, as psychologists, or artists
or even kindergarten teachers can tell you, the
ability to take something and make something out of
nothing is a very complex thing.

It's not as simple as going on the website
and remixing. So I think the concern that we located
just in a short period of time, based on - starting
from scratch, indicates that there is a concern on the
part of artists around the world about what's
happening with this study in the United States.

MR. CUNARD: I just want to respond I
think to Steve's second point, which is, we need to
distinguish between the separation of U.S. and non-U.S. works, and the possibility that whatever uses are made of works in the United States will be perceived or displayed or performed or distributed overseas.

Once a work is in the United States, whether it's a U.S. work or a foreign work, it's essentially entitled to the same treatment. And whether it's a U.S. or foreign work, if it's put into a book and a book is distributed overseas it's only going to be subject to orphaned works treatment, and frankly only subject to fair use treatment, in the United States.

So even today, to Ted's point, scholars and artists live with territoriality, and it's limitations, in deciding whether to make fair use of a particular work. And that's an incomplete solution, because books are now distributed globally. Websites are accessible globally.

And so I think people similarly would be cognizant of the fact that whatever benefits they get from orphan work status, that is to say, a limitation on remedies in a lawsuit brought in a U.S. court, however unlikely that would be, isn't going to benefit them at all overseas whether it's a U.S. work or a non-U.S. work.
MR. METALITZ: I think I didn't express myself very clearly, because that wasn't the point I was trying to make, although I think you're right that there is going to be this question of what are people's expectations about once they have the orphan work status and there is an educational effort to undertake it to make it clear that it only affects rights under U.S. law.

My concern was a little bit different, which was not with the status quo of what laws are outside the United States, although I would note that many countries have orphan works provisions on the books. Just to name two not insignificant markets, Japan and Korea. And Korea is now moving to make its orphan works provision, which is basically an authority to a government ministry to set a license rate. It's similar to the Canadian provision.

They're moving to make that applicable only to Korean works. And for the reason, the stated reason, by the way, that they are not sure that to make it applicable to foreign works would comply with their Bern obligations.

Those countries already have laws on the books, but my concern is with what other countries will do if the U.S. moves toward an orphan works
regime, and what impact that would have on foreign works in those countries, particularly U.S. ones.

So this I think is a reason to move cautiously in this area. I'd emphasize again that from the perspective of the recording industry as a user, it would probably benefit us to have this regime apply to foreign works, because there are foreign works which we want to make use of and we can't through due diligence locate or identify the copyright owner. So it would be good from that perspective.

But I think from the other perspective, we should be cautious about how it would impact the protection of U.S. works in other countries.

MR. SIGALL: Jeff hopefully reminded me that I did skip over that last prong of the three-step test. We did actually have a specific question related to that. And it plays off of - and I think this will be the last topic that we have - it plays off of a discussion yesterday that would involve the question of how you put unpublished works within this system.

A lot of concern was expressed about including unpublished works in this system regarding the creator's ability to keep works that it wouldn't want published away from the public.
I'm thinking most specifically in this case of works that for creative reasons they think aren't the ones that should be out there representing them, to avoid questions of privacy and other laws.

If we could stick to that kind of example. And I guess the question is, in an orphan works regime that would be applicable to unpublished works, and that would result in a situation where the user could make use of an unpublished work, and then even after the owner surfaced and said, that's not – that's my work and I don't want it published, if a regime would not permit some sort of injunction to stop the use of the work, but only require compensation, how does that square with the command of the three-step test to not unreasonably prejudice the legitimate interests of the right holder?

I guess we're talking about interests in the form of nonmonetary creative control interests of the right holder, particularly in light of the perspective of European countries with respect to moral rights and other rights of integrity with respect to works, that kind of analysis in light of their approach to that issue, how does this work, if we had a system that would permit use of these unpublished works requiring only some form of
MR. SPRIGMAN: Obviously the scope of moral rights is an issue on which our U.S. outlook is somewhat different from the kind of norm among Europeans, although it's wrong to say that the Europeans are monolithic on this. They actually differ amongst themselves. So to speak of a European approach to this is a little too broad.

But crudely, we here in the States have insisted for some time that the combination of the incidents of copyright law and the Lanham Act and state defamation law and state unfair competition law, you put those altogether, that equals sufficient respect for moral rights for us to actually accede to Bern and to satisfy its standards.

