

LIBRARY OF CONGRESS

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ORPHAN WORKS AND MASS DIGITIZATION
ROUNDTABLES

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MONDAY
MARCH 10, 2014

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

PRESENT

JACQUELINE CHARLESWORTH, United States
Copyright Office

KARYN TEMPLE CLAGGETT, United States
Copyright Office

ROB KASUNIC, United States Copyright Office

FRANK MULLER, United States Copyright Office

CATIE ROWLAND, United States Copyright Office

SESSION 1: THE NEED FOR LEGISLATION IN LIGHT
OF RECENT LEGAL AND TECHNOLOGICAL DEVELOPMENTS

ALLAN ADLER, Association of American
Publishers

JONATHAN BAND, Library Copyright Alliance

JUNE BESEK, Kernochan Center for Law, Media
and the Arts

KYLE K. COURTNEY, Harvard University

EMILY FELTREN, American Association of Law
Libraries

DAVID HANSEN, Digital Library Copyright
Project, University of California,
Berkeley School of Law & Law Library,
University of North Carolina School of
Law

JAMES HARE, Wikimedia District of Columbia

ANN F. HOFFMAN, National Writers Union
BRAD HOLLAND, American Society of
Illustrators Partnership
JAMES LOVE, Knowledge Ecology International
JIM MAHONEY, American Association of
Independent Music
JANICE T. PILCH, Rutgers University Libraries
JAY ROSENTHAL, National Music Publishers'
Association
MATTHEW SCHRUERS, Computer & Communications
Industry Association
SALLEY SHANNON, American Society of
Journalists & Authors

SESSION 2: DEFINING A GOOD FAITH REASONABLY
DILIGENT SEARCH STANDARD

MICHAEL CAPOBIANCO, Science Fiction and
Fantasy Writers of America
KRISTA COX, Association of Research Libraries
GREG CRAM, The New York Public Library
ALEC FRENCH, Directors Guild of America
ERIC HARBESON, Society of American Archivists
ANN F. HOFFMAN, National Writers Union
MEREDITH JACOB, Program on Information
Justice & Intellectual Property-
American
University Washington College of Law
KURT R. KLAUS, Attorney at Law
JACK LERNER, University of Southern
California Intellectual Property and
Technology Law Clinic-International
Documentary Association and Film
Independent
SARAH MICHALAK, HathiTrust Digital Library
NANCY C. PRAGER, Prager Law PLLC
JAY ROSENTHAL, National Music Publishers'
Association
CARRIE RUSSELL, American Library Association
AMY SABRIN, National Portrait Gallery-
Smithsonian Institution
BEN SHEFFNER, Motion Picture Association of
America, Inc.
NANCY WOLFF, PACA Digital Media Licensing

Organization

SESSION 3: THE ROLE OF PRIVATE AND PUBLIC
REGISTRIES

MICHAEL CAPOBIANCO, Science Fiction and
Fantasy Writers of America

MEGAN GRAY, Attorney

ERIC HARBESON, Society of American Archivists

DOUGLAS HILL, RightsAssist, LLC

BRAD HOLLAND, American Society of
Illustrators Partnership

ROY KAUFMAN, Copyright Clearance Center, Inc.

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

ALEX MCGEHEE, Association of Recorded Sound
Collections

EUGENE MOPSIK, American Society of Media
Photographers

NANCY C. PRAGER, Prager Law PLLC

COLIN RUSHING, SoundExchange, Inc.

FREDRIC SCHROEDER, National Federation of
the Blind

MATTHEW SCHRUERS, Computer & Communications
Industry Association

JEFF SEDLIK, PLUS Coalition

NANCY WOLFF, PACA Digital Media Licensing
Organization

SESSION 4: THE TYPES OF WORKS SUBJECT TO ANY
ORPHAN WORKS LEGISLATION, INCLUDING ISSUES
RELATED SPECIFICALLY TO PHOTOGRAPHS

DAN COHEN, Digital Public Library of America

RACHEL FERTIG, Association of American
Publishers

ALEC FRENCH, Directors Guild of America

ANNE COLLINS GOODYEAR, College Art
Association

DAVID HANSEN, Digital Library Copyright
Project, University of California,
Berkeley School of Law & Law Library,

University of North Carolina School of
Law

BRUCE LEHMAN, Association of Medical

Illustrators

MARIA D. MATTHEWS, Professional Photographers
of America

ALEX MCGEHEE, Association of Recorded Sound
Collections

EUGENE MOPSIK, American Society of Media
Photographers

BARBARA NATANSON, Library of Congress

MICKEY OSTERREICHER, National Press
Photographers Association

KELLY ROGERS, Johns Hopkins University Press

JAY ROSENTHAL, National Music Publishers'
Association

CHARLES J. SANDERS, Songwriters Guild of
America

JEFF SEDLIK, PLUS Coalition

LISA SHAFTEL, Graphic Artists Guild

SESSION 5: THE TYPES OF USERS AND USES SUBJECT
TO ANY ORPHAN WORKS LEGISLATION

ALLAN ADLER, Association of American
Publishers

MICHAEL W. CARROLL, American
University/Creative Commons USA

DAN COHEN, Digital Public Library of America

DANIEL COLLIER, Tulane University

KYLE K. COURTNEY, Harvard University

KRISTA COX, Association of Research Libraries

ANNE COLLINS GOODYEAR, College Art
Association

JODIE GRIFFIN, Public Knowledge

NANCY KOPANS, ITHAKA/JSTOR

LEAH PRESCOTT, Georgetown Law Library

MANON RESS, Knowledge Ecology International

CHARLES J. SANDERS, Songwriters Guild of
America

LISA SHAFTEL, Graphic Artists Guild

CHUCK SLOCUM, Writers Guild of America, West

A-G-E-N-D-A

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

(8:59 a.m.)

MS. CLAGGETT: Good morning, my name is Karyn Temple Claggett and I am the Associate Register of Copyrights and Director of Policy and International Affairs for the United States Copyright Office.

Thank you all for coming today to our Orphan Works and Mass Digitization Roundtables. Today we plan to discuss in some detail issues relating to the problems and possible solutions to orphan works and mass digitization under copyright law.

As many of you know, the United States Copyright Office has been intimately involved in these issues for many years. We issued a comprehensive report on orphan works in 2006 after extensive dialogue and analysis.

Many of the recommendations in our 2006 report were reflected in subsequent legislation in 2008. Yet, unfortunately at that time the United States was unable to pass

1 orphan works legislation.

2 Nevertheless, the issue continued
3 to receive significant attention worldwide.
4 Several countries considered or passed orphan
5 works laws and case law developments,
6 including a potential settlement in a major
7 case which almost achieved by way of voluntary
8 initiative what we were unable to do through
9 legislation -- that is, establish a collective
10 management regime that would govern certain
11 uses.

12 We appreciate everyone coming
13 today to continue this important dialogue.
14 While we recognize from the comments already
15 submitted that some of your perspectives may
16 have shifted since our last review, many of
17 you continue to acknowledge the real world
18 practical difficulties caused by orphan works
19 and wish to work on a solution that
20 appropriately balances a variety of interests
21 and perspectives.

22 Our goal today is not to come up

1 with a consensus on one solution that everyone
2 will be willing to agree to today. The issue
3 is just too complex for that and there are no
4 easy answers or legislation would have been
5 enacted years ago.

6 In fact, different perspectives
7 and opinions as to approaches and even the
8 need for legislation can also be seen as a
9 reason to have further dialogue rather than to
10 cut it off.

11 So today we hope to take stock of
12 where we are and get a general idea on those
13 proposals that are worthy of more in-depth
14 exploration by our office. We expect and
15 welcome different opinions but we also
16 recognize there are a lot of voices that
17 should be part of this discussion.

18 And we recognize that just because
19 one solution may work for one party or group
20 does not mean that it is a solution that will
21 work for the broadest interests as
22 comprehensive legislation should try to do.

1 Also, a brief word about the
2 issues that we really do not plan to explore
3 in detail today. I know some of your comments
4 raise broader concerns about the copyright
5 system as a whole such as the length of
6 copyright term, formalities, moral rights, and
7 the level of statutory damages allowed under
8 the law.

9 Although, as we recognize in our
10 NOI, some of those issues are an appropriate
11 part of the broader context of orphan works,
12 we obviously cannot adequately explore those
13 very broad questions in our current focus on
14 orphan works, or certainly in the time
15 allotted today.

16 So, we ask that you focus your
17 comments on our specific questions and issues
18 raised in our NOI and save broader comments if
19 necessary for some of the further written
20 comments that we are going to request. We
21 obviously cannot turn today's discussion into
22 a debate about how long the copyright term

1 should be.

2 Before we begin I'd like to go
3 over some quick logistics. First, a note
4 about video recording. The panel discussion
5 today is being video recorded by the Library
6 of Congress. There will be a short question
7 and answer period at the end of each session.

8 If you do decide from the audience
9 to participate in that question and answer
10 period, you have given us permission to
11 include your questions or comments in future
12 webcasts and broadcasts of this event.

13 For participants, we did send you
14 by email a video release form. If you have
15 not signed it there is an extra copy on the
16 table behind us so please do so before the end
17 of the sessions today.

18 At this time I'd like to ask
19 everyone in the audience and the participants
20 to turn off any cell phones or electronic
21 devices that might interfere with the
22 recording of the event. That's not our

1 policy, that's the policy of the people who
2 are currently videotaping it.

3 Also, since we have a court
4 reporter transcribing the proceedings, we ask
5 participants that each time you speak please
6 identify yourself for the record. Given the
7 number of panelists and our desire to hear
8 from all of you, please also be mindful of
9 other people speaking and raise your hand to
10 make a comment or ask a question rather than
11 simply jumping in so that we can easily
12 moderate the discussion. Otherwise,
13 obviously, it will quickly become somewhat
14 unwieldy with the number of panelists we have
15 today.

16 Given time constraints we will
17 limit responses from each panelist to no more
18 than about two minutes. So, in advance I
19 apologize because at times we might have to
20 cut some of you off. But again, we will
21 provide further opportunity for you to
22 elaborate on some of your comments in

1 subsequent written comments as well as in
2 possible times to participate either through
3 the audience participation question and answer
4 period at the close of the session on the
5 second day.

6 We will not have opening
7 statements, I let all the participants know
8 that already, but we'll just ask everyone to
9 briefly identify yourself by name and
10 affiliation for the record. And I'll start
11 with my Copyright Office colleagues in a
12 moment.

13 Are there any questions before we
14 begin the first panel session? Great. All
15 right, the first roundtable will cover the
16 need for legislation in light of recent legal
17 and technological developments.

18 We will explore the current legal
19 landscape and how any legal or other
20 developments should change or shape
21 consideration of orphan works legislation.

22 As I noted previously, we expect

1 there to be a variety of opinions. Some
2 library communities, for example, may believe
3 that at least for them fair use already
4 provides an appropriate solution for the uses
5 that they would like to make.

6 On the other end of the spectrum,
7 some groups like the Writers Union have viewed
8 legislation with skepticism for the very
9 opposite reason: that legislation would grant
10 greater freedoms than the law should allow.

11 Perhaps there's a middle ground
12 we'll be able to find today, something along
13 the lines of what the publishers have proposed
14 in terms of legislation, but we will see if
15 that's something that we will be able to
16 conclude.

17 So, I will start first with our
18 introductions by my Copyright Office
19 colleagues and then I'll just go around the
20 table starting here with just brief
21 introductions of your name and title from the
22 participants.

1 MS. CHARLESWORTH: Jacqueline
2 Charlesworth, General Counsel at the Copyright
3 Office.

4 MS. ROWLAND: I'm Catie Rowland,
5 Senior Counsel for Policy and International
6 Affairs.

7 MR. MULLER: Frank Muller,
8 Attorney-Advisor for Policy and International
9 Affairs.

10 MS. HOFFMAN: Ann Hoffman, First
11 Vice President, National Writers Union.

12 MR. MAHONEY: I'm Jim Mahoney, the
13 Vice President from the American Association
14 of Independent Music.

15 MR. LOVE: Jamie Love, Knowledge
16 Ecology International.

17 MR. SCHRUERS: Matt Schruers,
18 Computer and Communications Industry
19 Association.

20 MS. PILCH: Janice Pilch,
21 Copyright and Licensing Librarian, Rutgers
22 University Libraries.

1 MS. BESEK: June Besek, Executive
2 Director of the Kernochan Center for Law,
3 Media and the Arts at Columbia Law School.

4 MR. BAND: Jonathan Band
5 representing the Library Copyright Alliance.

6 MR. HOLLAND: Brad Holland,
7 American Society of Illustrators Partnership.

8 MS. SHANNON: Salley Shannon,
9 ASJA, the American Society of Journalists and
10 Authors.

11 MR. ROSENTHAL: Jay Rosenthal,
12 Senior Vice President and General Counsel,
13 National Music Publishers Association.

14 MS. FELTREN: Emily Feltren,
15 Director of Government Relations for the
16 American Association of Law Libraries.

17 MR. COURTNEY: Kyle Courtney,
18 Copyright Advisor, Harvard University.

19 MR. HANSEN: Dave Hansen, Digital
20 Library Fellow, Berkeley Digital Library
21 Copyright Project.

22 MR. HARE: James Hare, President,

1 Wikimedia District of Columbia.

2 MR. ADLER: Allan Adler, General
3 Counsel, Association of American Publishers.

4 MS. CLAGGETT: Great. So, I will
5 start. As I said, we're going to first start
6 off with the kind of questions that we've
7 listed in our NOI and then as the conversation
8 gets further developed we might ask follow-up
9 questions based on some of the comments that
10 we hear today.

11 But I'll start very broadly and
12 anyone who wants to jump in please just raise
13 your hand. Have the recent legal developments
14 such as various fair use cases obviated the
15 need for legislation in the orphan works area
16 or mass digitization area? Anybody who wants
17 to open up. Jonathan?

18 MR. BAND: So, someone has to go
19 first.

20 So, our view is certainly for the
21 library community that the answer is yes, that
22 the fair use jurisprudence as it has evolved

1 over the past 5 to 10 years, certainly since
2 the last roundtable, has really diminished the
3 need for orphan works legislation.

4 We've always seen the problem
5 largely as a gatekeeper problem, that the
6 kinds of uses we wanted to make have always
7 been fair use, that it was simply a matter of
8 convincing our gatekeepers that it was fair
9 use. But now, with these recent cases, it's
10 a lot easier to do that.

11 And it's not just the fair use
12 cases, it's the combination of the fair use
13 cases plus the eBay decision in the Supreme
14 Court concerning the standards for injunctive
15 relief as now it is being applied. That
16 was, of course, a patent case. Now it's being
17 applied in the copyright context. And so that
18 reduces the problem of injunctive relief. And
19 so from that perspective we think that the
20 status quo is a pretty good place.

21 MS. CLAGGETT: And I actually have
22 a question for Janice. Just because I know

1 that she represents a library as well and I
2 wanted to explore that a little bit further to
3 see if that position really has any regard
4 with respect to the type of library that might
5 be involved.

6 So for example, smaller libraries,
7 libraries that for example don't have the
8 protection of sovereign immunity. Do they
9 still see a need for legislation in this area
10 as well because they face maybe greater risk
11 than some of the larger institutions?

12 MS. PILCH: It is true that some
13 libraries face a greater risk. Some do not
14 have the benefit of claiming sovereign
15 immunity. Ours is one.

16 And our view is that there is a
17 need for legislation or a licensing solution
18 to address orphan works and mass digitization.

19 Recent legal developments have
20 addressed digitization of published books
21 including display of excerpts, preservation,
22 text search, and accessibility for the

1 visually impaired.

2 But there has been no ruling on
3 the full text display of the digitized
4 published books or on their further use,
5 including use of orphan works among them.

6 Furthermore, aside from the books
7 already digitized but not yet displaying full
8 text, libraries and archives seek to mass
9 digitize to make other types of works
10 available: published journals and other serial
11 publications, ephemeral materials, pamphlets,
12 brochures, unpublished literary works in
13 archives and special collections (manuscripts,
14 diaries, letters, other writings), published
15 and unpublished materials in other formats,
16 images, audiotapes, and audiovisual works.

17 Library mass digitization aims
18 toward full use and reuse. And so we think
19 that many questions remain.

20 MS. CLAGGETT: Anyone else? David
21 and then Kyle.

22 MR. HANSEN: Dave Hansen. So,

1 kind of echoing what Jonathan said, over the
2 last year the Berkeley Project has been
3 involved with an effort to develop some best
4 practices in fair use for libraries and
5 archives that want to make available orphan
6 works.

7 And over the course of the last
8 year we've gone around and worked with and had
9 conversations with over 150 different
10 libraries and archives of all different
11 varieties, large academic libraries, small
12 local public libraries, small historical
13 societies.

14 And the general sense that we've
15 got from every group that we met with is that
16 there's increasing comfort with relying on
17 fair use as a means of making orphan works
18 available.

19 And, in general, that tracks the
20 same rationale -- we've heard the same
21 rationale from all of those groups that
22 Jonathan just talked about. There's a strong

1 sense that those uses that libraries and
2 archives are making are transformative. And
3 then for orphan works in particular within the
4 collections there's a strong argument that
5 there's very little market harm.

6 MS. CLAGGETT: Okay, and I'm going
7 to have a follow-up but I'll say what the
8 follow-up will be in terms of -- I know I saw
9 in some comments a response about some of the
10 best practices that have been developed. I
11 know the library community has relied on
12 those.

13 Some content owners have expressed
14 concern about those best practices because
15 they haven't involved the perspectives of the
16 people most likely to sue. So I did want to
17 get a response maybe from some of the content
18 owners on that side.

19 As well as whether there's a
20 belief, generally, that all the types of uses
21 that people would want to do would be covered
22 under fair use, including both noncommercial

1 and commercial uses.

2 I think it was Kyle and then
3 Allan.

4 MR. COURTNEY: At Harvard we have
5 73 libraries currently, so we're a big target
6 for a lot of orphan works. We share the same
7 things that a lot of libraries share.

8 Our concern with legislation is
9 that it would dictate or circumscribe
10 transformative uses of orphan works or fair
11 use in a way. That would kind of curb that.
12 And that's kind of our concern.

13 The DMCA was passed and it didn't
14 say fair use in it. We had to have a test
15 case for that. We'd like to avoid that, if
16 possible.

17 Additionally, I think libraries
18 would be more comfortable making digitization
19 assessments if the level of risk were
20 diminished, so we could do that through a
21 504(c)(2) to indicate that courts have
22 discretion to reduce or remit damages,

1 statutory damages. And I know we're getting
2 off a little bit though. But that's the kind
3 of legislation we might be more comfortable
4 with.

5 And at the 73 libraries that we
6 have at Harvard, in the last year or two,
7 echoing Jonathan again, there's been more
8 comfort level with the decisions of
9 HathiTrust, Google Books, et cetera, of making
10 these kind of transformative uses.

11 MS. CLAGGETT: Allan?

12 MR. ADLER: Well, undoubtedly any
13 use of a copyrighted work at some point can
14 rely on an argument of fair use.

15 As we understand the problem of orphan
16 works, we think it's important that there be
17 solutions that are nationally consistent and
18 uniform. And the problem with relying upon
19 fair use is that it is not a foundation upon
20 which orphan works can really stand.

21 In any event, even if you use a
22 fair use approach, you would need to have some

1 notion of reasonably diligent search if the
2 concept of orphan works is actually being
3 maintained and we're not simply talking about
4 an assertion of fair use as it would apply to
5 any other use of a copyrighted work, whether
6 the copyright owner is known and available or
7 not.

8 I think it's ironic that the
9 principle of legislation, defining reasonably
10 diligent search and balancing that against
11 limitation on remedies, has been picked up in
12 the European Union in a Directive that
13 emphasizes the importance of a common approach
14 and harmonization.

15 If you can understand why the
16 internal market in the EU would want a common
17 approach and harmonization, you can certainly
18 understand why in the United States we don't
19 want rules for orphan works or determinations
20 for uses of orphan works to differ from
21 federal district to federal district or
22 circuit to circuit and state to state. And

1 for that reason, we think that legislation is
2 basically necessary.

3 We would also point out that in
4 addition to the question of legal certainty,
5 which I'm glad to hear the libraries are
6 feeling more comfortable about, but many
7 individual users may not, and we are talking
8 about more than just library use here, there's
9 also the question of whether or not certain
10 types of uses that can be permitted under an
11 orphan works legislation simply wouldn't be
12 permitted under fair use.

13 MS. SHANNON: I'm Salley Shannon.
14 First, I want to say thank you for including
15 the people who actually create the works here.
16 Our voices are not often heard in these
17 discussions.

18 Our concern is we're rather
19 between the devil and the deep blue sea here
20 with orphan works.

21 We would be content to rely on
22 current law, but we see this coming. The

1 recent technological changes have created many
2 difficulties for us centered around the fact
3 that publishers so often disappear.

4 We see the problem so much not
5 being an orphan works problem when books or
6 printed matter are concerned, but an orphan
7 publishers problem.

8 Our concerns are twofold. One, we
9 believe that an orphan work should belong to
10 we, the people, and it should not be
11 controlled by any corporate entity.

12 We know that the Copyright Office
13 and many of us have concerns about having
14 adequate money for the Copyright Office to
15 supervise a registry or any kind of
16 adjudication of these works.

17 But we are very concerned that the
18 decisions about these works will essentially
19 become something that are made by corporate
20 entities without the supervision of
21 independent parties or under regulations that
22 would be derived by the Administrative

1 Procedures Act. And we're very concerned
2 about that.

3 We also stand in the place that
4 book contracts did not have digital rights
5 provisions until seven or eight years ago.
6 And so often when people try to search and
7 find the creator of a printed work they go to
8 the publisher, but the publisher may be out of
9 business or may not know that the rights are
10 divided.

11 So our concerns really center
12 around two things, proper supervision and not
13 turning this over to profit-making entities.
14 And two, the nature of diligent search, which
15 I'm sure we'll address much later.

16 MS. CLAGGETT: Yes. Yes, Emily.

17 MS. FELTREN: I do agree with many
18 of the comments that have been previously
19 raised by some of the libraries about reliance
20 on fair use. I think that's true.

21 But I do know that some law
22 libraries do continue to be risk averse. So,

1 for that reason, we did take the position that
2 legislation would be needed, of course with
3 the caveat that Congress is a difficult place
4 right now, as we all know, and it would
5 potentially be dangerous to open something
6 like this up to legislation.

7 However, we still continue to
8 support the idea of legislation. We think
9 that reliance on the court decisions on fair
10 use, while certainly it has been positive for
11 the library community right now, there is
12 always the possibility that the courts could
13 go the other way as well.

14 MS. CLAGGETT: James and then
15 June.

16 MR. HARE: Thank you. James Hare,
17 by the way.

18 So, Wikipedia is very observant of
19 copyright and we wish to follow copyright laws
20 to the greatest extent possible. And we
21 believe that legislation would be useful in
22 letting volunteers better comply with the

1 wishes of copyright holders if they can be
2 located.

3 And a law would allow for a
4 diligent search standard that would make
5 volunteers more comfortable using copyrighted
6 works.

7 MS. CLAGGETT: Thank you. June.
8 And I did want to follow up. As I said I have
9 two kind of outstanding questions. Just how
10 do fair use decisions apply, or would they
11 apply to all the types of uses that people
12 would want to make for orphan works? And are
13 there differences, either within the library
14 community or outside of the library community,
15 in terms of whether fair use is certain enough
16 to be able to provide the basis to be able to
17 go forward with the type of uses that people
18 want to make? June.

19 MS. BESEK: I don't think that
20 existing law really provides sufficient
21 guidance for users because there is a wide
22 variety of users -- not only nonprofit

1 libraries, but also nonprofit libraries that
2 are linked with a for-profit organization, and
3 they're very concerned about the relationship
4 between the two. And then there are
5 individual users, small libraries, and so on.

6 I also don't think it provides
7 sufficient protection for users. There's this
8 question of what is an orphan work. There's
9 a lot of assumption that the owner of an
10 orphan work is somebody who hasn't followed up
11 on their rights.

12 But there are works that become
13 orphaned even now, and sometimes it's not
14 because of carelessness, but some kind of
15 wrongdoing or carelessness on the part of the
16 user rather than the right holder.

17 So I think that one of the reasons
18 we need new legislation is we need to decide,
19 for example, what should the search standard
20 be specifically with respect to orphan works?
21 And, with respect to orphan works and mass
22 digitization, who should be allowed to make

1 these unconsented uses and under what terms?

2 What should be the safeguards?

3 And then with orphan works I think
4 there should be a means by which right holders
5 can somehow reclaim rights if in fact their
6 work has been wrongly deemed to be an orphan
7 work.

8 MR. HOLLAND: I was happy to hear
9 my neighbor to the right's comments here
10 because while many of us who represent
11 creators believe that fair use may have gone
12 too far in the last couple of years we would
13 certainly be content with what they've already
14 done.

15 In 2006 we testified before the
16 Senate that we believed the orphan works
17 problem could be solved with specifically
18 crafted expansions of fair use as long as they
19 were carefully tailored to the necessary uses.

20 What we saw in 2006 and 2008 was
21 the excuse of orphan works used to go far past
22 orphan works uses into commercializing the

1 uses of artists who are working and trying to
2 manage their copyrights.

3 And with the recommendation that
4 all of this be handed over to commercial
5 entities which would compel artists of every
6 kind -- writers, cartoonists, illustrators,
7 fine artists -- to register everything they've
8 ever done with commercial entities to be
9 created in the private sector.

10 And I want to echo what Salley
11 said a minute ago. Creators have rarely been
12 heard in this.

13 In 2008 the Small Business
14 Administration conducted a roundtable in New
15 York City at the Salmagundi Club. And it was
16 the first time to my knowledge that any branch
17 of the United States Government has actually
18 inquired into how the orphan works proposals
19 in 2006 and 2008 would actually affect the
20 small business owners who were creating the
21 work.

22

1 This panel was held at the
2 Salmagundi Club. Many people came as far as
3 from across the country to spend a few minutes
4 saying their few words about the subject. But
5 the rest of them submitted papers, which we
6 submitted to the Small Business
7 Administration.

8 This is not a collection of work
9 by feckless artists who don't know anything
10 about their business. This represents
11 illustrators, represents cartoonists,
12 photographers, musicians, writers and it even
13 includes amendments that we proposed to the
14 2008 law that would have limited orphan works
15 usage to the specific cases involved.

16 And to the best of my knowledge
17 none of these people, despite the fact that
18 the SBA provided a roadmap of the issues that
19 concern creators and people who can speak out
20 from the various disciplines about this, to
21 the best of my knowledge not one of these
22 people has been invited to testify before

1 Congress.

2 And I think that would be an
3 oversight, that Congress ought to be looking
4 into this and invite some of these people to
5 testify so that they get a broader perspective
6 of how this affects the creative community,
7 not just libraries and museums.

8 And our real concern is the extent
9 to which libraries and museums are used as the
10 stalking horse for the commercial entities
11 that simply want to compel us to give them our
12 work so that they can use it to compete
13 against us.

14 MR. ROSENTHAL: Just a few points.
15 First of all, on the certainty of fair use,
16 the recent case that I think everybody is kind
17 of focusing on, it's in its first round. I
18 really wouldn't take a look at the Google
19 case.

20 MS. CLAGGETT: And not to
21 interrupt. I was going to ask -- my second
22 question would be -- would opinions change if

1 either HathiTrust, Georgia State, or Google
2 Books were reversed on appeal?

3 MR. ROSENTHAL: Yes, well, knock
4 on wood.

5 (Laughter)

6 MR. ROSENTHAL: Yes. You know, I
7 think that this again brings -- you're asking
8 should we have a law here? Should we at least
9 be looking at it?

10 Our viewpoint has always been that
11 music should be out of orphan works for all
12 sorts of reasons because we can really, most
13 people can, find the owners of works.

14 But, for the Google case in
15 particular, I think this is the first round.
16 The Second Circuit is not the Supreme Court.

17 And I think that this is really,
18 the idea that we are changing fundamentally
19 the contours of fair use and a new public
20 interest test is being introduced has really
21 activated a lot of folks to look at maybe we
22 have gone too far in a fair use context in the

1 courts. So I think there's going to be a lot
2 to go there.

3 The second point is that while we
4 have always taken the position that music
5 should be out, from the last time we had all
6 of these hearings and roundtables there have
7 been technological advances in the free
8 market.

9 In particular, in music, you see a
10 lot of activity around the idea that we must
11 understand. We have to find folks. We've got
12 to pay them. And there has been a lot of work
13 for that, meaning that it's easier to find the
14 owners of these works than ever before. And
15 I think that's just going to get better as we
16 move forward.

17 And I think that's all happening
18 in the free market as opposed to in any
19 context of a government-run registry of some
20 kind down the road.

21 We are not against the idea of
22 going forward with orphan works legislation

1 but it's got to be in context of all of that.
2 That fair use is not the place to go. You
3 know, we need more protections for copyright
4 owners.

5 And also we have to look at what's
6 going on in the free market in terms of being
7 able to find these folks and to get them to
8 approve the uses.

9 MS. HOFFMAN: As you said, the
10 National Writers Union believes that there is
11 no need for orphan works legislation. There's
12 no evidence that people seeking to use
13 published works in a legitimate way for a
14 legitimate reason are conducting any kind of
15 search and are unable to find the authors of
16 the works. That's the only way to ascertain
17 who holds the right to the work and whether
18 and how the creator is commercially exploiting
19 the work.

20 Both U.S. law of fair use and the
21 Berne Convention require consideration of what
22 is the normal exploitation of a work.

1 Technological developments over the last
2 decade have multiplied the means by which an
3 author or other creator may commercially
4 exploit his or her work.

5 E-books, webpages, databases, and
6 other ways to remix the work and make it a
7 different work. It's routine today for an
8 edition of a book, for example, to be out of
9 print, but for some or all of the content of
10 that book to be being exploited in some other
11 format by the original creator.

12 Libraries are risk-averse, but
13 the only thing that protects the rights of a
14 creator is risk aversion. If we cannot seek
15 damages for unpermitted use of our work,
16 copyright is meaningless to us.

17 MS. CLAGGETT: And I have one
18 quick follow-up question to you specifically
19 before I open it up. Would your opinion
20 change, for example, if courts felt that they
21 had to rely on fair use and expand, perhaps in
22 some people's view, fair use to accommodate

1 uses that they feel are socially beneficial
2 because there is no alternative exception?

3 MS. HOFFMAN: It's possible.

4 MS. BESEK: I just want to address
5 the question of whether fair use is the
6 appropriate vehicle for this.

7 I've said that fair use has
8 incredibly expanded over the past several
9 years and I think it's expanded to the point
10 that it is distorting the law. It's sort of
11 taken over some of the other exceptions like
12 Section 108, Section 121.

13 Now, I'm well aware in Section
14 108(f) there is a statement about the
15 relationship between Section 108 and fair use.
16 However, I think we've gone beyond that.

17 I think essentially fair use has
18 made some provisions simply meaningless,
19 written them out of the statute. As the cases
20 currently stand now, as was pointed out, those
21 cases could change on appeal.

22 And I just want to add that

1 societal benefit isn't a new consideration,
2 but it's been given new weight. There are
3 many things in this world that provide a
4 societal benefit, but that doesn't give them
5 a free pass. And I think that's true with
6 fair use as well.

7 The question isn't whether some
8 of these things like the mass digitization
9 databases have a societal benefit. The
10 question is how you get there, what the
11 appropriate avenue is. I don't think in any
12 area of the law, and that's true with
13 copyright as well, that we think that the end
14 always justifies the means.

15 MS. PILCH: On the question of
16 fair use also, recent legal developments have
17 been positive for libraries with respect to
18 book digitization.

19 But in the landscape of mass
20 digitization we believe that fair use too
21 easily becomes an opt-out system that offers
22 little recourse outside of costly and time-

1 consuming legal action because, as is well
2 known, the takedown system is really
3 ineffective. Fair use does and will unfairly
4 affect many right holders.

5 Most ordinary people don't have
6 the means, the knowledge, the time, or the
7 resources to litigate over use of their works.

8 Keep in mind that we're embarking
9 on mass digitization of many different types
10 of works. If only the wealthiest and the most
11 determined right-holders are able to enforce
12 their rights and their livelihoods, we will
13 have disenfranchised many highly creative and
14 talented individuals in our society. And
15 that's just not fair.

16 Judge Chin said of the Google
17 Books Project that all society benefits. But
18 all society doesn't benefit if asserting
19 rights requires an expensive lawsuit.
20 Copyright becomes a system for the 1 percent.

21 Our final comment, which is best
22 practices can work very nicely and sometimes

1 they do. But when they're used as a way of
2 "doing it anyway" until you get caught and the
3 only people who can catch you are wealthy
4 right holders, the system has broken down.

5 MS. CLAGGETT: Jonathan.

6 MR. BAND: Well, I guess a couple
7 of things. First of all, I think to the
8 extent that the system has broken down, we all
9 know that the root cause is something that
10 we're not really supposed to be talking about
11 here. But it's the very, very lengthy copy
12 term and the absence of formalities, and as a
13 result that so many things are covered by
14 copyright where there was really no intention
15 and there's no economic sense, no reason for
16 things, especially we're talking about
17 ephemera and all the kinds of photographs and
18 the things that are -- some of the things that
19 are in our archives it really makes no sense
20 for them to be subject to copyright in the
21 first place. But we're not supposed to talk
22 about that so we won't.

1 MS. CLAGGETT: Please put it into
2 your comments. We just don't want to have a
3 huge debate. That could be a long
4 conversation.

5 MR. BAND: Well, it is the
6 elephant in the room. But that's fine.

7 Turning to the specific question
8 you were asking about fair use, well, I don't
9 think it's simply one or two cases. I mean,
10 it's a trend of cases and I think June would
11 agree it's not just one or two cases. It's
12 many cases in many circuits.

13 Our view, and we think it's --
14 June might think it's a negative development
15 -- we think it's a positive development.

16 Certainly, if the trend changes
17 at some point then we might have a different
18 position. But right now the trend is in our
19 favor.

20 That's not to say that, again in a
21 perfect world, one couldn't sit down and come
22 up with a legislative solution. Again, in a

1 perfect world, there are lots of legislative
2 solutions to lots of problems.

3 But the point is we don't live in
4 a perfect world, we live in this world. And
5 in this world the likelihood of coming up with
6 a legislative solution that really is better
7 than, and I'm saying better than from the
8 perspective of the user community, is very
9 unlikely.

10 The nature of the reasonably
11 diligent search, how prescriptive it would be,
12 and how likely it would really be to cover all
13 the different situations. Again, every work
14 is different. Every search is going to have
15 to be different, depending on what you find.
16 What you do at step one depends on what you
17 find at -- what you do at step two is
18 determined by what you find at step one.

19 And, as a result, it's so complex.
20 The likelihood of legislation--really as a
21 practical matter, even if we could ever get
22 there -- but the likelihood that that

1 legislation could really provide anyone any
2 more certainty about whether they did a
3 reasonably diligent search or whatever the
4 other framework was, I think it's illusory.

5 It really will not provide anyone
6 with any more certainty. It will just be more
7 loopholes or more hurdles that everyone is
8 going to have to jump through.

9 MS. CLAGGETT: I just had a quick
10 follow-up question for you, Jonathan. In your
11 view, just following up on an earlier question
12 I had, does fair use -- would fair use --
13 cover all the uses that you think, at least
14 the libraries within your organization, would
15 like to make of orphan works? And have, to
16 your knowledge, any cases directly addressed
17 all of the types of uses that the libraries
18 would like to make with orphan works?

19 MR. BAND: Well, I would say that
20 chances are would fair use address all cases?
21 Probably not. But I think it's highly
22 unlikely that legislation would address all

1 cases either.

2 But I think certainly, going back
3 to Dave's point, the combination that the uses
4 that we're trying to make we would see as
5 transformative.

6 And also that, in our view, that
7 there would be no market impact. I mean,
8 those two factors together would suggest that
9 in the vast majority of cases, the vast
10 majority of uses we want to make, that they
11 would meet the criteria of fair use.

12 But I'm sure that there would be
13 situations where they might not, but then I
14 don't think that those would necessarily fall
15 within any other kind of legislative --

16 MS. CLAGGETT: I'm going to go to
17 Brad, Salley, Jay, and then Kyle.

18 MR. HOLLAND: I just wanted to
19 respond to Jonathan's comments about certainty
20 and uncertainty.

21 We heard this in the first
22 roundtables in 2005 where Christopher

1 Sprigman, for example, insisted that
2 infringers needed certainty that if they
3 infringed a work they couldn't be pounced upon
4 and penalized for the maximum penalty.

5 As a matter of fact it's the
6 uncertainty that is the only protection that
7 creators have for copyright. Most infringers
8 know that most work is not registered.

9 Most of them know that if they
10 infringe the work they may never be found out
11 because you can be infringed anyplace in the
12 world at any time by anybody and unless you
13 happen to be there on that spot at that time,
14 or unless somebody you know identifies your
15 work and tells you about it, you don't know
16 you've been infringed.

17 If you do find out that you've
18 been infringed you may not be able to track
19 down the infringer. And while the infringer
20 may have to do a reasonably diligent search to
21 find you, if you've been infringed you have to
22 do an absolutely successful search to find the

1 infringer. And then you have to make him
2 respond.

3 If all of that happens and you
4 drag the guy into court it may still come down
5 to a matter of who has the most amount of
6 money to stay in court.

7 So, the infringer can bet that if
8 he infringes a work he probably won't get
9 caught, the work probably hasn't been
10 registered, and he probably won't be sued.
11 But he can't be sure. And that uncertainty is
12 the only protection that creators have for
13 their work.

14 There is no Copyright Office
15 police force. There is no copyright bureau of
16 investigation to go out there and enforce our
17 copyrights. We have to enforce our own
18 copyrights.

19 And the only mechanism that the
20 law has ever given us is the penalties for
21 infringement and the uncertainty in the mind
22 of the infringer that he just might get

1 caught.

2 MS. CLAGGETT: Yes, I will say,
3 just to respond to that, it seems like the
4 libraries are saying there is no more risk or
5 uncertainty, at least with respect to the uses
6 that they want. So, that kind of cuts both
7 ways, I think, somewhat.

8 Going to Salley as well.

9 MS. SHANNON: I just want to say
10 I love the idea of a Copyright Office police
11 force.

12 (Laughter)

13 MS. SHANNON: Can we write that
14 into the legislation and hope to get it
15 through?

16 I'm heartened by some of the
17 things --

18 MR. HOLLAND: Can't you see the
19 little armbands with copyright C's on them?

20 MS. SHANNON: Oh, I love it, I
21 love it.

22 I'm particularly taken by what

1 Jay said, that perhaps the pendulum has swung
2 too far on fair use. Of course that's our
3 belief.

4 There is considerable market harm
5 being done to writers and there hasn't been
6 adequate attention paid to that.

7 And I'm also greatly heartened by
8 what Janice and June said, that the end
9 doesn't always justify the means. So, it's
10 gratifying to hear that concern.

11 For us full text display would be
12 a prospective nightmare for the reasons that
13 Brad delineates. We are alone out there
14 trying to protect our own works.

15 And it's very difficult for an
16 individual creator to go up against a
17 corporate entity. And the larger the entity,
18 the more difficult it is. I just want to
19 emphasize that.

20 MS. CLAGGETT: Okay, Jay, then
21 Kyle, Jamie, and Allan.

22 MR. ROSENTHAL: Okay. Just a

1 couple of points.

2 First of all, just to respond to
3 the issue about copyright owners as the 1
4 percent. Songwriters are certainly not in the
5 1 percent. In fact, in the digital age
6 songwriters have become impoverished. And all
7 you have to do is go to Nashville and talk to
8 the songwriters down there and understand how
9 much they've been hurt over the past 20 years.

10 Same with photographers, same
11 with a lot of other classes of authors. So,
12 in balancing these interests I think we also
13 have to keep in mind that we're talking about
14 a lot of authors who are really not doing well
15 at all out there.

16 Second of all, the issue about
17 whether fair use kind of is better than
18 guidance that could be found through an orphan
19 works regime, I think guidance is probably
20 better.

21 And I think we've always taken
22 the position that if we're going to go down

1 this orphan works road, we would much rather
2 create best practices. And I know we're
3 probably going to talk about this more in the
4 reasonably diligent search panel, but we are
5 much more interested in creating best
6 practices that would allow folks to be
7 educated on how to find these works than to
8 rely on some amorphous fair use concept that
9 might land them in court later on.

10 MS. CLAGGETT: Kyle?

11 MR. COURTNEY: Thank you. A
12 couple of responses to a couple of things that
13 have been swung around this panel.

14 I feel like I'm kind of in a time
15 machine and we've been having this
16 conversation in 2005, 2008, we're having it
17 again.

18 What are the chances that
19 legislation will be passed that satisfies
20 everyone at this table? Zero. What are the
21 chances that legislation will be passed? I
22 mean that's up to Congress.

1 But what we have now is we have
2 best practices now. And David's going to talk
3 about this. We have fair use now. It's not
4 perfect, but it's good enough.

5 And I think that we avoid this
6 kind of vicious cycle that we've been going
7 through over the last seven or eight years
8 with regards to orphan works. I mean, let's
9 rely on what we have now.

10 Codes of best practices are useful
11 as a tool for education, risk mitigation,
12 indicators of what's reasonable, and make
13 aspirational goals for a particular profession
14 or job function.

15 Librarians are information
16 professionals. We're the ones that are
17 probably going to end up doing the searches
18 and helping the users. That's what we do.

19 This is cost- and time-consuming.
20 Janice mentioned litigation is time-consuming
21 and costs money. Absolutely, but so does
22 searching for a book that's an orphan work or

1 a photograph, or trying to find it out. There
2 was some study that we did at Harvard where
3 someone spent 400 hours on 5 or 6 books to
4 really try and find who owns this. And that
5 costs money and time too.

6 And as for the remedies that are
7 offered to folks, you know, the only remedies
8 that a creator has is bringing something to
9 court. And the Small Business Association
10 report said that if they wanted to bring it to
11 court they would have to register it, right?
12 That's the prerequisite for a federal district
13 court complaint, that you would have to
14 register the work. So it no longer would be
15 an orphan work.

16 So, I'm thinking that there's a
17 lot of things to do here with infringement,
18 with registration and time. If it's a true
19 orphan work you can't find that person and
20 that person may not want to be found. And
21 that affects the fourth factor.

22 Because we're talking about if

1 they want to take advantage of the market that
2 they've had for creating these works, they may
3 or may not have registered this stuff.

4 And again, it's also the elephant
5 in the room. So I apologize for bringing up
6 the elephant again.

7 MS. CLAGGETT: I'm going to go
8 Jamie, then Allan, then James, then David, and
9 then Jim.

10 MR. LOVE: Thank you. First, I
11 agree with a lot of things that people here
12 have said.

13 I think the book publishers have
14 said that they thought the previous, the Shawn
15 Bentley, legislation was a good basis for a
16 legislative solution. We like that. We tend
17 to agree with that.

18 I think that a lot of people here
19 are anxious because they think that Congress
20 will just screw things up, so they're a little
21 risk-averse about that. That's reasonable.

22 What people would like to have is

1 something that expands access to orphan works.
2 For us fair use is -- it's gone a good way
3 from our point of view. But I think that
4 there are a lot of uses that it will not go
5 to. I think that there's a lot of things,
6 particularly the commercial publishers, would
7 do that we would find beneficial from our
8 point of view in terms of including works.

9 I would say that, for myself, I
10 hear all these people talking about creators.
11 I know I spent the weekend working on a paper
12 where having access to older primary source
13 material which I could find on the internet
14 was really important for me.

15 It's some paper I'm being paid to
16 do on innovation inducement prizes and I'm
17 trying to sort of profile an old case that
18 happened in the nineteenth century and things
19 that happened in the last century.

20 And these mass digitization
21 projects have really opened up a whole area of
22 research for people of just things that they

1 didn't even really -- gaps in their knowledge
2 and things like that.

3 People will pay me to do that
4 kind of work if I have access to data, if I
5 have access to sort of the primary materials.
6 It makes my contributions more available. So
7 I don't know whether you consider that part of
8 the creative process, but it's certainly part
9 of our situation.

10 Now, some of the -- if you look at
11 the previous legislation, a lot of it was
12 based on limitations on damages and on
13 injunctions.

14 If you look at the trade
15 agreements like the TPP, the trade agreements
16 have these requirements which are completely
17 unnecessary and overbroad. The published leak
18 Article QQH4 on Civil Procedures that required
19 that judicial authorities have to have the
20 authority to consider any legitimate measure
21 of value the right holder submits, including
22 such things as suggested retail price.

1 If you have, in trade agreements,
2 things that obligate you to do things which
3 are contrary to legislation, you're just
4 creating a problem. Particularly when that's
5 subject to investor-state dispute resolution
6 where private parties, including the people
7 around this table, can actually sue and get
8 damages against the U.S. Government for
9 violating the terms of the trade agreements
10 it's entered into.

11 Also, these trade agreements have,
12 and this one in particular, had a U.S.
13 proposal -- really aggressive on the term.

14 Now, if you wanted to sort of --

15 MS. CLAGGETT: Jamie, I'm going
16 to have to just interrupt and ask you to kind
17 of wrap it up a little bit.

18 And also just to give another
19 caution. Obviously, I know that there's
20 separate issues with respect to trade
21 agreements and the TPP, for which there's no
22 official text out there right now. So, that's

1 kind of one of the areas where we're not going
2 to be able to explore in a lot of detail
3 today.

4 MR. LOVE: Well, you're trying to
5 fix a problem and you're doing something as we
6 speak in the process that your office is
7 actually part of the consultive thing which
8 has a huge impact on the potential contours of
9 solutions you can do. So that's why I brought
10 it up.

11 Now, in terms of the flexibility
12 you have on legislation, on things like
13 introducing sort of formalities-type
14 obligations, one of the areas of flexibility
15 you have is in areas that are in excess of the
16 TRIPS term.

17 The WTO agreement is the most
18 important for term because it's subject to
19 dispute resolution and it's really impossible
20 for the United States to modify that
21 agreement.

22 The TRIPS term for photographs is

1 very short and for published works, other
2 works, it's 50 years from the calendar year of
3 authorized publication. It's not even 50
4 years after life.

5 So it is possible, within 50
6 years after something has been published, to
7 introduce a formalities-type thing and not be
8 subject to TRIPS-type sanctions and even
9 shorter for other things.

10 Now, the final comment I wanted to
11 make is that I understand in certain kinds of
12 art, in certain kinds of, you know, that music
13 has a different situation, that photographs
14 have a different situation. I think text, all
15 these things are kind of different.

16 And one of the challenges of the
17 legislation is to have kind of an overarching
18 framework that fits all these very special
19 cases that everyone has.