And that has been our position for a long time, and that continues to be our position. And there are some complaints, but there isn't a tremendous amount of pressure on that position, and I don't foresee a tremendous amount of pressure on that position.

So that position was reiterated what is it last term by the Supreme Court in the Daystar case, where they basically said that the right which was sought, which was kind of a permanent right of
attribution was not available under the Lanham Act for this particular piece of property, and the copyright law didn't provide it either, so it did not exist.

So again the narrowness of our conception of moral rights is pretty clearly established in U.S. law.

There is nothing in the systems that we've been talking about, either the reasonable effort system or the kind of categorical system that we favor that would detract from the level of respect for moral rights that the U.S. already accords.

We have the Visual Artists Rights Act, we have these narrow incidents where we have special rights. None of that goes away.

So I think that this question of reasonable interests, reasonable author's interests, is untouched.

MR. SIGALL: Let me clarify my question. I probably shouldn't have mentioned moral rights at the end. That may have confused the question.

I don't think it's a controversial statement to say that many authors and copyright owners believe that it is their interests of copyright to control first publication of their work separate and apart from a question of whether that's a moral
right or not. The copyright they get gives them the ability to stage the release of their works, and to not release drafts of their works, and to control that.

So I'm trying to focus mostly on what everyone would agree U.S. copyright law does give an author, which is the ability to do that, and I think that's reaffirmed in the Harper & Roe case in the Supreme Court, the question of first publication predominantly.

That, the question is whether that expectation and that legitimate interest of a copyright owner in the context of this, an orphan works regime like the one we are describing and talking about yesterday, whether that raises international issues, and how a third prong of the three part test affects that type analysis in that specific situation to give us some frame of reference to analyze these issues.

MR. CUNARD: What the third prong says, and that do not unreasonably prejudice the legitimate interests of the right holder.

So people have analyzed what is meant by unreasonably prejudice and legitimate interests. And a position that would say that unpublished works could
never be the subject of this Bern exception would take
the position that any use of an unpublished work, not
matter how small, no matter whether it had an economic
effect on the copyright owner or not, unreasonably
prejudices the rights of the copyright owner.

And I think United States law pretty
conclusively responds to your question by saying that
in 1992, when Section 107 was amended, Congress
specifically acknowledged that fair use could be made
of unpublished works, presumably in conformity with
Bern, and presumably because people thought that fair
uses, which by the way are not limited to particular
limited sense of Yiddish songs from Lodz, but apply
generally to every conceivable kind of copyrights work
under the horizon, that those kinds of fair uses did
not unreasonably prejudice the legitimate interests of
the copyright holder.

And as I said at the beginning of this,
it's ultimately up to Congress to make the
determination as to what unreasonably prejudices those
legitimate interests. We concluded, I think, in 1992
that unpublished works were not categorically excluded
from special treatment by virtue of the third prong of
the Bern test.

MR. KASUNIC: Well, I certainly am not
either. But in terms of comparing orphan works and fair use, I think we have some significant differences between the two, when we're talking about commercial use of works for any purpose, as opposed to in the fair use context where you have a limited scope or a limited purpose on a case-by-case basis.

Here we are talking about whole classes of works involving every – we're talking about all works, and scope is really not in anyway limited.

MR. CUNARD: Well, I was really responding to the threshold question, which was, sort of categorically could – would unpublished works always run afoul of the third prong of the Bern test. And I think the answer to that is no.

But then I think you're right that we would need to analyze on its own bottom the question of whether an orphan work regime with respect to either published or unpublished work would run afoul of that third prong.

And as I alluded to earlier, I don't think it does, because I don't think that it unreasonably prejudices the legitimate interests of the rights holder. And for that even though the panel decision might be viewed as having gone in the opposite direction from those who would propose an
orphan works regime here, I think there is language through the panel decision which would say that in this situation where somebody isn't enjoying actual or potential revenues from the exploitation of the work, there is no loss to or prejudice to the economic interests of the copyright owner that would run afoul of that prong.

I mean this is the kind of issue that I think frankly is better not described in this setting, or discussed in this setting, but perhaps either in a kind of written analysis or in a sort of more intimate environment, because it's really hard to sort of work with all the legal precedents, even those of us who are sometimes in ivory towers and sometimes now would prefer perhaps just to sit down and talk about it in a small room setting.