20 Now, if I look at the rulemaking
21 that takes place in the DMCA, the DMCA has
22 people make proposals for exceptions

1 effectively to the rights of copyright owners.
2 They have to be empirically-based proposals.
3 They tend to be narrowly crafted. There's
4 kind of a debate. It's kind of done by the
5 Copyright Office instead of the Congress. And
6 they're modified from time to time.

7 The big complaint we have about
8 the DMCA rulemaking process is the automatic
9 sunset which we think is a mistake. But if
10 you take the automatic sunset out of the
11 process, that might be the right way to think
12 about a legislative way forward on the orphan
13 works.

14 So that you don't have to put
15 photographers, illustrated work, news text,
16 everything into the same basket. Things that
17 were published commercially first versus
18 things, like Jonathan mentioned, that nobody
19 really intended to be commercial products in
20 the first place all under the same basket.
21 You can kind of like -- and if Congress could
22 give you the authority to adopt rules and

1 exceptions and special treatments for orphan
2 works, and then you could sort it out through
3 this rulemaking process and then iterate it as
4 technology changed.

5 People mentioned that technology
6 is going to make it easier for people to
7 identify right owners in the future. I think
8 for a lot of work, that's exactly right.

9 And I think that you do not want
10 to necessarily use the orphan thing as a
11 complete solution. And I think the mass
12 digitization issues, while important are, also
13 need to be unbundled a bit from the orphan
14 works problem.

15 Because I think one of the
16 problems on the mass digitization problem is
17 an economic issue of who pays for the mass
18 digitization. Because I think one of the
19 problems with the Google works thing is we've
20 sort of shifted to private companies the cost
21 of doing the mass digitization and that's led
22 to sort of concerns about the monopolization

1 of the output of that. Thank you.

2 MS. CLAGGETT: Thanks, Jamie. And
3 some of what you said with respect to
4 regulations is something that certainly we've
5 heard from some of the comments as well as
6 some of the foreign governments that have
7 considered having a high-level sortt of detail
8 in the actual statute and more detailed
9 regulations that would be more flexible in
10 terms of addressing the conduct.

11 I think Allan was the next.

12 MR. ADLER: I just want to make
13 sure that this type of conversation doesn't
14 mislead people by creating a false dichotomy
15 about the need for legislation and the
16 availability of fair use. They're not
17 mutually exclusive.

18 The simple fact of the matter is,
19 as I said at the beginning, fair use is there
20 and fair use is always there for somebody to
21 be able to assert that they can make use of a
22 work without permission from the copyright

1 owner.

2 But in the 2008 legislation that
3 Jamie mentioned there was a savings clause
4 with respect to fair use because it was
5 understood that if a copyright owner were to
6 come forward and claim the rights with respect
7 to his work, that shouldn't prevent the user
8 from asserting that the use was fair use in
9 any event.

10 But the difference here is, of
11 course, that if people want to make use of
12 fair use to use a work without having to worry
13 about permission, they can do so now but they
14 won't get the benefit of any kind of
15 limitation on remedies.

16 And they're going to have to
17 forego arguing the notion that market harm
18 factor is to be assessed on the basis of the
19 idea that, well, there's no copyright owner
20 evidently available and the work itself
21 doesn't appear to be currently being marketed
22 because it's out of print.

1 In those events, you're going to
2 have to get into the issue of whether or not
3 there was any actual inquiry for a copyright
4 owner. And once you do that you're already
5 down the path to having to decide what would
6 constitute a reasonable inquiry.

7 And we've already gone so far in
8 defining the notion of a reasonably diligent
9 search. It really would be sort of pointless
10 not to use that for those people who are
11 interested in getting some assurance that they
12 could limit remedies if they're wrong, or if
13 their search turns out unfortunately to
14 produce the wrong results.

15 MS. CLAGGETT: And do you have
16 any response to some of the comments that, you
17 know, in addition to the case law, things like
18 best practices on fair use have come up and
19 have provided greater certainty?

20 MR. ADLER: I worry about best
21 practices. Best practices provide greater
22 certainty only to the people who create the

1 best practices and who actually favor the way
2 they work.

3 Most of the best practices we hear
4 about from the library community haven't
5 involved any discussion with copyright owner
6 stakeholders. So, obviously there's some
7 difference of opinion about those.

8 But I think more importantly we
9 have a real example in the case a few years
10 ago of the orphan works project at the
11 University of Michigan.

12 Those were people who we believe
13 with all good intentions set about creating a
14 subjective set of criteria for how you would
15 determine the orphan status of a work.

16 And they proved to be
17 dramatically wrong on a number of the
18 conclusions that they made. And part of the
19 reason for that was because they had not gone
20 through the effort to try to develop as a
21 legislative process would and indeed did do in
22 2008 all of the various kinds of sources that

1 it would make sense to say should be checked
2 as part of a reasonably diligent search.

3 And one could only imagine if this
4 was the case with the University of Michigan
5 and its orphan works project, imagine if every
6 university in this country decided for itself
7 that it was going to create its own subjective
8 criteria for how to determine when a work was
9 an orphan work and could be used without
10 concern about permission.

11 You would have a patchwork quilt
12 of a similar kind that you're going to get if
13 you were to rely exclusively on fair use and
14 let federal judges all across the country
15 determine in individual cases ultimately when
16 a work should be accorded orphan status for a
17 particular use.

18 MS. CLAGGETT: James, then David,
19 then Matthew, then June, and then Salley.

20 MR. HARE: Thank you. And I'm
21 noticing this thread between fair use versus
22 legislation that could arguably limit or

1 rather limit the remedies that are available
2 to current copyright holders because it would
3 allow for safe harbor provisions and so forth.

4 But what I'm thinking is, I mean
5 legislation goes both ways. It could make
6 broader use of copyright, it could expand the
7 concept of fair use, or it could help curtail
8 some of the fair use. So you could actually
9 use legislation to say mass digitization
10 requires a lot more diligence than it requires
11 now.

12 But I'm thinking the value of
13 legislation would be to help make use of a
14 body of works, over a century of works that
15 cannot be reasonably used now because the
16 copyright status is uncertain.

17 And as an example of this there's
18 a photograph of the poet Ezra Pound as a young
19 boy. The picture is from 1898 but it was
20 never published so under U.S. law it is still
21 copyrighted. And a lot of effort has been
22 expended into figuring out who is the

1 copyright holder of this picture. And no one
2 can figure this out.

3 And you could argue that fair use
4 provides for the educational use of such a
5 photograph, but it is ultimately a defense and
6 legislation would allow for the use of this
7 copyrighted--but never really used for
8 commercial purposes--work to be made available
9 for volunteers to use on not-for-profit
10 educational projects.

11 MS. CLAGGETT: David, then
12 Matthew.

13 MR. HANSEN: Sure. So, two
14 things have been floating around that I wanted
15 to address.

16 The first is this idea about risk
17 aversion and that keeping libraries and
18 archives and other users from actually
19 exploiting orphan works.

20 I think it's worth noting that
21 there are no cases that I know of where we
22 have an instance where a user has actually

1 used an orphan work, made it available, and
2 then an owner has shown up. And I think
3 that's notable because that speaks to this
4 whole risk aversion issue of whether there is-
5 -it's just--a real or a perceived risk there.

6 Now, we do have the HathiTrust
7 case but Allan, actually, I would argue that
8 part of that process was listing the works and
9 putting up online publicly available a list of
10 the works that would be made available to ask
11 people to identify them.

12 So, from my perspective, the
13 HathiTrust, the Michigan orphan works search
14 process worked. The Authors Guild identified
15 some of those. They didn't anticipate the
16 suit, but in that respect it worked.

17 But the second thing is throughout
18 this best practices project where we've gone
19 around and talked to all sorts of different
20 librarians and archivists, the thing about
21 risk aversion that we hear more often than not
22 is it's not just the copyright issues that are

1 preventing them from using these works.

2 There are all sorts of other
3 issues embedded in there, especially with
4 special collections where there are privacy
5 issues, there are concerns about the integrity
6 of the work and telling the story as
7 accurately and truthfully as possible.

8 And so to say that copyright is
9 preventing libraries and archives from making
10 orphan works available is really a simplistic
11 way of looking at it. There are all sorts of
12 other things embedded in there.

13 And a legislative solution that
14 is aimed at alleviating the copyright risk may
15 not do nearly as much as one would think it
16 would because all of those other issues are
17 embedded in there.

18 The one other thing I wanted to
19 say is kind of in defense of the best
20 practices. Like orphan works, there are no
21 cases that I know of where someone has relied
22 on these sets of best practices that have been

1 developed over the last few years and been
2 successfully sued.

3 And I think that speaks a little
4 bit to their legitimacy and their usefulness
5 for user groups. And for libraries and
6 archives in particular, they're some of the--
7 throughout this best practices project--we've
8 seen they're some of the most conscientious
9 copyright users that there are. And the
10 creation of their best practices for orphan
11 works is coming out soon, in the next month or
12 so.

13 What we've seen go into that is
14 sort of a high level of concern not just about
15 the perceived risk of getting caught but the
16 perceived harm that is done to a potential
17 owner. And it's a lot more nuanced and
18 interested in kind of the underlying
19 preservation of the integrity of the copyright
20 scheme than it is just whether we will get
21 caught or not. And I think that's worth
22 mentioning.

1 MS. CLAGGETT: I'm going to go to
2 Matthew, June, and Salley.

3 MR. SCHRUERS: Matt Schruers,
4 CCIA. So, we're close to finished with our
5 first panel here and I had sort of assumed by
6 this point someone would have raised the
7 issues that I think are really important and
8 we haven't talked about that much: these
9 definitional questions which have been
10 acknowledged in some of the previous NOIs.

11 Certainly one of them has been
12 alluded to, which is the precise contours of
13 what's an orphan work and that ties into the
14 reasonably diligent search and all that.

15 There's also a very broad
16 question mark around what exactly a mass
17 digitization project is. And I think --

18 MS. CLAGGETT: And we will have
19 a panel devoted to that on the second day.

20 MR. SCHRUERS: Right. So in that
21 sense I think we may have sort of the cart
22 before the horse because there isn't a whole

1 lot of certainty about what it is we're
2 talking about here.

3 And you know, at one level mass
4 digitization could describe a very narrow set
5 of physical to digital translations which have
6 been the source of some of the litigation
7 that's come up. A poorly worded definition
8 could sweep in a lot of standard database-
9 related activities that go on in business all
10 the time today. And I don't think we'd want
11 to see that. That would clearly have a lot of
12 unintended consequences. And I think that's
13 something that needs additional exploration.

14 I just wanted to make a comment.
15 I was really surprised with Jamie's suggestion
16 about the notion of a DMCA-like process for
17 dealing with orphan works. Because when the
18 solutions that we're considering seem to
19 reflect the sort of increasingly regulatory
20 approach of copyright that makes me very
21 nervous.

22 And yet I understand the appeal

1 of it because it seems like something that
2 we're familiar with and that could work.

3 The complexity of copyright has
4 great distributional consequences. It's a
5 system that's much more easily navigated by
6 sophisticated players than individuals.

7 And I suspect that some of the
8 aversion to a legislative solution is that
9 there is no confidence that a solution would
10 not also be itself very complex and
11 regulatory.

12 And if that's the case, then that
13 solution will have similar distributional
14 consequences and isn't going to help some of
15 the stakeholders at the table because they
16 won't be able to navigate it.

17 MS. CLAGGETT: And before we get
18 to June and Salley, who I think I have as the
19 last people, we do want to have the
20 opportunity to open it up for the last few
21 minutes to people from the audience to ask
22 questions.

1 So, I'm going to throw out my
2 last two questions to the panelists to respond
3 to after June and Salley speak and then we'll
4 open it up to the -- and Jim--and open it up
5 to the audience as well with any final
6 thoughts.

7 But my last two general questions
8 would be, one, as Allan mentioned previous
9 legislation did include a savings clause.
10 There are savings clauses already in the
11 Copyright Act for fair use, for example, in
12 Section 108.

13 Would having a savings clause
14 explicitly to support and sustain fair use
15 address some of the concerns, especially from
16 the library community, in terms of being able
17 to ensure that fair use is not in any way
18 negatively impacted by a legislative solution?

19 And then my second question is
20 just to bring in the international element a
21 little bit. As many of you know, definitely
22 other countries are working on and/or have

1 adopted orphan works legislation.

2 The fact that copyright is now
3 global and other countries are addressing
4 this, does this also impact at all whether the
5 United States should do something now since
6 quite frankly other countries are going to go
7 forward with or without the United States on
8 this issue as well?

9 So those are the last two
10 questions I'll open up to the panel. And then
11 I'll go right now to June and Salley and then
12 anyone else from the panel to respond.

13 MS. BESEK: Well, with regard to
14 your latter question I think that this would
15 be the time to go forward if we want to try to
16 influence other countries as well. I don't
17 think trying to export fair use is the way to
18 do that with any certainty.

19 I just want to mention a few
20 different things that have come up. One of
21 the reasons I favor legislation is I think the
22 Copyright Office should have a role in

1 developing the guidelines rather than this
2 being done sector by sector by users.

3 I think many of those guidelines
4 are aspirational. And while I agree that
5 especially librarians are extremely
6 conscientious people, not all the guidelines
7 have been developed by librarians. And
8 they've all, I think, been developed by people
9 who sincerely believe they should be able to
10 make certain uses. But still, they don't have
11 the involvement of anybody who's a right
12 holder.

13 One point I wanted to discuss.
14 There was a point earlier about mass
15 digitization designed to make available legacy
16 works that otherwise would not be available.

17 And one question that I had if we
18 rely only on fair use and not on any
19 legislation is what happens going forward?
20 What happens when the reasoning for putting
21 something in your database isn't, well, no one
22 can get access to it, but instead it's not

1 part of my database and my database has to be
2 comprehensive? So I think there are some
3 problems with that as well.

4 And I don't think we're really
5 talking about limiting it to legacy works in
6 the future. And by legacy works I mean works
7 that were created in print form.

8 MS. CLAGGETT: Salley.

9 MS. SHANNON: Yes. I just want
10 to say that yes, I believe that librarians are
11 diligent and conscientious to a very great
12 degree.

13 And I also wanted to say that it
14 doesn't follow that just because a suit hasn't
15 been -- an orphan works suit -- hasn't been
16 successfully pursued now doesn't necessarily
17 mean that our best practices and the questions
18 we're asking are correct.

19 When the HathiTrust folks came
20 forth with their list of orphan works I was no
21 further than halfway down the first page
22 before I saw two working writers whom I

1 personally knew and it took me less than 10
2 minutes to find a phone number and address for
3 one of them.

4 Now, if I can do that in 10
5 minutes and conscientious librarians have
6 worked very hard to determine whether those
7 are orphan works, something is wrong about the
8 questions we're asking.

9 MS. CLAGGETT: Thank you. And
10 does anybody want to respond to the last two
11 questions I had, the savings clause and the
12 international aspect? Brad, then Jonathan,
13 and then Ann.

14 MR. HOLLAND: I just wanted to
15 make a general comment, and it does affect the
16 issue of legislation as a model for foreign
17 legislation.

18 Because there are so many lawyers
19 involved in this, we're talking about this as
20 if it's some arcane branch of the law. It's
21 not.

22 What you're talking about is

1 prescribing business models for people in
2 businesses in which frankly most of you don't
3 know enough about to be creating business
4 models.

5 In 2008, we were lectured by a
6 group that artists now learn that they have to
7 change their business models. Well, listen.
8 There isn't an artist or a writer,
9 photographer in this business who isn't
10 already trying to change his business models
11 because the landscape in which we have to
12 create has changed more dramatically than at
13 any time since the invention of the printing
14 press. Every single one of us is reinventing.

15 I've been in this business since
16 1961. Now, for me this is a huge learning
17 curve to jump over. After more than 50 years
18 of working in this business I have to digitize
19 50 years' worth of analog works. Paintings 5
20 feet by 7 now have to be digitized. Metadata
21 has to be dug up from as far back as half a
22 century. Can't be done.

1 The marketplace will create
2 business models. It can move faster than
3 Congress. It can move faster than the
4 Copyright Office, can move faster than
5 lobbyists and legal scholars.

6 If an artist comes up with a
7 better means of being discovered, other
8 artists are going to find out about it and
9 they will copy the same technique.

10 Leave this to the marketplace.
11 This is the best laboratory for creating the
12 business models. Don't allow Congress, which
13 has done no investigation whatsoever into the
14 way we work, into the way writers work, into
15 the way songwriters work, into the way
16 photographers and small business owners work.
17 There has been no study whatsoever of how we
18 work. And they are not prepared, they're not
19 qualified, to write business models for us.

20 MS. CLAGGETT: Thank you. And we
21 certainly will take any comments that you want
22 to submit during our process and make sure

1 that they are analyzed and presented to
2 Congress as well. Ann.

3 MS. HOFFMAN: I just want to say
4 that the National Writers Union is intervening
5 in many of the overseas processes. I don't
6 think they're doing any better job than we're
7 doing in the U.S., but we want to try and get
8 the voice of the creator heard everywhere.

9 MS. CLAGGETT: Jonathan, then
10 Jamie, then Jay.

11 MR. BAND: So, with respect to
12 savings clauses, obviously if ultimately what
13 Congress comes up with is sort of a complex
14 regulatory structure similar to what was
15 considered the last time around in 2008, then
16 obviously a savings clause would help.

17 But I have to note that even the
18 existence of savings clauses in -- let's say
19 Section 108 --rights-holders still assert that
20 that savings clause doesn't mean what everyone
21 thinks it means or what its plain language
22 means.

1 And even June before was saying
2 that if you interpret fair use too broadly it
3 swallows up the exception. Now, we don't
4 think that that's right but the point is that
5 the mere existence of savings clauses, by
6 itself, is not sufficient to eliminate
7 concerns.

8 Now, it could be what we propose
9 in our comments is that if Congress does
10 decide to do something very narrow, let's say
11 sort of like a one-sentence amendment to
12 504(c)(2) that simply gives a judge the
13 discretion to consider orphan works status
14 when assessing statutory damages, something
15 really, really simple, then you might not even
16 need the savings clause because you're simply
17 talking about a simple adjustment to 504(c)(2)
18 and you don't need to get into, you know, it's
19 not really an exception for which you need the
20 savings clause and so forth. So, there are
21 ways conceivably around that specific issue.

22 MS. CLAGGETT: Jamie.

1 MR. LOVE: One of the things that
2 we think that when people mention the foreign
3 legislative efforts -- one thing that we're
4 concerned about in some of the proposals like
5 in Europe -- create the idea that every orphan
6 work generates some kind of a monetary claim
7 for a collections society.

8 And we don't like the idea that
9 you just have sort of automatic money being
10 paid when you can't give it to -- when the
11 money doesn't go to the person who's the
12 actual right owner.

13 I mean, it would be one thing if
14 you sort of escrowed the money and used it for
15 some public purpose that benefitted the users
16 like mass digitization projects or buying up
17 rights from right owners, or something like
18 that.

19 But I think just sort of like
20 collecting money for works where you can't
21 find the owners and giving it to somebody that
22 didn't write the work or doesn't really have

1 a legitimate claim is something that we would
2 oppose.

3 MS. CLAGGETT: Jay, then Allan
4 will be the last person.

5 MR. ROSENTHAL: Okay. First of
6 all, on a savings clause, if Google is
7 overturned, I'm all for it. Just to show
8 that, yes, there are problems here with fair
9 use and a savings clause that some would buy
10 into and some would not.

11 As far as international goes,
12 there's a couple of issues on the
13 international side and what they've done in
14 other countries that could be instructive for
15 us. Certainly the separation of noncommercial
16 versus commercial uses has always been
17 something that we think you should look at.

18 But as a last point, I just want
19 to jump on what Allan said a while ago about
20 best practices. And while I am one who is
21 very critical of them, I think if this is all
22 going to work here the idea of creating best

1 practices in a way where all the stakeholders
2 are in a room possibly facilitated by the
3 Copyright Office to come up with the right
4 questions and the right guidance.

5 I think it's been mentioned a
6 couple of times how hard it is for libraries
7 to understand. I'm thinking in terms of if a
8 library wants to find a very old esoteric
9 sound recording that Jim's group, one of his
10 members, might own -- where would they even
11 start? Unless Jim's group tells them this is
12 how you find an old esoteric sound recording,
13 or an old musical composition, or whatnot.

14 So, again this goes into the
15 second panel but I think that this all turns
16 on us being able to come up with right
17 guidance. Then maybe best practices could
18 work.

19 MS. CLAGGETT: Allan?

20 MR. ADLER: Well, I think that
21 one of the problems here is that you can see
22 the circular reasoning involved in these

1 efforts to decide that you don't need
2 legislation. You can rely on fair use, or
3 perhaps a limitation on damages that
4 authorizes a judge to consider orphan works
5 status.

6 What exactly would the judge be
7 considering? Based on what? Is each judge
8 going to decide what orphan work status means?
9 Are we each going to decide what orphan work
10 status means?

11 Unless you have legislation, you
12 don't have the ability to have consistent
13 uniform standards that are understood by
14 everyone and that are applied in the same way.

15
16 And if you don't have that then
17 you're not going to have the notion of equity
18 which is supposed to underlie both fair use
19 and the treatment of orphan works.

20 MS. CLAGGETT: Thank you. And
21 with that I'm going to open it up very, very
22 briefly to anybody from the audience. There

1 will be microphones right here on stands. So
2 if anybody from the audience has a few
3 questions or comments that they would like to
4 impart please do so now.

5 If not, I will thank the panelists
6 and we'll give a couple of extra minutes to
7 get ready for our second panel which will be
8 on reasonable search guidelines. Thank you
9 very much.

10 (Whereupon, the foregoing matter
11 went off the record at 10:13 a.m. and went
12 back on the record at 10:29 a.m.)

13 MS. ROWLAND: Hello. I'm going
14 to be moderating this panel. I'm Catie
15 Rowland at the Copyright Office.

16 And again I'm going to read the
17 statement about our videotaping of this event
18 so bear with me.

19 This panel discussion is being
20 recorded by the Library of Congress. There
21 will be a short question and answer period at
22 the end of the session.

1 If you decide to participate in
2 that question and answer period, you are
3 giving us permission to include your question
4 or comments in future webcasts and broadcasts.

5 At this time I'd like to ask you
6 to turn off any cell phones or electronic
7 devices that might interfere with the
8 recording of this event.

9 With that out of the way, this
10 panel is going to talk about the reasonably
11 diligent search and what it could be, what it
12 shouldn't be, whether we should have it at
13 all. And I know there's a lot of interest in
14 it because the first panel seemed to veer off
15 into it a little bit. But I think now we all
16 have the opportunity to really kind of get
17 into the nuts and bolts of what it should be
18 or what it should not be.

19 And so I wanted to start with
20 just a really broad question about what should
21 a reasonably diligent search be vis-a-vis the
22 2008 --

1 MS. PRAGER: Do you want to go
2 around the room?

3 MS. ROWLAND: Oh, I totally
4 forgot. Yes, thank you.

5 MS. PRAGER: And then can I make
6 also a point of order?

7 MS. ROWLAND: Sure.

8 MS. PRAGER: When people answer
9 questions can they say their name before they
10 answer?

11 MS. ROWLAND: Sure. That was a
12 great suggestion from Ms. Prager, which is
13 that we're going to go around the table and
14 introduce ourselves, just our name and our
15 organization.

16 And every time you say something,
17 say who you are and what your organization is
18 just for the court reporter and for the
19 audience members who might not all be able to
20 see your placards.

21 So, I guess I'll start with
22 Karyn. You probably know her already.

1 MS. CLAGGETT: Karyn Temple
2 Claggett, Associate Registrar of Copyrights
3 and Director of Policy and International
4 Affairs.