UNIDENTIFIED SPEAKER: I graduated from a marble tower to an ivory tower, and I submitted this written work, and this analyzes these issues.

The way I would characterize the panel decision is, on balance, it's actually favorable for a system to address orphan works. And the owners of the works, subject to the 110.5 provision, were actually receiving some fraction of revenues from the establishments that they were serving.
It was the compulsory license put into place that deprived them of any revenues. So it's not a categorical imperative that there be no deprivation of income. The question is whether it's an unreasonable deprivation of income, given the kind of policy that you are pursuing.

So I think again the complexities of the 110.5 decision are deep, but it involves compulsory licenses that are not really similar to what we're talking about. And even so it approved many of the uses that were sought under 110.5.

MR. FEDER: Suppose you came across a 10-page Salinger short story. Or a part of a short story if you will. And he kept writing Salinger and he didn't answer. Salinger is a well known recluse. And you couldn't get hold of him, and you kept writing, kept writing. And finally you published the work. It's going to have a strong impact on the financial value of that work when and if he comes to publish it himself, or if his heirs come to do it.

MR. CUNARD: But I think even the most radical proponents of an orphaned works regime would not consider that use subject to orphan works status.

MR. HOLLAND: Why not?

MR. CUNARD: We covered this at great
length yesterday. Because the owner has expressly
made it clear that he refuses to license it. It's
absolutely within the right of the copyright owner to
express his or her refusal to license.

That is clearly not a case of
unidentifiable, unlocatable copyright owner.

MR. METALITZ: I was just going to say, I
think Jeff is too moderate to speak for the radical
view of orphaned works, because we certainly saw many
submissions in this proceeding that said, in that
circumstance where you get no answer, no answer and no
answer, can you be charged with notice that J.D.
Salinger has this view?

Maybe it's not J.D. Salinger, it's the
next author who is not such a well known recluse.
Some people do think that's an orphaned work. I
don't. And I think it should be made clear that it's
not.

But that's a universally held view.

MR. HOLLAND: Steve just made my point.
You're basing your argument on the assumption that
since J.D. Salinger is known as a recluse that that
would count some sort of due diligence.

If he weren't well known but had the same
proclivities, would he be entitled to the same rights
not to see his work used?

MR. CUNARD: Yes, the hypothetical, whether it's J.D. Salinger or not, is that there is a known person whose name is associated with; that you've contacted that person; that person has refused to authorize permission.

That's different from a situation where you're sending a letter out to 20 people and saying, are you the copyright owner? You have no idea whether any of them is the copyright owner. And they all refuse to answer the letter.

The hypothetical was, it's either J.D. Salinger or somebody else who is a known identifiable findable individual who refuses to license the work.

And I would say - I don't know what every comment would say, but I would say that at least our position and the position I think of many people would be that that is not an orphaned work situation.

MR. SPRIGMAN: That would be our position too.

MR. HOLLAND: Just one follow up to that. I know of artists who entered the business about the time I did, 30 some years ago, who dropped out of the business as I mentioned earlier today.

I'm sure they still value their work, but
they also valued their families and had to do
something to make a living.

    I don't - these are people who were
colleagues of mine and somewhere over the years, even
though I had their phone numbers, I couldn't locate
them myself right now.

    If I had access to their work, I would
have a known commodity. Would I be permitted to
publish that work because I don't know how to find the
person any longer?

    MR. CUNARD: Well, the question isn't
whether you're permitted to. You wouldn't have any
license to do so. And so if the person emerged and
sued you, the question is, what would you do?

    Really all of this boils down, I think as
Jule had said, whether you are going to pay the person
a reasonable license fee? Does the person get a right
to enjoin the use? Or do you pay him or her some
capped amount or actual damages or something like
that?

    That's really what all this boils down to
in my view.

    MR. HOLLAND: If it were capped, at some
of the sums that I've seen here, $100 or $500, I might
figure it's just a reasonable business expense to go
ahead and publish it and pay it as if it were a fine for a misdemeanor.

MR. CUNARD: Or you could conclude that the person is going to come forward and say, all right, the reasonable license fee for this, my work at the time was going for, pick a number, $400, $500, you have to tell me what his or her work was going for at the time.

And even at that, the guy will come forward, and I'll risk having to pay him $4-500 at the time. The point is that you wouldn't have a license to use the work. All of this is really about what's the remedy, and in your case, really, what's the risk analysis you're going through in deciding whether or not to publish without getting permission.