5 MR. MULLER: Frank Muller,
6 Attorney-Advisor for Policy and International
7 Affairs.

8 MS. JACOB: Meredith Jacob at
9 American University and working with Berkeley
10 on the Orphan Works Best Practices Project.

11 MR. HARBESON: I'm Eric Harbeson
12 from the Society of American Archivists.

13 MS. COX: Krista Cox with the
14 Association of Research Libraries.

15 MS. SABRIN: Amy Sabrin with the
16 National Portrait Gallery.

17 MS. PRAGER: Nancy Prager of
18 Prager Law.

19 MS. WOLFF: Nancy Wolff on behalf
20 of PACA, the Digital Media Licensing
21 Association.

22 MS. HOFFMAN: Ann Hoffman,

1 National Writers Union.

2 MR. FRENCH: Alec French
3 representing the Directors Guild of America.

4 MR. CAPOBIANCO: Michael
5 Capobianco representing Science Fiction and
6 Fantasy Writers of America.

7 MR. KLAUS: Kurt Klaus, attorney
8 at law in my private capacity. I'm also in-
9 house counsel at a network.

10 MR. ROSENTHAL: Jay Rosenthal.
11 I think I'm still the Senior Vice President
12 and General Counsel at the National Music
13 Publishers Association.

14 MR. SHEFFNER: Ben Sheffner, Vice
15 President, Legal Affairs at the Motion Picture
16 Association of America.

17 MR. LERNER: Jack Lerner here
18 representing International Documentary
19 Association and Film Independent.

20 MR. CRAM: I'm Greg Cram. I'm
21 the Associate Director of Copyright and
22 Information Policy at the New York Public

1 Library.

2 MS. RUSSELL: I'm Carrie Russell
3 from the American Library Association.

4 MS. MICHALAK: Sarah Michalak.
5 I'm Chair of the Board of Governors of the
6 HathiTrust Digital Library.

7 MS. ROWLAND: And thank you all
8 for being on our panel today.

9 And so back to the question which
10 is -- since 2008 has there been some sort of
11 general landscape change for the reasonably
12 diligent search?

13 I note that in our last panel we
14 didn't really talk about technological
15 advancements, even though that was on the
16 agenda. So it might be something some people
17 want to talk about now.

18 But this is kind of a broad kind
19 of opening-the-panel question iff you think
20 that things have changed a lot.

21 And not really in the case law,
22 the fair use case law that we just talked

1 about, but more in kind of the technical
2 mannerisms and how we would do a search. So,
3 I'm going to open up the floor to anyone who
4 has any thoughts on that. Any changes? Mr.
5 Harbeson?

6 MR. HARBESON: Sure, I'll lead.
7 I think that one of the things that has
8 changed for us, for the Society of American
9 Archivists, is that we've increasingly come to
10 the conclusion that the definitions of
11 "reasonable" in the reasonably diligent search
12 are increasingly not reasonable.

13 We have a problem here where the
14 copyright balance is out of balance. We know
15 that we have -- the problem is not that we
16 have -- we don't have enough protection or we
17 have too much protection and so we find
18 ourselves with works that the public is
19 needing us to use and not being able to.

20 So I'd like to point to one
21 study, for example, that shows how costly the
22 definitions of reasonably diligent search that

1 were in the previous legislation are.

2

3 So, the study is with the Thomas Watson papers
4 at the University of North Carolina. There
5 were 3,304 letters which were scheduled for
6 digitization. The university had spent many
7 -- so the cost in searching for the right
8 holders was extraordinary. Of the 3,304
9 letters, 79 percent of them they determined
10 were still under copyright -- that had not
11 entered the public domain yet. Of those, after
12 a considerable search, only four of those
13 right holders were ever found. After many
14 hundreds of hours of searching, the total cost
15 would end up being about \$1,000 per linear
16 foot. So when we're looking at archival
17 collections that are several hundred or even
18 thousands of linear feet, you have a situation
19 that just is not sustainable if we want to be
20 able to digitize the works,
21 if we want to be able to make them available
22 for the projects that the gentleman from the

1 Wikimedia Foundation, for example, was
2 discussing.

3 So we feel that a reasonable
4 search, to be reasonable, has to be cost-
5 effective and time-effective enough so that
6 people who need to make use of the works will
7 actually make use of the law.

8 MS. ROWLAND: Do you think that
9 there have been any sort of databases or other
10 search tools since 2008 that have helped the
11 situation? Or are you saying you think that
12 it's made it harder? Yes. Anyone else? Ms.
13 Wolff?

14 MS. WOLFF: Well, I think since
15 2008, and I speak on behalf of a number of
16 associations that have been involved in the
17 world of visual images and visual licensing,
18 I mean, I think these associations have taken
19 to heart that images have never been given
20 appropriate attribution. They're hard to
21 find.

22 And we haven't sat on our hands.

1 We've been working in support of what's known
2 as the PLUS Coalition to try to make search of
3 visual content that does not have attribution
4 be able to be found.

5 And of course it's a nonprofit,
6 so the wheels move slowly because it's not
7 heavily funded by any organization. But many
8 organizations, users, and I believe Jeff
9 Sedlik from PLUS is speaking on some others.

10 But it's content owners, it's
11 libraries, it's users, it's museums have all
12 worked together to form standards and try to
13 move forward, knowing that we're moving to a
14 world where it's important whether there's
15 orphan works or not to be found.

16 But it is a big process to
17 register and identify owners. But it's
18 definitely images having a reverse search is
19 helpful. And getting a registry, which is
20 sort of next on the agenda, up and running and
21 then get participation in that I think will be
22 helpful.

1 I don't think there's any one
2 registry that's going to solve all their
3 problems. I think there will need to be hubs.
4

5 And again, you will have the
6 issue with the analog historic work that will
7 take time, you know, won't have the ability to
8 be ingested as easily.

9 I mean, images currently are now
10 being created predominantly in digital format,
11 so that will make some things easier.

12 MS. ROWLAND: I think, Mr.
13 Rosenthal, you have your hand up.

14 MR. ROSENTHAL: Since 2008,
15 certainly, advances in content ID technology
16 I think are very important in the context of
17 what we're discussing. Certainly it is far
18 from perfect, there are issues with YouTube
19 and just user-generated content in general.

20 Which gets back to, I think, a
21 point I made in a prior panel--that there are
22 free market solutions here. And companies

1 that certainly should be incorporated within
2 whatever best practices, whatever guidance
3 that an orphan works law could create.

4 They must be brought into all of
5 this to be able to help and make sure that if
6 you don't use these free market-based
7 solutions, well, maybe you're not really
8 making a duely diligent search.

9 You know, when we talked about
10 this years ago, I raised the issue that for
11 the issue of digital samples there has always
12 been a market industry out there of search
13 companies that if you want to define the owner
14 of somebody, well, okay, you get to them, you
15 use them. Certainly if we're talking about
16 uses of works on a commercial basis that needs
17 to be part of it.

18 But I think that again these
19 technologies would be very helpful in finding
20 the folks. Because that's what we want. We
21 want them to be found. And this is part of
22 the solution in our mind.

1 MS. ROWLAND: Ms. Michalak?

2 MS. MICHALAK: Sarah Michalak. I
3 wanted to mention in reference to something
4 that Salley Shannon said in the previous
5 panel. That the 200 works that the HathiTrust
6 Digital Library posted in our orphan works
7 project did -- that whole process did benefit
8 from new uses of technology, i.e.,
9 crowdsourcing in this context. Because a lot
10 of those works were found just as Salley said
11 she had found two right away. Many works were
12 identified or had rights identification
13 through that process.

14 However, the process was -- the
15 project was curtailed because it was
16 discovered to be an erroneous approach to
17 finding -- to identifying rights.

18 Having said that, we at HathiTrust
19 continue to believe that most works are
20 findable and that a diligent search --
21 depending on what kind of subject area it is,
22 what community the material comes from, and on

1 the skill and capability and intuition of the
2 searcher -- most searches under those
3 circumstances will be successful and rights
4 holders will be identified. Naturally there
5 are some exceptions.

6 But we feel that since there is
7 a strong record of libraries succeeding with
8 searches for orphan works, it is not necessary
9 to prescribe minimal search approaches or to
10 try to define in detail what a basic search
11 should be, a truly diligent search should be.

12 MS. CLAGGETT: I have a follow-
13 up.

14 MS. ROWLAND: So do I. I think
15 a lot of people do. I may be speaking for a
16 lot of people with this question, but so if
17 you could explain a little bit about what
18 happened, I guess. Why were you guys not able
19 to find the authors that some other people
20 were? And why do you think that that
21 experience wouldn't lead to having some sort
22 of guidelines from outside?

1 MS. MICHALAK: The idea in the
2 beginning was to put up a couple of hundred
3 works that Hathi felt were not -- that were
4 truly orphan works. And very shortly, after
5 a very short period, they discovered that they
6 may have appeared to be orphan works but in
7 actuality they were not because rights holders
8 corresponded with the library.

9 And, again with the benefits of
10 crowdsearching, people who knew who the
11 copyright holders were spoke up.

12 So, they began to realize that
13 they were listing works that needed to have
14 more detailed rights searches. And they took
15 them down saying that that approach to orphan
16 works was not a good way to go. And those
17 orphan works are now treated as in-copyright
18 works in the digital library.

19 MS. CLAGGETT: And I did have a
20 slight follow-up on that although we don't --
21 we want to make sure we hear from everyone.

22 But do you think, in light of the

1 fact that after the works were listed you were
2 able to get through crowdsourcing and other
3 contacts some guidance in terms of what
4 copyrighted works were included and who were
5 the authors and owners of those works, would
6 guidance about crowdsourcing or who to
7 contact, some type of best practices that had
8 been taken into account prior, would that have
9 actually helped you think in terms of reducing
10 the likelihood that some of the orphan works
11 that you posted were in fact erroneously
12 posted?

13 MS. MICHALAK: I would say not.
14 We are opposed to having minimum searching
15 instructions or directions. We feel that
16 there is so much variety among all of the
17 different kinds of works that could be called
18 orphan works today that the searchers need to
19 be able to make decisions depending on their
20 sense of how -- what sources to use.

21 And it is true that some works
22 require many, many, many hours to determine.

1 But in the end most works can be -- most at
2 least printed and published works -- can be
3 identified. Rights holders can be identified.

4 So we feel that the searcher on
5 the ground so to speak needs to have the
6 complete freedom to -- and intuition and
7 knowledge to -- complete a search.

8 MS. ROWLAND: Thank you, and I
9 think we have a couple of comments. Actually
10 more than I thought. So we're going to go
11 with Ms. Prager, Mr. Lerner, Mr. French, and
12 then Ms. Cox. So, Ms. Prager?

13 MS. PRAGER: Yes. One of the
14 challenges that I'm hearing today is that this
15 conversation seems very geared toward
16 libraries. Let's talk about the real world
17 and real users outside of libraries because
18 librarians have special skills for searching.

19 I'm a lawyer. I'm here on behalf
20 of my own experience representing a range of
21 clients including a very important cultural
22 participant who publishes a music compilation

1 every year on -- that highlights -- the music
2 of the American South.

3 I have learned so much working on
4 that project every year. There do need to be
5 minimum standards. Because without someone
6 like me involved that can help guide the
7 process, there are many works that people
8 would deem to be orphans that would go unheard
9 because my client does everything on a most
10 favored nation basis, gratis, and they
11 couldn't use it if they can't get somebody to
12 sign off on the rights. This is -- I'm okay
13 saying all this.

14 We go to great lengths to find
15 these rights holders, including at times a
16 group of kids that go into a studio in
17 Mississippi or Alabama, cut a song and that's
18 the only song they have ever played and ever
19 recorded. And to be able to get the rights to
20 use the song.

21 There need to be minimum
22 standards. Because other people would say

1 this -- good faith -- that's part of the
2 language that's been used that I pray today is
3 removed from that language. Because it needs
4 to be a reasonable objective standard that
5 everyone, whether you're a librarian with
6 years of experience or a student documentary
7 filmmaker doing their first student film, can
8 have some assurance that they are doing the
9 research that will satisfy.

10 If there is ever an orphan works
11 exemption, it has to be an objective standard.
12 It has to be something that we can all look at
13 and quantify that this was a reasonable
14 search.

15 Since 2008 there have been
16 advances in technology. And we can discuss
17 the registries on the next panel because there
18 are a lot of issues with that.

19 But I do really, really hope that
20 we stop saying that this is a library-focused
21 situation because we need to look at it from
22 a broader perspective. And that's all.

1 MS. ROWLAND: Thank you, Ms.
2 Prager. Mr. French?

3 MR. FRENCH: Thanks. The
4 question was what has changed since 2008 and
5 we talked a little bit about technology but
6 there have been some legal changes too. In
7 particular, the EU Directive.

8 And I think looking at that is
9 instructive, particularly because one of the
10 things that is in the Directive is that you
11 have to seek to identify all rights holders.
12 That's part of, in a sense, a reasonably
13 diligent search there.

14 That's something that frankly
15 reflects a proposal that the Directors Guild,
16 in conjunction with the Writers Guild, has
17 been making in this process since 2005 -- that
18 you shouldn't, at least in the circumstance of
19 motion pictures, have to look for only the
20 copyright owner, but you should look for other
21 rights holders like the directors and the
22 writers.

1 We have -- and in the European
2 Directive we are part of that definition of
3 rights holders. You have to look for us too.

4 The reason why that's important
5 is, one, from a practical perspective we're
6 easy to find. Look at the credits. The
7 credits roll on a motion picture, you see who
8 the director is, you see who the writer is.
9 You can find us very easily directly at the
10 guilds, through databases like IMDB. You can
11 find us -- if you can't find the copyright
12 owner, then we can help you find the copyright
13 owner. So, it's a practical thing.

14 It's also just because as rights
15 holders in those works we have a whole series
16 of economic, creative, and human rights
17 recognized under international human rights
18 agreements tied up in those works.

19 So the idea that if you look for,
20 in a reasonably diligent search, and don't
21 find the copyright owner and that's all you
22 have to do and you don't have to come and find

1 us and account for the fact that we have under
2 collective bargaining agreements economic
3 rights, residuals, health and pension
4 contributions that go on for the life of the
5 work, that we have human rights, that we have
6 creative rights in our contracts but also
7 obviously in our international agreements.

8 We should be part of that chain.
9 We can help you find the copyright owner but
10 you also should have to come find us because
11 we have rights tied up in this that need to be
12 accounted for other than the rights of the
13 copyright owner.

14 MS. ROWLAND: Mr. Lerner?

15 MR. LERNER: Thank you. I want
16 to commend Ms. Prager for commenting that this
17 isn't only about libraries, although I think
18 libraries are more real world today -- more
19 relevant to the real world today -- than ever
20 before.

21 But I represent a group of
22 creators that depend on copyright protections

1 for a living. And we're here today because we
2 think an orphan works solution will benefit
3 the creative community and society at large.

4 And we think that the best way to
5 do that is through best practices. And I
6 think one of the differences between the
7 HathiTrust experiment that Ms. Michalak was
8 talking about earlier is that best practices,
9 when done properly, are created by communities
10 of practice, people who are both creators and
11 users. So they have an incentive to try to
12 actually find the rights holder.

13 I mean, a lot of people want to
14 license, that's what they want to do. And
15 we're just unable to do that.

16 And so we think that if you have
17 an orphan works solution and particularly if
18 you have best practices, it will actually end
19 up with more people getting licenses and more
20 people being able to actually monetize their
21 content both as original rights holders and as
22 downstream creators who want to license

1 content.

2 I don't think -- to answer your
3 question because we're still on the first
4 question, right -- but to answer your question
5 what's happened now is that a lot more ways to
6 find rights holders are developing every day.

7 And I'm happy to see Ms. Wolff
8 here. We talked about this in 2012. The MPAA
9 talked about this in 2012. There's a lot more
10 ways to find rights holders and all of these
11 should be rolled into best practices.

12 But one of the things that we
13 don't want to do is have an ossified or a slow
14 or a cumbersome regulatory regime that can't
15 keep up with all of the developments.

16 So, I think we need lean,
17 generally applicable principles that folks can
18 then go into the private market and develop
19 best practices around. And then actually
20 begin to monetize those best practices, or,
21 not monetize them, but actually use those best
22 practices.

1 And Brad Holland said the market
2 can move faster and we agree. But the
3 difference is that we think that the way to do
4 that is through best practices.

5 I want to say one other thing in
6 response to Catie's question and that is that
7 we have -- not only have more ways to find
8 rights holders developed and are continuing to
9 develop very, very rapidly, but also more
10 orphan works are now available than ever
11 before.

12 Not just because of the library
13 projects but because of lots of other ways.
14 Content is being created digitally, content is
15 being uploaded and all of that is really
16 greatly enriching our ability to create new
17 works. And as rights holders we're going to
18 be the owners of orphan works. We're going to
19 be, my clients are going to be, subjected to
20 the exact same regime. So we want the same
21 thing.

22 And when we went and created the

1 documentary filmmaker statement of best
2 practices and fair use, it was with that in
3 mind. And that's why it's been such a
4 success, because you have people with both of
5 these incentives there creating these best
6 practices.

7 And by the way, not only have I
8 not heard of any cases that have been
9 successful, I actually don't know of any
10 allegations of, specific allegations, of
11 misuse against any of these best practices.

12 And I think that's the question
13 we should be asking. How are they being
14 misused in ways that actually hurt rights
15 holders.

16 MS. ROWLAND: I think there's Ms.
17 Cox, and then Mr. Sheffner, and then Mr. Cram.

18 MS. COX: Thank you. I agree
19 with much of what Jack Lerner said about best
20 practices being an excellent way forward.
21 Best practices created by the communities that
22 are familiar with these uses, familiar with

1 the type of circumstances that arise.

2 And best practices can, as Jack
3 pointed out, evolve to adapt to new
4 technologies, new circumstances.

5 Our fear is that by codifying or
6 creating these regulations that are very
7 narrowly defined or rigidly defined, that they
8 will not be able to adapt to changing
9 circumstances.

10 It would be impossible to come up
11 with regulations that will conceive of every
12 possible circumstance that goes forward in the
13 future.

14 And I think that with a flexible
15 standard you can accommodate different uses,
16 users, circumstances because the differences
17 between these uses, users, and circumstances
18 can create differences as to the
19 reasonableness of the search.

20 And our fear is also that with
21 rigidly defined standards, it can reduce the
22 use of orphan works and result in institutions

1 not taking advantage of legislation and orphan
2 works becoming relatively inaccessible to the
3 public, basically creating a chilling effect
4 if they are too narrowly defined.

5 We also note that Nancy mentioned
6 that she feels like there is a need for a
7 specific minimum standard in order to
8 accommodate users that are not libraries.

9 But I would point out that fair
10 use is a very flexible standard and that's not
11 just used by libraries. That's used by all
12 types of users. So we think that a flexible
13 standard can accommodate both libraries and
14 other types of users and work really well.

15 I mean, fair use has been called
16 one of the most important safety valves of the
17 copyright system and that is a flexible
18 standard.

19 MS. ROWLAND: I will let Ms.
20 Prager interject for a moment.

21 MS. PRAGER: Fair use is not a
22 catch-all for every use. There are certain

1 uses that are specifically not going to be
2 fair use. And there are cases. So every time
3 you have to go to court -- we need -- so, fair
4 use isn't the balloon that's going to save
5 everyone in this case.

6 MS. ROWLAND: Okay, I think Mr.
7 Sheffner was next.

8 MR. SHEFFNER: Thank you. Ben
9 Sheffner with the Motion Picture Association
10 of America.

11 I want to take a step back here
12 and talk for a little while about what we're
13 actually trying to accomplish here. And what
14 we're trying to accomplish I don't think
15 should just be the establishment of some sort
16 of elaborate system, whether it's through
17 legislation or best practices or whatever.

18 The point is to facilitate
19 voluntary licensing transactions. In other
20 words, or the flip side of that, the point is
21 to minimize the population of orphan works.
22 I do think that best practices can play a

1 major role and a very important role in doing
2 so.

3 I do think it's important that
4 there be minimal standards. Minimal standards
5 and flexibility are not in tension. You can
6 have minimal standards and then you can have
7 on top of that flexibility to do what's
8 reasonable under the particular circumstances
9 for the particular type of works.

10 I do think it's important when
11 crafting best practices -- I think it was Jay
12 who mentioned in the last panel -- that they
13 do involve all stakeholders.

14 And I do think -- I don't mean to
15 put additional work on the Copyright Office --
16 but I do think the Copyright Office would be
17 a good forum for coming up with sets of best
18 practices.

19 Of course, they're going to
20 differ among the types of work. It's one
21 thing to look for the owner of a major motion
22 picture. There's probably going to be few, if

1 any, orphan works. I realize the situation is
2 much tougher with photographers and other
3 visual artists.

4 I do think also that it may be
5 helpful not to wait until legislation is
6 actually on the table or passed. But I think
7 the Copyright Office, there actually may be
8 benefits for the Copyright Office to go ahead
9 and start doing this now.

10 It'll advance the discussion.
11 Again, it'll help minimize the population of
12 orphan works by giving people who legitimately
13 want to find the copyright owner instructions
14 and guidance on how to do it.

15 And I think it will also give
16 comfort to certain copyright owners who may be
17 nervous about orphan works legislation because
18 they're not sure that the requirements for a
19 rigorous search are going to be rigorous
20 enough.

21 It'll give them comfort to see
22 that these things actually work in practice.

1 And as Jack was alluding to -- well you know
2 what, maybe there is not much evidence that
3 people are misusing them. Maybe it turns out
4 that -- you know what, once they have these
5 best practices, they actually do a much better
6 job of searching.

7 So again, I would encourage the
8 Copyright Office to see if there's a way that
9 they could facilitate the drafting of such
10 best practices again, even before legislation
11 is on the table.

12 MS. ROWLAND: And I'm going to go
13 to Mr. Cram next. But before I do, I wanted
14 to say this is kind of going into the next
15 question I had. So Mr. Cram, if you want to
16 address what you already wanted to say as well
17 as this next question and everyone else after
18 Mr. Cram.

19 Which is basically we talk about
20 flexible versus rigid standards. And people
21 are very concerned about having minimum
22 standards. But as Mr. Sheffner was saying,

1 you could have some sort of combination.

2 And at our last panel somebody
3 mentioned the DMCA Section 1201, which might
4 not be that popular for everybody, but there
5 could be things in which you could have some
6 sort of baseline there beyond a good faith
7 search, maybe a reasonable person search,
8 whatever the case may be.

9 Plus, having someone direct the
10 users to the Copyright Office or somewhere
11 else to say here is what we think is
12 reasonable at this time. It could be through
13 a rulemaking or it could be through just our
14 -- we make studies every now and then, as
15 we're doing right now. Something like that.

16 And I wonder how people feel
17 about that, both kind of a combination of the
18 rigid and the flexible as well as the
19 Copyright Office's position in that as well as
20 other organizations.

21 And with that, Mr. Cram, I'll
22 turn it to you. And I think Mr. Rosenthal is

1 next.

2 MR. CRAM: Thanks, Catie. So, I'm
3 Greg Cram. I'm from the New York Public
4 Library.

5 And the first thing to say is
6 that NYPL doesn't think we need an orphan
7 works legislation. We feel really confident
8 with years of fair use decisions coming down,
9 we feel comfortable that most of our uses are
10 going to be protected by fair use.

11 What we're really concerned is
12 about is an overly prescriptive search
13 standard. We're really concerned that
14 whatever search standard the Copyright Office
15 comes up with or Congress comes up with won't
16 take into account these technological changes.

17 You know, six years ago Google
18 images search didn't exist. Reverse image
19 searching didn't exist. We use it now every
20 day when we're trying to find rights holders.

21
22 So we're really concerned about

1 having a prescriptive search that calcifies
2 and ossifies, that doesn't take into account
3 some of the changes.

4 We're also concerned about having
5 Congress try to tell us what the search
6 standard is. We think that Congress is
7 probably the slowest body to make these
8 decisions.

9 And even the Copyright Office, I
10 think, would be burdened by the amount of uses
11 and the amount of works that we have in our
12 collections and the various types of works
13 that we have to come up with best practices
14 for every single type of work.

15 I mean, we are something of a
16 unique library where we have 44 and a half
17 million physical objects in our research
18 collection. Those things range from
19 photographs, home photographs, to published
20 works. And it's really hard for us to imagine
21 a system that takes into account all of those
22 types of works and the searches that would be

1 required to get there.

2 MS. ROWLAND: Mr. Rosenthal?

3 MR. ROSENTHAL: First of all,
4 your point about a flexible approach, I think
5 that probably is the best way to look at all
6 of this depending upon the works that are
7 involved and whether it's commercial or
8 noncommercial. That might be a way to kind of
9 separate the two.

10 But two points I wanted to make.
11 One is I wanted to join with Alec and talk
12 about that as part of all of these best
13 practices and duly diligent search processes,
14 we have to keep in mind the artist.

15 And I want to point out an
16 example. During the last round we brought
17 this to the Hill an example of a record label
18 that you couldn't find the owner. The owner
19 had fled, you know, tax reasons, whatever.
20 Big legal bills, whatever.

21 But the artist that we were
22 talking about, a number of the releases of

1 this label, the artist was playing in town
2 that week.

3 And the thought of an orphan
4 works process going through a due diligent
5 search where you just stop with the owner
6 might not be the best way to look at this. We
7 do have human rights obligations here and we
8 have to have that as part of it.

9 And the last point is just, to
10 make this even more complicated, we have to
11 take into account termination rights. And
12 when you have a situation where you have an
13 owner not being an owner anymore, how does
14 that fit into this?

15 Termination rights in and of
16 itself might be the main reason why we have to
17 somehow bring into this discussion should
18 artists be part of this search.

19 And what happens if you find the
20 artist and you don't find the owner? That has
21 to be discussed as well and thought through.

22

1 I'm not quite sure what the answer
2 is. But just to ignore it and not to have
3 that part of the conversation, I think, is the
4 wrong way to go.

5 MS. ROWLAND: I'm going to turn
6 to Ms. Russell and then Ms. Jacob, Mr.
7 Harbeson, and Mr. Capobianco.

8 MS. RUSSELL: Carrie Russell from
9 the American Library Association.

10 We've been working on the orphan
11 works stuff since probably 2004. We're the
12 largest library association in the country.

13 I collect information, case
14 studies from all libraries, public, school,
15 academic libraries.

16 And I have to tell the panel that
17 in my experience the efforts that librarians
18 make to identify a rights holder are very
19 sincere and are very broad and encompassing.
20 To the point that you wouldn't even believe
21 what someone would do to try and find a rights
22 holder.

1 They also, if they can't find a
2 rights holder, often refrain from using the
3 work altogether.

4 So I don't want people to think
5 that libraries are willy-nilly digitizing
6 anything that they have, that they're not
7 trying to actually find these individuals.

8 In addition, I think we focus a
9 lot just on digitization, but in our libraries
10 we also have an educational role. So often we
11 have instructors or faculty who want to use an
12 illustration in their class. We feel they
13 need to get permission. We can't find the
14 rights holder after a diligent search. So,
15 this is also another socially beneficial
16 activity that's going on with orphan works,
17 actually teaching.

18 Furthermore, I wanted to mention
19 that over the years the libraries have been
20 very aggressive in developing best practices.
21 And I don't mean just the ARL best practices.
22 I mean other sets of rules and suggestions.

1 If you look at the 16-page report
2 of the Society of American Archivists on how
3 to conduct a search, you can tell that people
4 are really taking this quite seriously.

5 Meanwhile, our associations are
6 doing things. We have for years created the
7 actual bibliographic records that represent
8 all the works that are published. Libraries
9 have been doing that.

10 We also have been developing
11 tools to help people find works, public domain
12 tools. Stanford's fair use site has a number
13 of tools to try and identify how to find a
14 rights holder.

15 We have principles for digital
16 content, a policy in the American Library
17 Association that very clearly articulates that
18 we respect the rights of rights holders. So
19 I want everyone to realize that we do our due
20 diligence.

21 The problem with setting minimum
22 standards is because sometimes you have

1 nothing to do at all. You might have a work
2 that has nothing on it, a photograph. You
3 can't identify where it was taken, who took
4 it, at what time, you have nothing. So, it's
5 kind of ridiculous to ask people to look for
6 facts that have never existed in the first
7 place. So that's a problem with minimum
8 search. I'll stop there.

9 MS. ROWLAND: I think Ms. Wolff
10 probably will have something to say about
11 photographs, but I will turn to Ms. Jacob.
12 And Ms. Wolff, if you want to say something in
13 a minute that would be great.

14 MS. JACOB: Thank you. My name
15 is Meredith Jacob. And I just wanted to start
16 off by agreeing with Mr. Cram and Ms. Russell
17 that having a single standard is very hard.

18 Because Ms. Michalak said, you
19 know, in the books context most searches can
20 eventually be successful. And in our
21 discussions with libraries and archivists,
22 that's completely dependent on what types of

1 materials you're working with -- both the
2 types of materials within the collection and
3 the focus of the collection.

4 And so for some things like Ms.
5 Russell said there is no reasonable search to
6 be done. There is really very little place to
7 start.

8 And in the context of the
9 collection, you know that if you go in an item
10 by item search, the digitization of the
11 collection for access is impossible. And so
12 in those situations, if there is a reasonable
13 search standard, I think it will wall off
14 large areas from the public.

15 And just to follow onto that, I
16 think the other question is if you're
17 searching for potential rights holders for
18 objects that were never created for a sort of
19 public purpose, it's also very hard to get
20 responses.

21 So you might be able to trace a
22 group of letters and find out who you think

1 the rights holders might be, but then get a
2 very, very low response rate from those sort
3 of cold calls. And so in that environment
4 having a single reasonable search standard
5 would be very hard.

6 MS. ROWLAND: Mr. Harbeson and
7 Mr. Capobianco and Mr. French.

8 MR. HARBESON: I'd like to again
9 agree with Carrie Russell. We do definitely
10 go through our due diligence.

11 But to go back to Mr. Rosenthal
12 from the Music Publishers Association. The
13 point about going back to the artist and
14 keeping the artist in mind. The study that I
15 mentioned earlier where we had 79 percent of
16 these letters that were -- of more than 3,000
17 letters -- that were under copyright and we
18 found 4 -- or we, the University of North
19 Carolina, the study -- found 4 rights holders
20 among those some 79 percent of 3,000.

21 Of the rights holders that were
22 found, most of them of course were more than

1 happy to let us use the materials. And of
2 those, most of them weren't even concerned
3 about compensation or something.

4 There have been other studies
5 that have suggested this, where with things
6 like letters, family snapshots, and things
7 like this where there was never any commercial
8 intent in the first place. There is no concern
9 on the part of the rights holder for, at least
10 from a copyright standpoint, receiving any
11 royalties or anything of that nature.

12 So this is why we suggest that
13 there really should be -- any orphan works
14 solution really needs to take into
15 consideration whether material was created
16 with commercial intent or not.

17 When material was created with
18 commercial intent, of course you don't want to
19 go and -- there may be a -- when material is
20 created with commercial intent the standard
21 needs to be different than when there was no
22 intent in the first place to exploit the work

1 commercially. Thanks.

2 MS. ROWLAND: Mr. Capobianco?

3 MR. CAPOBIANCO: Thank you. Two
4 points. One of the things that we've
5 suggested in our submission to the Copyright
6 Office is that part of any best practices or
7 any orphan works regime would include a free
8 voluntary author registry or database
9 presumably run by some entity like the
10 Copyright Office so that there was a place for
11 people to actually look for these orphan works
12 and the authors of them.

13 The second point is, and this is
14 going along with what Jay said, you must be
15 searching for the authors. And this may be
16 part of what was going on with the HathiTrust
17 situation. I don't know. It would be
18 interesting to see exactly what their
19 procedure was that led them down the pathway
20 to their incorrect assumptions.

21 But in many cases -- especially
22 with book, text, artworks -- the author is the

1 only one who knows who owns the rights. And
2 in many cases, especially when you're talking
3 about digital rights, the author or creator is
4 the owner of those rights. The publisher
5 either never licensed those rights or those
6 rights have reverted to the author.

7 So I don't know if this even
8 sounds like something unusual to everybody
9 else here, but it's the authors that you're
10 looking for. It's not the other rights
11 holders. It's not the publishers. It's not
12 the licensees. It's the authors.

13 MS. ROWLAND: Mr. French?

14 MR. FRENCH: So, assuming we're
15 on the second question about flexible versus
16 rigid?

17 MS. ROWLAND: I think so.

18 MR. FRENCH: Okay. I guess I'd be
19 a bit of a broken record and kind of say the
20 European Directive, I think did a little bit
21 of both.

22 It certainly has the flexibility

1 of pushing things off to best practices, but
2 it starts with the principle that as part of
3 a search you have to try to identify all
4 rights holders and defines rights holders as
5 not only the copyright owner but other rights
6 holders. In our case that would be the
7 director who has economic rights. So, I think
8 you can have a mix of both, but I think
9 starting from the principle I've heard
10 reflected by a few folks.

11 One of the things you should have
12 to do, I guess I would say it is a minimal
13 standard like they did in the EU Directive, is
14 you have to identify all rights holders in the
15 first place and find them. Then what are the
16 practices after that I think is where the
17 flexibility comes in.

18 MS. ROWLAND: And I wanted to make
19 a statement about a later panel that I think
20 this might come up again is the types of works
21 that might be within an orphan works solution.

22 And hearing Ms. Jacob talk about

1 the difficulty in finding visual arts, I'm not
2 sure what the solution is. I'm sure Ms. Wolff
3 and others who will be participating on that
4 panel will have a lot to say.

5 But I wonder if it's also a kind
6 of a catch-22. Because if you have this many
7 problems with a type of work maybe -- should
8 it really even be in the orphan works solution
9 at all? So, it can kind of cut both ways.
10 And that's something that we really want to
11 pursue.

12 I have a long list of people who
13 want to talk. So Ms. Sabrin, Mr. Klaus, Ms.
14 Michalak, Mr. Lerner, Ms. Hoffman, and then
15 Ms. Cox. So we'll start with Ms. Sabrin.

16 MS. SABRIN: I'm Amy Sabrin from
17 -- and I'm here on behalf of the National
18 Portrait Gallery where as a volunteer I am
19 overseeing a project to try to identify
20 holders of rights of orphan works. I'm a
21 retired attorney.

22 Which I want to emphasize that a

1 lot of public institutions who exist for the
2 purpose of educating the public as to our
3 cultural and historical heritage don't have a
4 lot of resources to conduct extensive
5 searches. And visual images are particularly
6 challenging, as you've noted.

7 Minimal flexible standards, you
8 know, I think they have to be flexible to take
9 into account the type of work that you're
10 looking for, the age. Because of a lot of
11 what we're finding is a lot of older works
12 that still are probably within the life of the
13 copyright but -- we can identify the author
14 but the author is dead, finding the rights
15 holder at that point is very challenging. So
16 the standard has to give you enough
17 flexibility to say what's diligent in that
18 situation as opposed to what's diligent in
19 another situation.

20 As a lawyer I would caution,
21 however, that I don't think you're going to
22 get any more certainty if you have a flexible

1 standard than you have now with fair use.
2 You're going to have judge-made law that will
3 develop over time about what constitutes a
4 reasonably diligent search in any particular
5 situation. So I'm not sure it actually does
6 solve a lot of the problems that we're hoping
7 to solve.

8 MS. ROWLAND: Okay. I'm going to
9 go to Mr. Klaus. Before I do that I would
10 love to see also how you view things with the
11 Copyright Office or some other entity that
12 might be able to help with these minimal
13 standards.

14 So, assuming that there is a way
15 to do some sort of flexible -- a flexible --
16 approach that has minimal plus some rigid
17 things in there, who would it be who would
18 make those decisions? How would that work?
19 And other comments you wanted to make.

20 MR. KLAUS: So, in a total
21 commercial setting, especially the mass
22 distribution of audiovisual works, hitting a

1 standard that's both flexible and rigid I
2 think is really imperative.

3 Because what that represents to
4 a mass distributor of audiovisual works is
5 risk reduction. In the form of if there's a
6 risk or an unclear right, the network or
7 whomever the mass distributor is is not going
8 to distribute the work because the risk is too
9 high and insurance companies won't cover it.

10

11 Those simply exempt them from a
12 policy and the work that could have been
13 included and distributed to the benefit of the
14 public -- of course there's a commercial
15 benefit as well -- will not be included in the
16 distributed work at all.

17 So, by having a standard against
18 which insurance companies, for example, and
19 television networks can say -- you know what,
20 we've hit the minimum standard here and
21 there's some flexible items here we could also
22 include in our search. And to have that

1 guidance, I think, would facilitate moreso the
2 distribution of works that otherwise would not
3 be included.

4 MS. ROWLAND: And who do you
5 think should be involved in coming up with
6 these more flexible standards?

7 MR. KLAUS: Well, it could take
8 the form, I think, of whatever you come out
9 with first as far as the law goes. And then
10 -- and the form of regulations that might be
11 added, following forums. Revisiting what has
12 worked in the past, what hasn't. In the
13 audiovisual industry--what's important, book
14 industry -- what's important. And in that
15 regard be flexible and build upon the base.
16 And that could be facilitated through the
17 Copyright Office.

18 MS. ROWLAND: Okay. Ms. Michalak?

19 MS. MICHALAK: I wanted to say
20 something that responded to both Ms. Russell
21 and Ms. Prager.

22 Evaluating a work according to

1 the principles of fair use is not just seeking
2 an excuse to use the work. As Ms. Russell
3 said, sometimes fair use review does not say,
4 okay, this is a fair use and the work is not
5 used. So I don't want the idea to remain that
6 the library community just uses fair use as an
7 excuse.

8 There have been -- I'm very
9 familiar with the UNC project and the
10 university librarian at UNC-Chapel Hill. And
11 we have had some objections to digital works,
12 but particularly in that case.

13 But the objections often always
14 have to do with something other than rights.
15 They have to do with ideology, with privacy,
16 particularly in a big collection of
17 correspondence. And the Tom Watson collection
18 has offended some people because his ideology
19 was very difficult to swallow.

20 And my third point is that a
21 flexible standard can never cover everything.
22 I couldn't even sit here and name all the

1 varieties of material that are out there where
2 the rights cannot be identified.

3 So, the more you try to craft
4 something that is flexible it becomes either
5 more and more detailed and therefore more
6 rigid, or it will end up being so general that
7 it really doesn't help for many of the
8 different kinds of works involved.

9 MS. ROWLAND: Mr. Lerner?

10 MR. LERNER: I want to respond
11 and add to something that Mr. Klaus was saying
12 -- oh, Jack Lerner -- to say what Mr. Klaus
13 was saying before.

14 Insurance already operates based
15 on best practices and fair use. And so what
16 the underwriters do is look at whether someone
17 has complied with a statement of best
18 practices and fair use in the filmmaking
19 context and they issue insurance based on
20 that.

21 The private market actually is
22 working based on these best practices that

1 have been created by communities of creators
2 who are also users. And so that's what we
3 recommend.

4 The way these standards are put
5 together is instructive, and I thought maybe
6 I would share that with the group and with our
7 hosts.

8 What we do is we work with small
9 -- to create these best practices, the people
10 that have created them -- work with small
11 deliberative groups of people who are doing
12 this work day in and day out, who have become
13 experts in how to do it appropriately and
14 responsibly and then create best practices
15 from those.

16 So numerous meetings with small
17 deliberative groups. In this case it would be
18 clearinghouses, footage finders, licensing
19 experts, people who are in the business of
20 locating owners.

21 The resulting best practices end
22 up taking that knowledge and distilling it

1 into what the important points are and sharing
2 that with wide groups of people.

3 So in the documentary filmmaking
4 context what that did was educated filmmakers
5 who had no concept of this and took these
6 users and helped them make responsible uses
7 very quickly. And that's a really important
8 education function, that privately created,
9 private market best practices have allowed.

10 And ultimately we think that with
11 a statement of best practices for a reasonably
12 diligent search everybody would be able to
13 figure out not just how to get the low-hanging
14 fruit but maybe the whole tree, or as much of
15 the tree as is going to be found.

16 And just to respond to what Mr.
17 Rosenthal is saying, no one is saying, and I'm
18 certainly not saying, that that might not
19 include saying look at some of the people
20 involved with the creation of this work.

21 I mean, if I have a photo of a
22 person and I don't know who the owner is,

1 maybe I would talk to the subject of the
2 photo, right? If there is a book and I can't
3 find the publisher, why wouldn't I look for
4 the author? Right?

5 And so these are really common
6 sense kinds of things. And those are the
7 kinds of things that come out when you put
8 these best practices together.

9 And I want to go back to the
10 insurance point for just one second. And that
11 is that one of the key checks on whether these
12 best practices are going to work, and one of
13 the things that enable them to work is that
14 there are lots of gatekeepers involved who
15 are, to use a term that was bandied about a
16 lot in the last panel, risk-averse.

17 Broadcasters, distributors, and insurance
18 companies are very risk-averse. And they've
19 got to sign off on a lot of these uses. And
20 that would happen with filmmakers, but I think
21 it would also happen with lots of other
22 groups.

1 So we support -- I mean, I think
2 that the statement of best practices and fair
3 use, not just particularly the documentary
4 filmmaker statement, but other statements are
5 the greatest success story in copyright over
6 the last 10 years and should serve as a model
7 for how to handle orphan works.

8 I think the fact that they've
9 been -- they haven't led to allegations of
10 abuse, much less to findings of abuse, speaks
11 for itself.

12 And so what I recommend the
13 Copyright Office do is support something that
14 replicates that experience. Support a
15 solution that allows the private sector to
16 determine the search criteria and then let the
17 courts do their job, settle disputes and let
18 the law evolve.

19 There have been two terms used.
20 One is minimum standards and one is minimal
21 standards. I think minimal standards make a
22 lot of sense -- basic standards with

1 flexibility so that they can be applied in
2 lots of different areas.

3 Communities of practice get
4 together and let the private market take care
5 of it. And that's going to be the most
6 elegant, the most nimble and the most flexible
7 solution long-term. And ultimately it's going
8 to lead to a lot more rights holders,
9 songwriters, photographers, lots of people
10 getting paid.

11 MS. ROWLAND: I didn't mean to
12 cut you off, Mr. Lerner. Continue.

13 MR. LERNER: No, thank you.

14 MS. ROWLAND: Ms. Hoffman?

15 MS. HOFFMAN: I want to speak to
16 the American public. If they knew that people
17 were considering making use of their family
18 photographs that they're posting on the
19 internet, or their internet jottings, or their
20 YouTube videos and thinking that they had the
21 right to do it without ascertaining who owned
22 it, I think there would be a revolution.

1 And I hear -- I mean, the use of
2 letters and photographs I think is
3 particularly troubling. I think they don't
4 fit into a discussion of orphan works.

5 The other point I want to make.
6 Mr. Lerner went through a number of
7 directories that are available that people can
8 search to find out who rights holders are.

9 There are no such directories of
10 creators at this time. And before we
11 establish standards we better find lots of
12 ways and define a lot of ways to locate
13 creators or we will continue to be left out of
14 the process.

15 MS. ROWLAND: Thank you, Ms.
16 Hoffman. I think Ms. Cox was next.

17 MS. COX: So, I think that
18 studies since 2006, when a lot of discussion
19 was being had around orphan works, have shown
20 that sometimes the search can actually be
21 harder than expected. Sometimes the results
22 are more ambiguous than one might expect.

1 In particular, just because one
2 identifies the author doesn't mean that they
3 identify the rights holder. And, as several
4 panelists mentioned on the first panel, that
5 the elephant in the room is the age of the
6 work. When you have these extended copyright
7 terms sometimes the, you know, when it's left
8 for 70 years that it's the authors heir, or
9 the heir's heir that actually are the rights
10 holders. And it's not always easy to identify
11 that.

12 But even where the author is still
13 alive sometimes that work has been
14 transferred. Someone else owns the work.

15 And so, the reason why I think
16 it's so important to have a flexible standard
17 is to accommodate the fact that not every work
18 is the same. Over the life of the work the
19 reasonableness of the search might change.

20 I think the studies show that,
21 particularly for archival works, that it is
22 ambiguous and it is hard to find those works.

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And I think, again, as Jack mentioned, best practices can accommodate this. It's not just about having a flexible standard. Because you can have the flexible standard but then allow the user communities to develop these best practices.

We're not saying that a flexible standard results in a free for all. It's not true at all. The library community is very conscientious, very concerned with following copyright rules and has responded to fair use by creating multiple codes of best practices and looking at the new technologies that have come out in order to evolve and change and adapt to these technologies, take them into account, and also to take into account new uses and new things that we want to support like mass digitization. And all of that can be accommodated through flexible standards and best practices.

1 And also, just one thing that I
2 wanted to add to that, is we agree with what
3 Greg said. And from our perspective we don't
4 really think there is a need for orphan works
5 legislation.

6 But if orphan works legislation
7 does come to be we want to make sure that it's
8 flexible enough to accommodate all types of
9 users and uses and new technologies that come
10 out.

11 MS. CLAGGETT: Before we go to the
12 next question I have a follow-up that I want
13 to explore. We talked a lot about the best
14 practices issue. And I know that there are
15 already existing best practices.

16 On the last panel there was some
17 concern about the development of best
18 practices in the sense that some of them
19 didn't actually take into account the views of
20 content owners.

21 So I wanted to see in terms of the
22 best practices that we might use for purposes

1 of a diligent search, for example. Would that
2 benefit from some additional support by the
3 Copyright Office or others to make sure that
4 they are done in a way that both the users and
5 the content owners who, obviously, we would be
6 searching for are comfortable with the type of
7 best practice guidelines that are developed?
8 So that's just a question I have. After the
9 people who are waiting, anyone else can
10 respond to that or the question that's on the
11 table as well.

12 MS. ROWLAND: It is a good
13 question and I'm actually going to -- I'm just
14 going to turn to Ms. Prager and Ms. Wolff, who
15 I think both had their hands up for that
16 follow-up question. So if you could say what
17 you were going to say or as well as address --

18 (Simultaneous speaking.)

19 MS. WOLFF: Nancy Wolff with PACA
20 Digital Media Licensing Association. A couple
21 of things to address.

22 One, I think that the Copyright

1 Office should play a role in dealing with best
2 practices and diligent search because they
3 will, and I think you can, take into account
4 all stakeholders.

5 Because when you have best
6 practices just designed by either library or
7 those -- if you don't take into the -- those
8 that actually own the rights, you may be
9 missing a lot of ways to find a search. So I
10 do think that the Library of Congress
11 Copyright Office is very relevant and should
12 play a relevant role.

13 And going back to maybe some
14 comments from the last section is that I think
15 there should be some basic guidelines from the
16 Copyright Office and then best practices
17 developed that -- so, for example, one, a
18 diligent search should be made. Two, that
19 just if there's no attribution that that
20 doesn't mean that no diligent search at all
21 should be made. Something more has to be than
22 just that there's not a name on a photo.