MR. SIGALL: I think Oliver has a question, final question.

MR. METZGER: On this third step in the three-step test, I have a question for the archives and libraries. It seems like we've discussed often the sort of paradigmatic example of taking a lot of photographs from the basement and making them more available. I assume that means putting them on some type of website.

We've also heard that sometimes making an
item available in digital form on the web can permanent end the market value, however much that exists, for that work. I think Kay said earlier for novels that would probably be the case, that once it's out, a publisher would no longer publish it.

So I'm just wondering, in the example, like the setup that Jule gave us was, in a regime where continuing use can continue even after the owner reappears, if Cornell or whatever has its 300,000 photos up there, is the 300,000 or even if one of those users comes back and says, okay, please take it down, and they say fine, we'll take it down, how would that interplay with the unreasonably prejudice the legitimate interests of the right holder?

I mean my concern obviously is, is the right holder going to say, it was up there for six months. Who knows how many copies were made. I'm never going to be able to publish that again.

MR. OAKLEY: Yes, I think one of the key things to remember that we're assuming that there is going to be a relatively small, maybe very small, number of people coming forward. Many of these works are very old and have not been economically exploited for a very long time.

I think that Jonathan said yesterday that
in the case of a digital use of the work, some kind of notice and take down kind of thing, would be definitely a possibility. That's different from the case of other kinds of uses of the works, such as when it gets incorporated into a new book or movie or something that's out there on the market. You can't pull that back in the same kind of way.

So I think the library community would accept some kind of notice and take down provision. Whether that completely eliminates the market for that work is a more difficult question. It's really hard to sort of know what that market might have been. Certainly, there hasn't been any market for it up to that point.

MR. METALITZ: I just want to say, first of all I see that my mike comes on when yours comes on. You raise a very interesting question we only barely touched on, and I'm sure we're not going to get into now at this hour of the second day, and that is, is there some category of use that is so invasive of a copyright owner's interest that it shouldn't be subject to orphan work status, it shouldn't have these limitations.

I think you put your finger on it by saying if there is a kind of use that totally destroys
the future market value of the work, I would certainly be uneasy with the idea that that would be subject to orphan works treatment, the same way as all the other uses we've been talking about here, the library and archives uses, and many others, even commercial uses, that don't necessarily destroy the future value.

It's a little hard to say what that kind of use might be. It might have to be something that is very time sensitive, for example, because otherwise, works that are used once often do have an afterlife.

But I think it's worth noting, to think about whether there is some such category that shouldn't be subject to orphan works treatment.

MR. HOLLAND: I think one of the concerns we've tried to express is that the more esoteric categories of, say, cultural work not become a wedge that opens up an expanded kind of royalty-free stock house of other people's work.

I don't think anyone anticipated when the copyright law was written that the work for hire thing would be expanded into this forever and in perpetuity clause, and used under threat of not being able to work for a client.

We saw a kind of situation this morning
where Paul suggested that these work for hire agreements would limit the number of orphaned works, because they would be going to large corporations like Conde Nast.

Well, that would give Conde Nast greater bargaining power to demand work for hire agreements from artists. And if anything, artists would love to see the work for hire provision reformed, rather than given greater - rather than see orphan works used to give it greater bargaining power in our negotiations with clients.

MR. SIGALL: Okay, I think we've exhausted our topics. And I think we had a good discussion on this last panel.

And I think that will conclude the roundtables here in Washington.

I would like to thank all the participants here for a very cordial and thoughtful and productive discussion. I know that we may have succeeded only in multiplying the number of issues and uncertainties and questions in trying to resolve this problem, but that's always the first step towards actually getting something that is right and useful.

So I think by that measure our goal, from the office's perspective, was accomplished, and
accomplished very well and very easily, mostly to your participation and your skills in articulating your thoughts and issues, and your ability to listen to others and participate in a real thoughtful discussion.

So I thank you for that, and for helping to make this a very productive two days from our perspective.

(Applause.)

MR. OAKLEY: And Joel, I would like to thank you and the Copyright Office for tackling this problem head on. This has been a huge issue for libraries over the last 10-20 years as we've gotten more into the preservation problem, and the office is to be congratulated and thanked for tackling it and trying to resolve it. Thank you.

(Whereupon at 4:33 p.m. the above-mentioned proceeding was adjourned.)