1 I mean, there are many reverse
2 image technologies available now. You can go
3 to TinEye and look up images. PicScout has
4 reverse images. A number of organizations and
5 companies that have been developing reverse
6 image search.

7 Again, the purpose of trying to
8 find someone under orphan works is much
9 different than fair use. With orphan works if
10 you do ultimately find someone, that's great,
11 you can ask permission, maybe do a license.
12 And then if there is orphan works legislation
13 you rely on it and an emerging rights holders
14 emerges, they get paid fair market value.

15 If everything gets lumped under
16 fair use, creators and authors will never be
17 paid anything because anytime you can't find
18 someone you'll just assume it's fair use.

19 Even getting back to the
20 insurance question. I mean, I vet a lot of
21 works for documentaries too and I think
22 vetting for fair use and vetting for not

1 finding and being able to find a rights
2 holders are two different things. And I think
3 you can't just lump them all in one place.

4 And I don't know if this is
5 appropriate at this time, but also it's
6 important that the diligent search is done at
7 the time, before the use and someone just
8 doesn't try to, you know, reverse engineer a
9 diligent search afterwards.

10 MS. ROWLAND: Ms. Prager.

11 MS. PRAGER: Thank you. One
12 thing I think that may be a little confusing
13 here is that we need to separate out
14 digitization. Which I think Krista's point
15 about fair use, that's sort of her -- I mean,
16 I don't want to presume for you --but
17 digitization of collections which you all deal
18 with and libraries are dealing with.

19 And I was sort of taking the
20 approach of users of content for what I would
21 deem noncommercial but courts have considered
22 what some of my clients do as being commercial

1 even though it's in a noncommercial context.
2 So that distinction, between commercial and
3 noncommercial, to me is a little bit of a red
4 herring and also a little bit undefinable.

5 But I do want to share something
6 with you all about orphans in the music
7 industry. Because unlike Mr. Rosenthal and
8 the cohorts he works with, I believe very
9 strongly that this has to consider music.

10 Sound recordings which are not in
11 the copyright -- in the public domain -- in
12 the United States and may or may not be
13 subject to federal copyright. There's a lot
14 of confusion -- on some parts pre-1972, but
15 even post-1972, when there's clearly defined
16 copyright federal protection.

17 Let's say you want to use a
18 recording of a band from 1975 and it was
19 recorded on a made-up label number 1. And you
20 have the disk. You have the 78 or the 45,
21 whatever. You're looking at it.

22 You go and you research it and

1 you find a clear-cut history in the United
2 States that that label, through 16
3 acquisitions, is now part of Sony Records.

4 You contact Sony, whether it's for
5 a commercial or a noncommercial use, and they
6 say what? We don't have a record of that
7 record.

8 The record labels, the sound
9 recording companies have not been incentivized
10 to go back and do a clean title search of
11 everything in their catalog. It's easier for
12 them to say no.

13 There's actually some benefit for
14 saying no to some uses. If they don't think
15 they're going to get a high value, it helps
16 their bottom line from an accounting
17 perspective.

18 Coming up with a clear approach
19 to orphan works could incentivize them to go
20 into their catalogs and clean them up. And
21 identify yes, we do own made-up label number
22 1 through 16 acquisitions.

1 Because right now I could make an
2 argument that there are orphan sound
3 recordings from 1980 out there because we
4 can't get the labels to admit that they own
5 it.

6 My favorite: I've been asked, and
7 other people I know in the industry have been
8 asked, can you show us the contracts that show
9 we own that label?

10 But my suggestion also right now
11 is to separate when we're talking about this
12 to sort of identify that there's digitization
13 issues and then also use issues by commercial
14 and noncommercial users.

15 MS. ROWLAND: Thank you, Ms.
16 Prager. And I think -- so, we have a couple
17 of people. Mr. Sheffner, Mr. Rosenthal, and
18 Ms. Jacob.

19 And I guess when I call on you,
20 Mr. Lerner, now it's you. The question being
21 about the best practices and what -- obviously
22 Mr. Lerner's talked about it -- was both the

1 users and the owners who kind of got together
2 and developed their best practices.

3 But what other kind of
4 coordination has taken place between the
5 content owners and the users? And so I guess
6 I will start with Ms. Jacob.

7 MS. JACOB: I just wanted to
8 clarify earlier. I don't think that a rule
9 based on photographs versus music versus
10 written work is a good standard. I do think
11 that they're very different types of works.
12 And so I just wanted to go back to that.

13 But on the best practices, I
14 wanted to agree with Mr. Lerner that they're
15 a really strong tool here because they do deal
16 with specific communities of practice.

17 So we heard a concern earlier
18 about the issues around the digitization of
19 letters or family photographs. And the
20 strength of the best practices project that
21 we're doing -- working with librarians and
22 archivists that work with people who have

1 experienced professional training and ethical
2 guidelines for dealing with those materials --
3 t's not being created in a vacuum.

4 So, in these best practices
5 projects you're working with people who are
6 already really very much in the weeds on how
7 to deal with these types of materials and you
8 get to draw on that expertise.

9 And I think there that the best
10 practices model lets you work community by
11 community and with certain types of materials,
12 not only the types of materials but the types
13 of uses. And so it can create a closer fit
14 than any sort of single evenly applied
15 standard would.

16 MS. ROWLAND: A more specific
17 question I think than Ms. Temple Claggett had
18 was do you reach out to the content owners
19 when you're coming up with these best
20 practices.

21 MS. JACOB: In the archival
22 context that's an interesting question because

1 there really, you know, in the issue of sort
2 of letters or in the types of sort of ephemera
3 in a lot of these collections, there is no
4 content industry. And that's, I think, a part
5 of the problem that those people are dealing
6 with is that it's a very different thing if
7 you have a sort of, you have the music
8 industry, or you have the film industry.

9 But when you're dealing with
10 things that could include working memos,
11 letters, correspondence, photographs,
12 instructional manuals, parts of recorded
13 speeches that there isn't an industry to reach
14 out to2.

15 And I think that there the
16 community of practice is the source of
17 information about how to deal with those
18 materials.

19 MS. ROWLAND: Okay, Mr. Harbeson,
20 then I will go to the other side of the table.

21 MR. HARBESON: That was actually
22 a lot of what I wanted to say. But I did want

1 to respond to the comment to my left. The
2 archives community takes very seriously the
3 trust that's placed in them when people donate
4 letters and family photographs and the like to
5 us. And so the archives community has spent a
6 lot of time researching and worrying about the
7 problems that come up when you make very, very
8 personal documents available to the public,
9 whether -- we've been dealing with this since
10 long before the online access issue was even
11 an issue -- this is something that we've
12 researched very well.

13 So I think that to the extent
14 that -- I don't think that there is likely to
15 be a revolution if people find out that we're
16 going to be putting their family photographs
17 or their letters or correspondence online.

18 But I think, to the extent that
19 there is concern about this, what we're
20 talking about here is a copyright issue, not
21 a right of privacy issue. Those are issues
22 that are best dealt with elsewhere.

1 MS. ROWLAND: Okay, Mr. Sheffner.

2 MR. SHEFFNER: Ben Sheffner with
3 the MPAA.

4 One thing that has not gotten
5 mentioned so far in the context of the minimum
6 search requirements is the Copyright Office
7 records themselves.

8 One thing that we've said in our
9 previous rounds of comments is that at a
10 minimum when people are undertaking a diligent
11 search they should consult the Copyright
12 Office's records, registration and
13 recordation.

14 I realize that doesn't solve all
15 the problems. If all you have is a
16 photograph, going to a Copyright Office
17 database is not going to tell you who the
18 owner is. But there's lots of situations
19 where it will at least lead you on the right
20 path.

21 And I just want to commend the
22 Copyright Office. I know you're undertaking

1 studies right now about modernizing the
2 recordation process. I'm sure there will be
3 future proceedings on registration.

4 I'm sure, as a lot of people in
5 this room are aware, records before 1978 are
6 not even all digitized.

7 And I think it behooves all of us
8 in this room -- no matter which side in some
9 of these debates we're on -- is for all of us
10 we should be doing all we can to support the
11 Copyright Office in its modernization --

12 MS. ROWLAND: Thank you. We
13 agree.

14 MR. SHEFFNER: -- in its
15 modernization efforts. I realize that you
16 have limited resources but again, we should
17 all be doing what we can to help get you more.

18 And again, the modernization of
19 these records, making the databases more
20 searchable, more accurate, will again go to
21 minimizing the population of orphan works
22 which is, again I think, should be the overall

1 goal of this process.

2 MS. ROWLAND: I wanted to point
3 out just we're having some roundtables in L.A.
4 -- it may be in San Francisco, in California
5 at the end of the month. Ms. Shaftel was
6 going to say something.

7 MS. SHAFTEL: There's one in New
8 York also on the 28th.

9 MS. ROWLAND: So we are having a
10 series of roundtables on recordation issues
11 later this month. If you check out our
12 website you can see them. If you're
13 interested in that topic you can come to
14 those. We'd love to hear you.

15 We're running a little short on
16 time. I think I'll go to Ms. Russell because
17 you had your hand up a little earlier and then
18 I had one final question for the panel. And
19 then we'll try to get some audience questions.

20 MS. RUSSELL: In terms of the
21 Copyright Office's role in developing search,
22 I think the Copyright Office should focus its

1 energy entirely on updating its records.
2 Because if people could find the rights holder
3 this would really -- when people want to ask
4 permission, they already know their use isn't
5 fair. They want to find the rights holder.
6 They want to engage with that person. So I
7 would focus on updating the records.

8 I also wanted to point out that
9 with audiovisual materials librarians,
10 teachers, everybody, they can easily find the
11 rights holder.

12 The problem with audiovisual is
13 that the rights holder doesn't respond. And
14 the reason why they don't respond is because
15 a library or a school wanting to use some
16 footage from a film, they're not going to be
17 able to really collect the kinds of money they
18 can versus NBC wanting to use footage from
19 their film. So they often put the nonprofit
20 kind of requests over to the side. And maybe
21 that is a problem that they need to address.
22 Because we never hear back from these people.

1 MS. ROWLAND: Thank you, Ms.
2 Russell. And I had one final question for the
3 panel. I'm not sure who wants to talk about
4 this a little bit.

5 It's about the EU Directive and
6 how over there once you do your reasonably
7 diligent search --assume we've all figured out
8 what it's going to be and you've done it and
9 you've found nobody -- at that point they make
10 a recordonline anyone can search it and have
11 kind of a registry.

12 And at that point also other
13 people can kind of tag along, tack onto that,
14 unless the orphan works owner appears.

15 And so I wondered if people had
16 thoughts on making a registry or any kind of
17 tagalong users of orphan works. Ms. Prager?

18 MS. PRAGER: That was actually
19 something I was going to bring up but I didn't
20 know if it was appropriate in this case.

21 I think that however we proceed
22 with orphan works in the United States, taking

1 the advisement of how they're doing it in the
2 EU is important.

3 And making that registry
4 available so that it becomes part of the
5 record. One of the things that didn't get
6 brought up here is that what we're really
7 talking about with orphan works is a problem
8 because of the copyright law.

9 In 1988, when we signed onto the
10 Berne Convention, you no longer had to put the
11 copyright sign on to have a copyright, and you
12 can't do formalities anymore and all that kind
13 of good stuff.

14 So the rights holders and the
15 creators are now the ones that we're coming
16 back to 20 years later almost and saying yeah
17 well, now your stuff is considered an orphan
18 so do something about it. So if we go down
19 that road, then let's make this part of the
20 process.

21 MS. ROWLAND: Mr. Rosenthal?

22 MR. ROSENTHAL: Yes. I would

1 probably, if you're going down the road of
2 trying to think of using a registry of some
3 kind, is again to look at the free market.

4 I think what you're talking about
5 here is somewhat of a Creative Commons
6 approach where you would have some kind of a
7 registry. But I'm not sure whether it would
8 be the government that's the best place to do
9 it, or whether you would have some kind of an
10 organization outside of government handling
11 this kind of a thing where someone actually
12 not just would have an orphan work, what they
13 believe is an orphan work, so we're going to
14 register it, but maybe they want to do that.

15
16 And therefore you have an
17 opportunity like in the Creative Commons
18 approach where once I register I know that all
19 the libraries can use it. And all the, you
20 know, maybe noncommercial uses, maybe even
21 commercial uses, they can go down that road
22 and use it.

1 And just the last point. I just
2 want to say to Nancy -- I've never heard of a
3 label disavowing ownership of a track, but I
4 have heard of tracks where multiple labels
5 claim ownership. And that's where you have a
6 lot of mom and dads --

7 MS. PRAGER: I can show you lists
8 from years and years.

9 MR. ROSENTHAL: Yes, no, I
10 understand.

11 MS. PRAGER: And I can also put
12 you in touch with lots of music clearance
13 people who come up with the same issue.

14 MR. ROSENTHAL: Yes. But here is
15 the reality. You have SoundExchange out there
16 with databases of sound recordings and
17 artists, ASCAP, BMI with songwriters. I think
18 you're probably --

19 MS. PRAGER: I will address the
20 problems with those databases in the next
21 thing.

22 MR. ROSENTHAL: Yes.

1 MS. PRAGER: But including in
2 SoundExchange where foreign labels that don't
3 have any rights to the underlying sound
4 recordings are collecting the payments on the
5 royalties because they're listed as the owner
6 of that part.

7 MR. ROSENTHAL: I understand the
8 problems with SoundExchange.

9 MS. ROWLAND: I think this might
10 be a discussion for a different place.

11 MR. ROSENTHAL: That's a
12 different topic.

13 (Laughter)

14 MR. ROSENTHAL: The point is
15 there's databases. That's the point.

16 MS. ROWLAND: Because time is
17 short I wanted to give Mr. Capobianco and Mr.
18 Lerner the last word.

19 Before I went forward I wanted to
20 make clear when I talk about the EU Directive
21 they're not trying to make -- their intent
22 does not appear to be to make a list of things

1 that can people just use freely. It's more to
2 make a list of works so that the owners can
3 find out if people are using them.

4 So the owners can come and either
5 claim them back or negotiate or something. So
6 it's not an attempt to make kind of a free-
7 for-all on the use part.

8 Mr. Capobianco, then Mr. Lerner,
9 then we'll see.

10 MR. CAPOBIANCO: Well, as far as
11 a government-run registry I can think of two
12 ways of doing it. One would be to have a
13 registry of prospective orphan work
14 publications.

15 In other words, you would put the
16 information on this registry saying I intend
17 to publish this and they -- so it would be
18 like a six- or eight-month period during which
19 that would stand up there.

20 And then that would give it a
21 chance for the rights holder of the work to
22 find the -- in other words, reversing the

1 process.

2 MS. ROWLAND: Sounds like the
3 Trademark Gazette. They publish the pending
4 trademarks.

5 MR. CAPOBIANCO: Yes, something
6 like that. And then of course what you were
7 just saying, also having an ongoing registry
8 of orphan works that have been demonstrated to
9 be orphan works. So that someone would not
10 have to redo the search for them because these
11 would be permanently labeled orphan works
12 until someone came forward maybe and said no,
13 that's not an orphan work.

14 MS. ROWLAND: Mr. Lerner?

15 MR. LERNER: Jack Lerner. I just
16 want to respond to Ms. Temple Claggett's
17 question about the Copyright Office
18 involvement. We do have a lot to say about a
19 registry of proposed works but we can talk
20 about that after lunch.

21 You know, I think the experience
22 with the best practices has been a good one,

1 we see, because there haven't been a lot of
2 problems. In fact, there haven't been a
3 single problem that I know of with these best
4 practices. And so I think we should replicate
5 that process.

6 The Copyright Office could get
7 involved, but I don't think that's necessary.
8 I think what we want to do is let the private
9 market do its thing.

10 And some communities and some
11 industries will undoubtedly contact rights
12 holder groups and talk about registries run by
13 rights holders and so on and some won't. And
14 that should be decided by those industries.

15 What we don't want to do is more
16 photocopying guidelines from the seventies
17 that don't get used ever. And what we don't
18 want is a Canadian system that also doesn't
19 get used ever.

20 So if you want these to actually
21 get used, the best way to do it is to let the
22 private market do its thing. Let insurance

1 companies and other gatekeepers serve as a
2 check to that.

3 And ultimately if you support
4 legislation that limits remedies, what you'll
5 end up doing is super-charging that process in
6 a way that ends up finding a ton of rights
7 holders that aren't being found yet because of
8 the education function. And you'll end up
9 with a lot of compensated uses. And we think
10 that's the way to go.

11 MS. ROWLAND: Thank you, Mr.
12 Lerner. And I think we're out of time at this
13 point. So I would like to see if there's
14 anyone from the audience who had a question.
15 If you do, I think we're going to have some
16 mikes coming up. I think some people are
17 coming over. So there are mike stands being
18 set up. So if you just kind of come over you
19 can ask your questions.

20 MR. BAND: I'm Jonathan Band with
21 the Library Copyright Alliance.

22 And just very quickly to respond

1 to give my view on the question about the best
2 practices and who should be involved in that
3 process.

4 Certainly in a perfect world it
5 would be great if you could have, if there was
6 an affected industry or a group of rights
7 holders it would be great if you had the user
8 community sit down with the owner community
9 and work out best practices.

10 But again, this is not a perfect
11 world. What would happen is you would have a
12 three-, four-, five-year negotiation. You
13 either would never reach an agreement or the
14 agreement would be so complex that it would be
15 useless or it would be so general that it
16 would be useless.

17 So, again, in this world a much
18 better solution is to do exactly what's been
19 happening, which is user communities come up
20 with their best practices. So far the owner
21 community has sort of complained about the
22 fact that the user community has come up with

1 their best practices, but they've never
2 actually come up with any specific objections
3 to those best practices.

4 But I would suggest that they
5 should come up with their specific objections
6 and then a user could look at the best
7 practices developed by the user community.
8 They could look at the addendum, or the
9 dissent or whatever is developed by the owner
10 community. And then they do what they think
11 is right.

12 The likelihood of anyone ever
13 objecting, meaning any owner coming out of the
14 woodwork, is infinitesimally small. If there
15 is a problem, at that point a court could look
16 at it and see whether the diligent search was
17 performed.

18 But the notion of trying to sort
19 of delay this process at the outset by trying
20 to basically have the Copyright Office
21 supervise 50 negotiations between rights
22 holders and users I think is just a complete

1 waste of time for everyone involved.

2 MS. PILCH: I have a question.

3 A recurring theme in your conversation is the
4 distinction between commercial and
5 noncommercial uses.

6 We're talking today in part about
7 orphan works and mass digitization that aims
8 to put works up on the open internet and that
9 makes these works exploitable for indirect
10 uses, for advertising, data collection, data
11 tracking, and profiling of searches.

12 The advertising and the data
13 collection that goes on already is very
14 profitable for technology companies. Should
15 there be a different diligent search standard
16 for isolated uses and mass uses that in some
17 way, I think it's fair to say are always,
18 commercial because of the indirect uses that
19 are made by the technology sector.

20 MS. ROWLAND: That is a good
21 point, Ms. Pilch. That was actually something
22 that was raised in some of the comments. I

1 think the opposite of what you're saying,
2 though.

3 Some of the comments were saying
4 that nonprofit enterprises should not really
5 have -- should have more of a relaxed diligent
6 search requirement. Although on the other
7 hand some of these nonprofits are probably
8 some of the people who could do the best
9 searches. So it's an interesting theory. I
10 don't know if anyone wants to briefly talk
11 about it, as in very briefly. Mr. Harbeson?

12 MR. HARBESON: I'm not sure that
13 I would agree that all mass digitization
14 efforts are necessarily commercial efforts.

15 I would say that we definitely
16 feel that any solution to the orphan works
17 problem that is done legislatively needs to
18 work both for item-level digitization or uses
19 and collection-level digitization efforts,
20 which is how we see the mass digitization.

21 There has to be a way not only to
22 make a decision based on an individual item

1 search but also a folder of letters from a
2 particular person or something like that.

3 MS. ROWLAND: We have some
4 comments. Mr. Rosenthal and then Mr.
5 Capobianco.

6 MR. ROSENTHAL: Just to respond to
7 Jonathan. I think that the focus here should
8 be to try -- of all copyrights should be to
9 facilitate licensing. So the process of
10 creating best practices, whether it is before
11 we have a bill like Ben has suggested or as we
12 get towards a bill and work through, I think,
13 is just a fantastic thing to do.

14 The more that the content
15 industry can educate the user industry on
16 where these rights are and how to get to them.
17 And again, I come back to music and I'm
18 thinking of terms of well, how does a library
19 know about digital samples within a sound
20 recording that might trigger other ownership
21 issues. How would you know that unless you
22 really communicate with the content owners?

1 And I think it's a very positive thing to do.

2 MS. ROWLAND: Mr. Capobianco.

3 MR. CAPOBIANCO: Yes. To me it
4 seems that the concepts of mass digitization
5 and diligent search are incompatible. There
6 really is no way to do a diligent search on a
7 mass basis. It has to be an individualized
8 search.

9 MS. ROWLAND: And then I think we
10 have one final question from the audience.
11 Mr. Hansen.

12 MR. HANSEN: Hi, Dave Hansen, UC
13 Berkeley.

14 So, there were a number of
15 comments on this panel about the EU Directive
16 on the kind of approach that it took to
17 diligent search, this kind of combined minimum
18 standard with some other things built in
19 there.

20 And I just wanted to give a word
21 of caution about that. Because from what I
22 have heard so far from European libraries and

1 being involved in workshops there and things
2 like that is that they view that approach, and
3 at least the standards that are built into the
4 Directive right now, as being for the most
5 part unworkable for them and not very useful
6 at least for digitization efforts.

7 And that's notable because the EU
8 Directive is aimed primarily at libraries and
9 archives and other nonprofit uses like that.
10 So, I think, in terms of the Copyright Office
11 Study, that it would be well worth the effort
12 to talk to European institutions, not the ones
13 that were involved with passing the Directive,
14 but those that are actually impacted by and
15 trying to use it to assess whether that is an
16 effective approach. Because from what I've
17 heard it, so far, is not.

18 MS. ROWLAND: Okay, with that I
19 would, unless anyone else has a question. I
20 don't think I see anyone else coming to the
21 podium. So with that, thank you to our
22 panelists for coming.

1 Right now we're going to adjourn
2 until 1 o'clock so you can have some lunch.
3 There's a cafeteria right next door --
4 remodeled just a couple of years ago. So you
5 can go there. We have a lot of different
6 eating establishments right around. Thank
7 you.

8 (Whereupon, the foregoing matter
9 went off the record at 11:54 a.m. and went
10 back on the record at 1:01 p.m.)

11 MR. KASUNIC: Good afternoon,
12 everyone, I'm Rob Kasunic. I'm Associate
13 Register of Copyrights and Director of
14 Registration Policy and Practices.

15 And before we begin I'm told
16 there is something I have to read. This panel
17 discussion is being video recorded by the
18 Library of Congress. There will be a short
19 question and answer period at the end of the
20 session.

21 If you decide to participate in
22 that question and answer period you are giving

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

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

7 And also, before answering or
8 jumping into the discussion, just note that
9 you should please state your name and your
10 affiliation prior to speaking for the
11 transcript.

12 And before we begin, this is the
13 session on public and private registries, I
14 wanted to go around and have everyone
15 introduce themselves around the table. And I
16 guess we'll begin over to my left.

17 MR. RUSHING: My name is Colin
18 Rushing. I'm the General Counsel of
19 SoundExchange.

20 MR. HILL: Doug Hill. I'm
21 Managing Partner of RightsAssist, a copyright
22 clearance company.

1 MR. HARBESON: I'm Eric Harbeson
2 from the Society of American Archivists.

3 MR. MCCORMICK: I'm Patrick
4 McCormick with International Documentary
5 Association and Film Independent.

6 MS. PRAGER: I'm Nancy Prager with
7 Prager Law.

8 MS. WOLFF: Nancy Wolff with PACA
9 Digital Media Licensing Association.

10 MR. MOPSIK: Eugene Mopsik,
11 Executive Director, ASMP, the American Society
12 of Media Photographers.

13 MR. SEDLIK: Jeff Sedlik,
14 President and CEO of the PLUS Coalition.

15 MR. CAPOBIANCO: Michael
16 Capobianco, past President of Science Fiction
17 and Fantasy Writers of America.

18 MR. KAUFMAN: Roy Kaufman,
19 Managing Director of New Ventures at Copyright
20 Clearance Center.

21 MS. GRAY: Megan Gray, former
22 attorney for visual artists.

1 MR. MCGEHEE: Alex McGehee,
2 Association of Recorded Sound Collections.

3 MR. SCHRUERS: Matt Schruers,
4 Computer and Communications Industry
5 Association.

6 MR. SCHROEDER: And I'm Fred
7 Schroeder, First Vice President, National
8 Federation of the Blind.

9 MR. HOLLAND: I'm Brad Holland,
10 American Society of Illustrators Partnership.

11 MR. KASUNIC: Okay. Well,
12 welcome, everyone. And it's nice to see some
13 of you again. As some of you may recall, I'm
14 a veteran from the original orphan works
15 roundtables back in 2005. So, interesting
16 that we're still at this.

17 (Laughter)

18 MR. KASUNIC: So, I guess I'd
19 like to start by sort of giving a little
20 summary of what I'd like to look at in this
21 session, in addition focusing a little more
22 from what was in the Federal Register notice.

1 I think one thing we saw from the
2 original orphan works report is that there are
3 at least one or two things that everyone can
4 agree on. And one is that an orphan works
5 problem exists. Another is that the problem
6 is pervasive.

7 The focus of this panel will be
8 to discuss how registries, first starting with
9 public and then private, can ameliorate the
10 orphan works problem.

11 We'll discuss private registries
12 in the second half of our discussion including
13 ways that private registries may supplement or
14 be integrated with or interoperate with public
15 registries.

16 First, I'd like panelists to
17 focus on what can be done to modify or enhance
18 the current U.S. Copyright Office registration
19 and recordation systems to reduce the orphan
20 works problem.

21 The Office is already aware of
22 certain improvements that either can be made

1 under existing statutory authority, such as
2 the provision of a relatively simple low-cost
3 option to update, address, and write some
4 permissions information in existing
5 registration records.

6 And also expanding offerings and
7 incentivize the provision of unique
8 identifiers for authors in particular works
9 for newly registered works, and possibly for
10 preexisting records as well.

11 Other changes that the Office has
12 recommended considering include additional
13 incentives or requirements to register
14 transfers of ownership in works or divisible
15 exclusive rights in order to provide the
16 United States Copyright Office registry with
17 adequate chain of title information that is
18 built into many other property registries,
19 such as real property, or motor vehicles.

20 This may require statutory change
21 but Berne-compliant incentives or requirements
22 do appear to be possible.

1 Moreover, after the initial Orphan
2 Works Report, the Office considered
3 establishing an intent to use registry
4 allowing or requiring users to register their
5 intended use of works prior to use. Should
6 this continue to be considered?

7 So again, let's first focus on
8 what can be done to modify or enhance the
9 current Copyright Office registration and
10 recordation systems to reduce the orphan works
11 problems.

12 And please keep your comments
13 concise and on point. We don't have a lot of
14 time and we have a lot of participants. And
15 if you give me some indication, I'll note your
16 name and we'll call on you in order.

17 Eugene.

18 MR. MOPSIK: Yes, happy to jump
19 in. So, there are a number of things that I
20 think could be done from a photo standpoint,
21 photography standpoint, to make things more
22 efficient.

1 The current registration practice
2 and in particular the group registration,
3 while particularly convenient for
4 photographers who in fact register more works
5 or I believe certainly create more registrable
6 works than any other class of rights holders,
7 ends up with a registration that's fairly
8 meaningless from a search or enforcement
9 standpoint because there's no searchability.

10

11 You can't identify -- if you
12 submit a registration with 700 images on it in
13 thumbnail and it's not searchable -- the value
14 from an orphan works standpoint or for
15 identification purposes is minimal. So I
16 think that ultimately that practice is going
17 to be needed to change or modified so that
18 images are registered with appropriate
19 metadata and are ultimately searchable.

20

21 I think the other thing that
22 we've been speaking to you about, and other
 folks in the Office, for years is a creation

1 of an API that would allow photographers to
2 register works from within their digital asset
3 management workflow.

4 So when they ingest a job, they
5 process X number of images, there would be an
6 action within that digital asset management
7 program that would then allow them to register
8 those images and simultaneously deposit them
9 into an orphan works registry, because they
10 would have all the information that they would
11 need at that point. I would imagine the
12 information that you would need for registry
13 would certainly serve to identify from an
14 orphan works standpoint.

15 And then again, anything that the
16 Office or anyone else can do to create
17 persistent, actionable identifiers that would
18 stay with photos would be fabulous. And
19 that's why we've been working with the PLUS
20 Coalition, who I think has been working
21 closely with the Copyright Office in this
22 regard.

1 But if there are ways to integrate
2 the PLUS data or PLUS information fields into
3 registrations, that would go a long way to
4 helping to identify photographs.

5 MS. WOLFF: I just agree that --
6 Nancy Wolff, PACA -- there are ways to make
7 things easier on a going-forward basis. And
8 having an API in some way that's easy to
9 register without necessarily having to use the
10 process that's in place with the Copyright
11 Office.

12 I mean, I understand that there
13 is a review that must be done to make sure the
14 works are subject to copyright. And I know
15 that still needs to take place. But trying to
16 work it in with current software would be
17 great.

18 I have so many people coming to
19 our office and you don't really want to have
20 lawyers trying to do registrations. But I
21 can't tell you how many complications,
22 particularly with older works.

1 It's so difficult to register
2 older works. And people inherit their
3 father's or mother's works and they want to
4 protect them. And trying to figure out when
5 something is published, not published. There'
6 are lots of hurdles.

7 And maybe that leads me into the
8 next issue. I mean, I would hesitate trying
9 to make copyright registration as technical
10 and as binding as real estate chain of title.
11 I would hate to have formalities that make it
12 even more difficult to claim ownership and
13 just keep that in mind.

14 I think that real estate and
15 authorship in some ways are two different
16 things. Chain of title is great and helpful
17 in the orphan works situation but it should be
18 something voluntary I think and not something
19 that would deprive someone of their
20 registration.

21 MR. KASUNIC: Nancy?

22 MS. PRAGER: Nancy Prager, Prager

1 Law.

2 So, I hate to disagree with Ms.
3 Wolff, but I actually think having a process
4 for assignments and everything, Rob, you said,
5 Mr. Kasunic, you said, I completely 100
6 percent agree with.

7 I was prepared today to sort of
8 say the negatives but you want positives, so
9 it's switching focus. I think, moving
10 forward, if we could build a database that
11 could provide for links to works within the
12 Copyright Office or even to external so that
13 you can see which work is being claimed.

14 In the music industry there is a
15 long history, in the nineteen fifties and
16 sixties, seventies probably too, of an artist
17 recording the same song with slightly
18 different titles for a variety of reasons. To
19 make more money. Also to get out of contracts
20 that maybe were bad for them.

21 And so you go on the Copyright
22 Office database and you're not really sure

1 which work you're looking at.

2 Similar to over in the trademark
3 world where you have to file specimens and
4 also a drawing. So you see it two different
5 ways. I think that would be fantastic.

6 But I do think having a way of
7 building into a chain of title would allow for
8 avoidance of orphan work problems where the
9 works are actually still being utilized but
10 the copyright records are not up to date.

11 And my concern, and what I was
12 prepared to talk about, was how the copyright
13 database wasn't up to date. And if you do a
14 search on it and you don't see any assignment
15 information, well, you're done under a
16 diligent search perhaps. If we went sort of
17 with a very lax system.

18 Where if you took it one step
19 further and you went to PLUS or you went to
20 ASCAP or you went to something else and you
21 could find that there's a new owner in place.
22 So the copyright database should have an

1 incentive to record everything. Thank you.

2 MR. KASUNIC: Megan?

3 MS. GRAY: So, to follow up on
4 that, I think the first step that the
5 Copyright Office could take is just retention
6 of the deposits. So, it is -- so far hasn't
7 been practical for those deposits to be
8 copyrighted and digitized and made easily
9 accessible. But at some point maybe it can.
10 And I think we're all anticipating that it
11 will within our lifetime.

12 And I think the first step in
13 making sure that can become a reality is
14 making sure that the deposits that we have on
15 file now are not destroyed in the routine
16 course of making space.

17 I think the next thing is for the
18 deposits that we do have, and I'm sure
19 everybody here already is aware of this, but
20 those deposits are public records. There's no
21 question of confidentiality or otherwise. So
22 the public has a right to see those deposit

1 materials.

2 But it currently is inaccessible
3 for the public, as a practical matter, because
4 they have to physically come to the Copyright
5 Office to get those records, assuming that the
6 deposits are still on file.

7 So, for some deposits it would be
8 relatively easy to get them online. Because
9 they're submitted digitally. And so I don't
10 know why that hasn't -- more progress hasn't
11 been made in that direction. Going backwards
12 and being retroactive with the deposits of
13 course is going to be a much bigger hurdle.
14 But given the e-filing incentives that we have
15 now, if they're being submitted digitally
16 already they ought to be viewable just like
17 the main copyright registration record is. So
18 that's -- I think those ideas could be
19 implemented if not outsourced. Some
20 components of those can be implemented now.

21 MR. KASUNIC: Roy?

22 MR. KAUFMAN: Roy Kaufman,

1 Copyright Clearance Center.

2 In keeping with Gene's API theme,
3 you can have an API in for registration. It
4 would also be very useful to have an API out
5 so that the information that's in the
6 registration can be brought out by those of us
7 who would probably make use of it to find more
8 commercial uses and make it more searchable.

9 The other thing is I love the idea
10 of author identifiers, individual author
11 identifiers. And there are plenty of existing
12 author identifiers. In academic publishing
13 there's something called an ORCID. Maybe if
14 you had a field where people could put in
15 optionally their identifier and state which
16 identifier they wanted to use so that the
17 ORCID identifier, which would be used for
18 academic publishers, would be one thing.
19 Maybe in music there would be a different
20 identifier.

21 I don't think it's particularly
22 useful to try to come up with a whole new

1 identifier scheme, but there are these schemes
2 out there that are quite helpful and they are
3 persistent.

4 MR. KASUNIC: And I should just
5 add with that that there are certain kinds of
6 unique identifiers that the Office does
7 request. It's an optional field. For
8 instance, the ISSN or the ISRC for sound
9 recordings. So those are existing fields that
10 we find are largely very underutilized.

11 And that's something we'd like to
12 hear more about is how we might be able to get
13 people to participate and provide either for
14 works or for authors those identifiers.
15 Michael?

16 MR. CAPOBIANCO: Yes, I would say
17 that the single most helpful thing that the
18 Copyright Office could do regarding preventing
19 things from becoming orphaned is to digitize
20 all of its records, especially the records
21 from 1923 to 1963 where it's not clear whether
22 something was renewed or not. It would be

1 great if a renewal could be linked to its
2 original registration so that there was no
3 confusion about whether things were registered
4 and/or renewed.

5 And as you know Science Fiction
6 and Fantasy Writers of America has been
7 advocating that the Copyright Office produce
8 its own author registry. Actually, we spoke
9 about that in 2005. Technology has come
10 forward a little bit. The internet is
11 certainly more pervasive than it was back
12 then.

13 We feel that it would not be an
14 onerous job to provide a place whereby authors
15 could register their copyrights separate from
16 the actual registration process. Just to put
17 in their name, put in their contact
18 information and then put in some information
19 about their works, if there was an author
20 identifier number and a DOI for each
21 individual work or some sort of a numerical
22 way of distinguishing works and disambiguating

1 authors. It would be very, very helpful.

2 Right now the international
3 community is doing some of this. I just
4 recently discovered something called ISNI, the
5 International Standard Naming Institute or
6 something, I'm sorry. But they are assigning
7 authors numbers. They are pulling in data
8 from the Library of Congress authorities.
9 They're pulling in data from the VIAF and
10 trying to consolidate all this material.

11 And the best part about it, from
12 an author point of view, is they have a
13 procedure whereby the author can change and
14 modify and fix the incorrect information that
15 they might have for them.

16 MR. KASUNIC: And Michael, as to
17 your first point, just to clarify, that the
18 Office has been digitizing all of the old
19 records. And we have digitized all of the
20 Catalog of Copyright Entries that existed and
21 have pretty much all of the -- or millions of
22 the file cards digitally scanned.

1 And so at some point hopefully
2 when funding is available to make those --
3 figure out a way to present those so that you
4 can find that information. We're actively
5 hoping to get those up in the very near
6 future.

7 MS. GRAY: But none of that
8 digitization is for the deposit material, for
9 the actual copyright.

10 MR. KASUNIC: It's not for the
11 deposits, right.

12 MR. CAPOBIANCO: And my only
13 thing I would say is that my impression was
14 that you haven't put the emphasis on the 1923
15 to 1963 material as much as I think is
16 justified.

17 MR. KASUNIC: I believe we have
18 scanned all that, but we can look into that.
19 Matt?

20 MR. SCHRUERS: So, I'm encouraged
21 to hear some of the things that when the PTO
22 did the green paper panels. Some of these

1 issues were addressed on the licensing. And
2 there I commented about the need for an
3 outward-facing API. And it may have been in
4 our comments actually, I don't recall.

5 But the fact is it's for
6 precisely the same cost factors that you want
7 an inward-facing API. In other words, the --
8 an API that facilitates the Office's ability
9 to take information in. You want to have one
10 that facilitates people taking information
11 out. And I think the Copyright Clearance
12 Center comments indicated that.

13 And one of the reasons why that's
14 so important is that increasingly so many of
15 the services we're talking about are working
16 with very large portfolios of works. And so
17 trying to do a work by work search for any
18 service of relevance, just the transaction
19 costs are going to swamp the potential
20 benefits.

21 And, additionally, you're going
22 to run into the kinds of problems that were

1 being discussed with photography where
2 different classes of works have different
3 characteristics. And so metadata about what's
4 in the image is going to matter a lot more in
5 photographs, for example, than other classes.

6 And so if you have the ability
7 for services to sort of take information out
8 on a regularized basis, different
9 constituencies will have the ability to map
10 their own data on top of that. That'll be
11 relevant for their markets or their user base
12 and facilitate new works as they come along.

13 And so then the Copyright Office
14 isn't in the business of always having to sort
15 of keep up with all the technological change.

16 And that means that all databases
17 in the universe are not going to be the same.
18 Some will have a lot of information that
19 others don't. But they will be sort of
20 customized for the constituency that needs
21 them.

22 And that might actually take a

1 lot of the burden off the Copyright Office to
2 sort of keep adding its own voluntary
3 identifiers. But none of that's going to
4 happen if you don't have a standardized way of
5 allowing people to take that base information
6 out and work with it.

7 MR. KASUNIC: Thanks. Eric?

8 MR. HARBESON: So, I'm kind of
9 seeing a couple of different kinds of
10 materials that folks are talking about here.

11 You have the works where, like Ms.
12 Gray over here was talking about, where
13 Copyright Office has received registration but
14 the information from that registration may not
15 be available to the public.

16 There's other material where the
17 records were once current, they were
18 registered, they were once current, but
19 they're not now.

20 Those things I think we can
21 largely get at with modifications to existing
22 databases. And not to tell you folks how to

1 do your job, but I would point out that there
2 are a lot of people in this very building who
3 are doing a lot of work creating unique
4 identifiers in authorities.loc.gov. I mean,
5 I think that's a really first-rate database.

6 And that's kind of where I'd like
7 to go with the concern of archivists because
8 what the -- what we're looking at is material
9 that was not only never -- that's not just --
10 it's not outdated. We don't have outdated
11 information or inaccessible information, but
12 we don't have any information at all.

13 This is a lot of what folks have
14 been talking about so far, are published works
15 where there was commercial intent, or possible
16 commercial intent. Whereas archivists are
17 worried about what is, I think it's probably
18 safe to say, the vast majority of orphan
19 works, which are things like my notes which
20 I'm writing down right now which I have a
21 copyright on but which no one will ever be
22 able to trace, and which could one day end up

1 in my personal archives somewhere if they are
2 deemed that important.

3 So I think that any talk about a
4 registry solution for the orphan works problem
5 really needs to consider, these materials that
6 no one has ever heard, of very carefully. And
7 that would require something like, well, I
8 don't know how it would be done but it almost
9 has to be a voluntary opt-in registry. I'm
10 not thinking of another way to go about that.

11 The thing that is most important
12 to us from a registry point of view is that
13 there be one registry.

14 MS. CLAGGETT: Just to follow up.
15 An opt-in registry from the notice of use
16 standpoint? To say that you're about to use
17 the orphan work? Or from the actual, I guess,
18 orphan owner which would be I suppose somewhat
19 theoretically difficult. So I just wanted to
20 get a little bit more detail on that.

21 MR. HARBESON: I guess when I
22 said that I probably was just speaking off the

1 top of my head and not necessarily for SAA.

2 But I think that -- I'm trying to
3 think of a way that you could have a registry
4 of John Smiths who may have taken -- sent a
5 letter to an important person.

6 And if you don't even know to -- I think that
7 those kind of semi-anonymous people out there
8 that are contributing these orphan works to
9 our cultural heritage would kind of need to
10 make themselves known somehow and then provide
11 contact information, because a notice of
12 intent to use would require that you know what
13 the work is that might be being used, right?
14 And I'm sure that I've sent letters to people
15 that I've completely forgotten about.

16 MR. KASUNIC: Thank you. Gene?

17 MR. MOPSIK: A couple of quick
18 points. In regard to the comment that was
19 just made about the need to have a single
20 registry, I don't think that's going to
21 happen. But I think what's important is that
22 registries are federated, that they can talk

1 to each other. And if that happens, you end
2 up accomplishing the same goal.

3 Beyond that, I think for
4 photographs the issue is not I guess the
5 ability to attach a discrete identifier. The
6 issue is making that persistent, something
7 that sticks with -- either sticks with the
8 photo or sticks in a database that can then
9 identify that rights holder or photo in a
10 manner again that PLUS uses.

11 And the comment, again, about the
12 activities in the EU. Last year Jeff and I
13 traveled on a number of occasions to the UK
14 and EU and worked with people who are working
15 on something called the RDI Project, the
16 Rights Data Integration project, and the
17 Linked Content Coalition.

18 And they have available -- I
19 think they were just awarded is it the
20 equivalent of \$1.5 million? Close to \$1.5
21 million to do a test project, this RDI project
22 where they'll be linking various databases

1 together for the purposes of image
2 identification and to be able to monetize
3 those.

4 And again, my point is that they
5 have EU support for that and it's something
6 that we don't get that. I mean you don't get
7 that kind of budget to be able to front those
8 kinds of projects here on a test basis,
9 unfortunately.

10 MR. KASUNIC: Jeff?

11 MR. SEDLIK: First, the acronym
12 API is being thrown around. It's application
13 programming interface. And all it means is to
14 allow one system to talk to another system.
15 It's a specification and a way for these two
16 systems or multiple systems to talk to each
17 other.

18 And I really think that that's the
19 direction that the Copyright Office should go
20 is bringing stakeholders together and
21 discussing a means to allow your system to
22 communicate with other systems and then

1 relying on private industry and others to
2 develop interfaces and systems for search and
3 for registration where you hold the data that
4 you need to hold, but provide in and out
5 access.

6 And echoing everybody else's
7 comments here, much in the same way that the
8 Copyright Office came to industry and
9 suggested that we form this coalition that's
10 now called the PLUS Coalition, which has many
11 of the people seated on this panel and in
12 other panels from the libraries, to the
13 museums, to the photographers and illustrators
14 and advertising agencies, et cetera, just
15 working on the solution of identifying works
16 and creating a global registry hub.

17 That word, "Hub," is important.
18 I agree with Gene that a single registry will
19 not fly. We're looking at a global issue
20 here. A United States registry or a United
21 States identification system is not the
22 answer.

1 We need to work internationally on
2 adopting an identification system and on
3 linking multiple registries, both public and
4 private together, so that you can both submit
5 images and search, and that a search of any
6 one registry will search all registries.

7 MR. KASUNIC: Well, before I get
8 to you, Nancy, I just wanted to open this up
9 since we're in the second half hour is just
10 that we should -- let's specifically also
11 include some discussion of how private
12 registries and ways that they can play a role
13 in diminishing the existence or the orphan
14 works problem.

15 So, and particularly what role
16 can private registries play to supplement
17 public registries. And I think we've heard a
18 lot about how those APIs can facilitate that
19 kind of interaction, but would like to hear
20 more.

21 Should private registries be
22 linked in some way to the U.S. Copyright

1 Office registry through APIs or otherwise?

2 And what role should the Office play in
3 certifying such third party registries?

4 Nancy?

5 MS. PRAGER: All right, thank
6 you. I was very honored to be asked to be on
7 this panel because I do a lot of work with the
8 private registries on the music side and they
9 may have some of the oldest private registries
10 available.

11 I would tread very carefully in
12 doing anything that might put the imprint of
13 the federal government giving any
14 classification that the data in those
15 databases is good.

16 It is disheartening how difficult
17 it is when you're operating in that system and
18 you find information that not only is
19 incorrect but also potentially fraud.

20 An example I'll give. Colin
21 Rushing is here and I'm just going to put it
22 on the table. SoundExchange database, called

1 PLAYS, is littered with people who have filed
2 as the rights holders for sound recordings for
3 which there is no chance they own them.

4 They're European compilation
5 labels that are claiming royalties on behalf
6 of the labels that are orphans, the ones that
7 I mentioned in the last -- labels that have
8 been lost over time through acquisition or
9 just bankruptcies or just people give up on
10 their labels.

11 You can find works not available
12 in the United States readily available in
13 Europe because these labels know that rights
14 holders have no opportunity or artists have no
15 real chance of going over there to claim their
16 rights unless they're the top 1 percent of
17 music performers that make up 75 percent of
18 sales.

19 So, I would tread very -- and it's
20 not just SoundExchange PLAYS. ASCAP, BMI,
21 SESAC as well, Harry Fox too. Information can
22 be missing. It can also -- clerical errors.

1 Like we have an issue this year where a
2 publisher who now operates under the name of
3 a publisher that was around in the sixties is
4 getting the performance royalties from the PRO
5 on behalf of a songwriter who claims she never
6 signed a contract with that original publisher
7 anyway, so therefore why were they getting
8 that money.

9 The PRO's response to her was
10 prove to us you don't have a contract. Or get
11 us something from the second one that says
12 that they don't have the rights.

13 So, in an industry that's had a
14 long history with these private registries I
15 can point -- and I'm happy to sit down and go
16 through data after data with you of these
17 mistakes.

18 Additionally, there's a problem
19 between the PROs that they will not play nice
20 with each other. Unlike in Europe where
21 there's only one PRO for each country and
22 often only one for each right so they do both

1 the neighboring rights and the musical
2 composition right. We have multiple players
3 in the marketplace that are trying to protect
4 their revenue streams.

5 There's some private players in
6 the music industry that have very valuable
7 databases that they're not making available
8 even if someone offers to pay for it -- that
9 they've collected all the data that people
10 would need.

11 So we need a way of getting this
12 information out of these walled gardens into
13 a more public -- and that's going to take the
14 Copyright Office. But I think you're going to
15 have to start from scratch.

16 MR. KASUNIC: Okay, we'll go to
17 Patrick and Jeff. But I wanted to just add
18 that these are some things that we have been
19 concerned about at least in terms of, one, the
20 issue of fraud and for updating information in
21 the registries.

22 There is some concern about

1 whether people could put in false information
2 and redirect all of the revenues to some
3 different source. And how do we deal with
4 that?

5 Also, the issue of the value of
6 distinguishing between the Copyright Office
7 record and if there is linkage between the
8 Copyright Office and private registries, how
9 do we distinguish those differences? There
10 can be add-ons that might be at least
11 informationally useful that private registries
12 can provide, but where -- the accuracy or
13 verification of that information -- the
14 government can't state -- put that
15 relationship too far. So, Patrick?

16 MR. MCCORMICK: We agree that
17 there shouldn't be a government fingerprint or
18 endorsement of any of these private
19 registries.

20 Where we differ, however, is that
21 if this reform were to pass, then with the
22 huge influx of registries and the need for

1 easy searchability with metadata and the
2 massive amount of different kinds of media,
3 that a single registry won't suffice, and that
4 private registries are more nimble and better
5 suited to adapt to new technological advances.

6
7 The Copyright Office should
8 function as a clearinghouse for these
9 registries and provide links to these and
10 point them out to users who might want them.
11 But not necessarily endorse them, just allow
12 people to find registries that are established
13 and that people are using.

14 I'd like to speak to some
15 comments that were made earlier about the
16 intent to use registry. Those registries seem
17 to function well as an idea for archival
18 houses or libraries or that kind of thing,
19 where that may be part of their diligent
20 search in finding the rights holder.

21 But for individual users of
22 different kinds of media such as documentary

1 filmmakers or journalists, that can raise
2 serious confidentiality issues with projects
3 if they have to announce what media they
4 intend to use.

5 It can cause a huge problem with
6 the timing of production if certain media has
7 to wait for a mandatory waiting period in a
8 registry like that before they can use it.

9 Other users will find it
10 misleading if they see that there and fail to
11 do their own diligent search, which is a
12 further concern because they may be the best
13 situated party to actually find the rights
14 holder.

15 And after having performed a true
16 diligent search, however we define it, if you
17 still haven't found the rights holder that's
18 not a likely party to show up and monitor a
19 registry like this.

20 You're more likely to have trolls
21 registering for this, looking for easy
22 settlements, establishing themselves as the

1 rights holder, threatening injunctions, or
2 however else it may be, and really driving up
3 the costs of productions for things like this.

4 MR. KASUNIC: Okay. Jeff, Nancy,
5 and then Brad.

6 MR. SEDLIK: Any system, any
7 registry system or any system at all, there's
8 going to be good actors and there's going to
9 be bad actors. And there is little that you
10 can do to absolutely prevent bad actors.

11 I would agree that the Copyright
12 Office should not be in a position of running
13 a global registry network. First of all, the
14 Copyright Office is part of the Library of
15 Congress and part of the U.S. Government and
16 again, we're looking at a global issue.

17 Second of all, the Copyright
18 Office is not really charged with verifying
19 the accuracy of the information submitted to
20 the Copyright Office on registrations
21 currently. I could submit all the photographs
22 ever taken by every person in this room and as

1 long as I fill out the copyright registration
2 application correctly, it's likely that I will
3 get a certificate that I am the copyright
4 owner of all of your photographs. However, it
5 doesn't mean I'm the copyright owner of all of
6 your photographs. The paper is worth nothing.

7 This is what the courts are for.
8 You have bad actors. You make their actions
9 either illegal or you kick them out of the
10 system.

11 The way that we're addressing it
12 within the PLUS registry is we are not going
13 to make determinations as to who owns what.
14 We're going to allow the users to place
15 records into dispute with public notification
16 and then people can come to us with a court
17 order from whatever country they're from and
18 we will pull things down, or edit them, or
19 remove them based on court order.

20 The other thing I wanted to
21 address was earlier there was a suggestion
22 about making all the deposits public. I want

1 to make sure that everyone understands that
2 visual artists and other creators often
3 register works that are not intended to be
4 public at that time.

5 It might be a photograph that's
6 going to go on a book cover, photographs of a
7 car or automobile that's not yet out there,
8 released. Confidential type information that
9 is submitted. And, currently, the only way
10 that you can get at those deposits is to
11 either go to the Copyright Office and look at
12 it on a computer sitting there in that system,
13 or you can be either an attorney representing
14 a litigant, or the owner. And you can get
15 access to that deposit information.

16 But I think if we did make all the
17 deposits public, we would have to have a means
18 for masking the work back when it needs to be
19 confidential. Similar to, I believe that
20 there's another provision for another type of
21 work, it might be architectural plans or
22 something to mask it back so that you can't

1 actually see the deposits themselves. That
2 was it.

3 MR. KASUNIC: Nancy.

4 MS. WOLFF: I was going back to
5 the question of the role of private
6 registries. And I think they will play an
7 important part because there is no one size
8 fits all.

9 For example, I think even if you
10 look at many of the images that are available
11 commercially -- if you want to do a search of
12 many of the large databases, you can find
13 things.

14 In fact, PACA has something, since
15 we talked about this in 2005, orphan search.
16 Actually, if you're trying to find an image,
17 you can contact the director and he'll send
18 out a request to every single member within it
19 and they'll look in their database of digital
20 images. So there are many private databases
21 that are very helpful.

22 And again, yes, there always will

1 be, you know, anyone can upload a picture and
2 say they took it. I mean, I recently was
3 involved in a case with two Woodstock
4 photographers and they both registered the
5 same photographs here. We had this messy
6 federal court case about it.

7 One thing that might be helpful
8 with registries, if maybe there was a process
9 that perhaps the Copyright Office could deal
10 with, just an easy sort of dispute resolution.
11 So any time there could be an author issue
12 that maybe wasn't, you had to, you know,
13 register, go to federal court, have something
14 similar, more like a domain name dispute.
15 Maybe some of those things would be helpful
16 for keeping registries reliable.

17 I know I sat three years on the
18 108 committee and we talked a lot about having
19 trusted depositories for preservation because
20 you don't want everyone to be making databases
21 of other people's works.

22 And I think, probably, sort of

1 the best use of the Copyright Office is
2 working with the different stakeholders in
3 having best practices and directing people to
4 the most reliable registries.

5 MR. KASUNIC: Brad?

6 MR. HOLLAND: Visual artists
7 have, I think, two major problems with
8 registries, with either commercial or private.

9 The first is the extent to which
10 work not registered in the registries would
11 come to be considered, either in statute law
12 or by practice, as an orphan. In other words,
13 if you can't find it in one of the registries,
14 does it become an automatic orphan.

15 The second one is that the
16 experience of artists with things like
17 stockhouses is that a lot of photographers and
18 a lot of artists entrusted their work to some
19 of these stock agencies and found that the
20 agencies were not only breaching their
21 contracts and infringing their work, dumping
22 their managed copyrights into the royalty-free

1 market and then using the work they were
2 entrusted with to go steal clients from the
3 very artists who had entrusted them with the
4 work.

5 If companies like that become
6 registries, and we know that some of them have
7 been lobbying on behalf of the orphan works
8 bill. We don't know what they've been
9 lobbying for because they've asserted
10 attorney-client privilege. But we've got
11 documentation from artists that their rights
12 have been abused, their copyrights have been
13 infringed, their contracts have been breached.

14 And they have begun putting out
15 work not only taking in high commissions,
16 anywhere between 50 percent to 90 percent in
17 some cases. They've been removing artists'
18 names from the work. There's even one case in
19 illustration of an artist whose last name
20 began with a C and who used his signature to
21 encase a copyright symbol.

22 So what did the stockhouse do?

1 They cut the C off of his name so that the
2 copyright symbol was removed and dumped his
3 work on the royalty-free market. He could
4 sue, of course, but the agency is owned by the
5 richest man in the world and who wants to go
6 into court with a situation like that.

7 In the SBA roundtable there were
8 a number of photographers who gave estimates
9 of what it would cost them to comply with this
10 registration. I won't read their comments but
11 I'll read some of the figures.

12 One artist estimated, one
13 photographer, estimated that it would cost him
14 between \$104,000 and \$263,000 to comply with
15 a law that required him to register work.

16 Another suggested \$25 to \$50 per
17 image. One suggested, based on information
18 from Corbis, \$70 per image. One photographer
19 estimated \$80,000 in two years. If he hired
20 someone at minimum wage to do nothing else for
21 two years it would cost him \$80,000. Another
22 one estimated \$50 to \$750,000. I won't go on.

1 I've spent the last five years
2 digitizing a lot of my old work and I will
3 estimate that for me to comply with an orphan
4 works law would cost me \$250,000 and would
5 take either 5 years if I could afford to hire
6 somebody full-time at \$10 an hour, 40 hours a
7 week, or take me 10 years if I could only
8 afford to hire them at \$10 an hour for 20
9 hours a week. That's a quarter of a million
10 and anywhere from 5 years to 10 years.

11 And that would not include
12 metadata because there would be no way I could
13 go back 25, 30, 40, 50 years and dig up
14 metadata to include in this. Not to mention
15 filling out forms. I'm 70 years old. My
16 creative life would be over if this kind of a
17 law were passed.

18 So that's the first problem that
19 not only artists, but we have a statement in
20 here from Jerry Colby who in 2008 was the
21 president of the National Writers Union making
22 the same claim about writers, that it would

1 simply be impossible for them to register all
2 the work they would need in a registry of this
3 sort.

4 The other thing, I won't go on,
5 but there was a comment made earlier about
6 digital object identifiers and author
7 identifiers of the sort.

8 We in the Illustrators Partnership
9 which was the parent organization to the --
10 this group -- that we represent now is
11 actually 12 organizations. It's a coalition
12 of everything -- medical illustrators,
13 cartoonists, general science illustrators,
14 aviation artists, and regional artists groups
15 in various cities.

16 And our parent organization, the
17 Illustrators Partnership, which we started in
18 2000, in 2003 made an approach to the
19 Copyright Clearance Center, specifically to
20 Joe Allen who at that time was CEO, asking how
21 artists could be represented as authors in the
22 work that CCC was licensing. And we were told

1 CCC had no way of licensing art -- that they
2 would talk with us if we would come back to
3 them with a proposal for how we could track
4 the usage of the work.

5 So we contacted a company called
6 Identity Commons and Cordence and, at a great
7 deal of expense and over a period of a year,
8 we came up with a proposal which we drafted
9 with the help of technical experts from
10 Identity Commons and Cordence.

11 And we presented it to Joe Allen
12 who told us well, he couldn't talk about this,
13 but he'd give us the name of his director of
14 author relations.

15 We had a conference call. He
16 said he could only spend half an hour with us,
17 then asked us what our favorite color was,
18 what kind of music we liked. We couldn't get
19 down to the business of talking about
20 persistent identity tags.

21 We had artists ready to embed
22 these tags in their work that would go through

1 the Copyright Clearance Center, but we could
2 not get anyone from CCC to talk with us.

3 When Joe Allen retired, we tried
4 to talk with the new director Tracey
5 Armstrong. We arranged a meeting at which
6 nothing was concluded.

7 We also know that the Artists
8 Rights Society, which handles the estates of
9 Picasso, Matisse, Jackson Pollock, Frank Lloyd
10 Wright and 40,000 fine artists has also been
11 trying to work with CCC to find some way that
12 work can be tracked.

13 Now we've made, in 2005, a
14 proposal to the Copyright Office that CCC be
15 encouraged to work with illustrators and
16 graphic artists and fine artists to find a way
17 to embed these kind of persistent identity
18 tags with our work and then use it to track
19 the work so that artists could be paid.
20 Nothing ever came of our proposal.

21 It could be done with money that
22 is actually being returned overseas right now

1 from reprographic licensing that is not being
2 directed to CCC, but is going to a number of
3 organizations who in the case of graphic arts
4 have refused to account for what they have
5 done with the money. This money could --

6 MS. CLAGGETT: I hate to cut you
7 off but I know that we have a lot of other
8 people.

9 MR. HOLLAND: I know. Let me just
10 finish, then I won't say anything else.

11 MS. CLAGGETT: No, you can say
12 more but I just want to make sure -- I think
13 there were a number of hands that were up.

14 MR. HOLLAND: I will. This is a
15 concrete proposal that would not cost anybody
16 any money. It could be done with money that
17 is already being licensed in the commercial
18 usage of illustrators' work.

19 MR. KASUNIC: Okay, we're going
20 to go to Eric, Doug, and then Colin.

21 MR. HARBESON: So, the question
22 is still the private registries I think,

1 right?

2 And so I wanted to, first, if I
3 could, clarify my statement. When I said that
4 what we need is one registry, what we need is
5 one place to look. If it's a federated system
6 of registries that is functionally the same
7 thing.

8 I think, as has been pointed out earlier, if
9 you have a whole lot of private registries,
10 you're going to increase the cost of search.

11 Now, as I mentioned in the
12 earlier panel we have studies that have shown
13 how much the cost of searching for an orphan
14 work is, especially as you move down the line.
15 When you have an archive that is trying to
16 make up for 50 years of non-record keeping
17 over the ownership of a work, it's going to
18 cost a significant amount of money.

19 And if we have a public good that
20 we're trying to meet where we're trying to
21 make the information available according to
22 the best practices of our profession, we need

1 to be able to -- if we are expected to do
2 this, I think that there needs to be some way
3 for us to be able to reliably find the work
4 without spending more than 70 percent of our
5 time on the problem.

6 Now, the registry question is
7 definitely -- so, we strongly prefer a
8 registry solution over something like an
9 extended collective licensing solution, which
10 I know you're going to talk about tomorrow.

11 But for kind of the same reason
12 whereas a solution that doesn't involve a very
13 easy way of searching and showing due
14 diligence -- so, properly done, a registry
15 solution should be: you search in this
16 registry and that is your due diligence. You
17 don't have to search in 20 different
18 registries and do a long trail because that's
19 how you get your 70 percent of your time spent
20 on copyright work rather than on the work of
21 the profession.

22 So, but we strongly prefer that.

1 Without something like that our time is -- we
2 may as well not make use of the works in the
3 first place.

4 With an ECL regime we're putting
5 money into a system where, as our research
6 shows, the vast majority of the time the money
7 will never even be claimed.

8 MR. KASUNIC: Douglas?

9 MR. HILL: The needs for the
10 private or public registries are about access
11 and monetization. You either need to get
12 access to images to be able to -- or audio
13 files, or any other intellectual property --
14 be able to use it, or you're interested in
15 being able to monetize it either as the owner
16 or as someone who wants to use that material
17 in a project.

18 So, there's never going to be a
19 situation in which the Copyright Office will
20 be able to be central to that access. It just
21 is not possible for you to be the repository
22 of everything that could possibly be used.

1 Therefore, there's going to have
2 to be registries of a variety of kinds spread
3 across the industry. The best situation is
4 going to be for the Copyright Office to enable
5 an API to be able to access that information
6 directly back and forth amongst those
7 registries and/or pass through requests to the
8 Copyright Office, to those registries to be
9 able to answer those questions.

10 That's a way in which you're
11 facilitating the information exchange, you are
12 enabling people to get access to the material,
13 and you're attempting to resolve the issue of
14 I cannot find this copyright holder.

15 No one's yet talked about work we
16 do, which is we go to the estates. We go to
17 the probate offices in the city we think --
18 we think -- that individual may have died in,
19 try and get a copy of their will and determine
20 where their estate passed the rights for their
21 materials for.

22 If they're older than a certain

1 age and died prior to 1970, roughly, then we
2 know they're not going to mention anything at
3 all about where their rights passed to because
4 until Elvis died the idea of passing that
5 right onto a future generation was not a big
6 moneymaker.

7 But at \$85 million, you know,
8 that's got a lot of people's attention about
9 how to be able to monetize it after you're
10 gone. It becomes a -- for some photographers
11 it becomes -- a legacy to pass onto their
12 children.

13 So, if the Copyright Office can
14 figure out how to be able to enable that
15 process of the sharing of information, I think
16 that's the single greatest contribution you
17 can make to the industry of intellectual
18 property in general.

19 MR. KASUNIC: Okay, Colin and
20 then Frederick.

21 MR. RUSHING: Sure. So, I hate
22 to sort of dial things back a few speakers

1 ago, but I just wanted to respond to Nancy's
2 question which actually is a good segue to one
3 of the points I wanted to make.

4 So, Nancy earlier talked about the
5 SoundExchange database and specifically the
6 PLAYS database as an example of some of the
7 problems of private registries. And I can
8 understand where that perception would come
9 from.

10 The PLAYS database, though, is
11 not actually our database. And this is why I
12 think it's an interesting sort of object
13 lesson. The PLAYS database really reflects
14 the raw material that SoundExchange gets and
15 is in the process of being matched.

16 It's not intended to be a sort of
17 public-facing registry of who owns what. It's
18 our attempt to basically give the public,
19 hopefully record companies and recording
20 artists an opportunity to say hey, I think
21 this is mine.

22 We use that as a piece of

1 information. We actually have a really sort
2 of complicated process to take all the
3 information that we get and make sure we're
4 paying the right people.

5 Which I think is a useful
6 illustration, because the value that a private
7 registry has, sort of part of this network of
8 information out there is the people that, you
9 know, SoundExchange and other organizations
10 like us, the role we play is paying people for
11 works that they own.

12 And so the people participating
13 in that have a really strong incentive to
14 participate and make sure the information is
15 accurate.

16 And no one is perfect and we
17 wouldn't claim to be, but we have a process to
18 make changes all the time. And, in fact,
19 we're regularly updating accounts through our
20 claims department to make sure we're paying as
21 accurately as possible.

22 So I think that is one important

1 takeaway, which is that there really is value
2 in having private registries, seeing them as
3 a source of accurate information. Because the
4 participants have an incentive, an immediate
5 financial incentive, to get the information
6 right.

7 The other thing that our PLAYS
8 database illustrates is the sort of matching
9 challenge. Whenever you're talking about a
10 registry, you're talking about a record of
11 hopefully who owns what. And in the case of
12 most works that have commercial value, you're
13 talking about who owns what, when and in which
14 territory, which can be incredibly
15 complicated.

16 That's just the information about
17 who owns what, when, and where. There's a
18 first step challenge of making sure that
19 you're actually accurately matching to that.

20 Because the license that we do is
21 a statutory license that, people using it, you
22 know, they can just sort of give us what they

1 believe is their sort of best effort. But
2 it's incredibly poor. And the PLAYS database
3 really reflects the type of information that
4 we're getting from the users of the
5 recordings, not the information that we're
6 relying on. And I think it's sort of
7 illustrative of the challenge of frankly
8 matching incoming information to information
9 in a database.

10 MR. KASUNIC: Frederick and then
11 Alex and then I think we're out of time after
12 that.

13 MR. SCHROEDER: Yes, thank you.
14 Recognizing the time, I'll be very brief.

15 I just want to say that
16 particularly with mass digitization of
17 materials now, there's unprecedented access to
18 information by blind people and others with
19 print disabilities.

20 And as we look at legislation,
21 regulations that deal with access to
22 intellectual property, just to remember that

1 the use that is vital to blind people and
2 others to get to this information, that it not
3 be inadvertently compromised, made more
4 complicated, or that disincentives to making
5 materials available not be an unintended
6 casualty.

7 And I just wanted to say one
8 other quick thing. With databases, some of
9 your users of databases are blind people. And
10 I can tell you that there are many, many
11 databases these days that are not readily
12 searchable using non-visual text-to-speech or
13 other assistive technology.

14 And it seems to me that if people
15 are expected to do a search of a database,
16 there needs to be the enforcement of
17 requirements around accessibility.

18 MR. KASUNIC: Thanks. Alex?

19 MR. MCGEHEE: I'd like to
20 reinforce a couple of comments that have been
21 made today about simplifying the system. I
22 think it would be very helpful if people

1 understood a definition of what due diligence
2 is because there seem to be a lot of
3 definitions of it and it's a situation that
4 can wind up in court.

5 The second thing is our
6 organization is a relatively small group.
7 We're about 1,500 archivists, librarians,
8 sound collectors, sound enthusiasts. And
9 someone who has got to go through the process
10 of finding the original owner of a work is
11 really up a tree in terms of cost. And that
12 was mentioned earlier.

13 So I think the system has got to
14 be -- let me make it very hard for you --
15 relatively simple. It has to be low-cost,
16 which means it doesn't involve lawyers with my
17 excuse to fellow members of the panel.

18 And it needs to take care of a
19 unique problem that we have in recorded sound,
20 which is pre-1972 records. They, right now,
21 are under individual state laws and this needs
22 to be federalized so that pre-72 recordings

1 can be found in one place and under one piece
2 of legislation.

3 And we don't get into a situation
4 like we do with the New York law, which is the
5 most stringent law, and so everybody now goes
6 by the New York standard. There needs to be
7 a federal standard. Thanks.

8 MR. KASUNIC: Okay. Do you want
9 to add any questions?

10 MS. CLAGGETT: Yes. We have just
11 a few moments. I think we're running a little
12 bit over so just a few moments to take any
13 questions from the audience. As before, we'll
14 have a microphone if anybody has any
15 questions. If not, we'll end with Gene if
16 there are no audience questions. Anybody from
17 the audience? Okay, Gene.

18 MR. MOPSIK: Thank you. So, I'm
19 going to make a few -- you'll be sorry, maybe.

20 (Laughter)

21 MR. MOPSIK: They're kind of
22 extraneous comments. But you know, I've been

1 listening all morning and I've heard two
2 things. I've heard about public good and I've
3 heard about how difficult it is to identify
4 orphan works.

5 So, I'm an unabashed
6 representative and advocate for independent
7 small creators. I know my photographers wish
8 every day when they go out to a job that the
9 job would be easy. But not all the jobs are
10 easy. Some of the jobs are hard. Some of
11 them are more difficult.

12 Some of them are impossible, what
13 I used to call "subject failure." They're
14 faced with -- to try -- to make something good
15 that's impossible, a real pig in a poke. But
16 they have to do it. Comes with the territory.

17
18 You know, public good at whose expense? I
19 guess I just have a hard time understanding
20 how we can be expected to provide works
21 without any compensation in an ongoing basis
22 and still expect to sustain a class, a

1 creative class, and have people sustain their
2 livelihoods. So I can go on forever on this,
3 but I just felt compelled to make those
4 comments having listened to --you know, as far
5 as I'm concerned, I guess it goes with the
6 territory. If it's difficult to find a rights
7 holder, well so be it, it's difficult. Comes
8 with your job.

9 MS. CLAGGETT: Thank you. So
10 with that uplifting note I guess --

11 (Laughter)

12 MS. CLAGGETT: -- we're going to
13 take a short break and then we'll go onto the
14 next panel, which will focus actually
15 primarily on photographs and other types of
16 works that may or may not need to be included
17 into orphan works legislation.

18 (Whereupon, the foregoing matter
19 went off the record at 2:05 p.m. and went back
20 on the record at 2:15 p.m.)

21 MS. CLAGGETT: All right, we're
22 going to get started with Session 4. Before

1 we do, one quick logistics thing. I know you
2 guys are going to get sick of hearing this
3 over and over again but we have to do it for
4 each panel, so I'll read our little video
5 release language.

6 The panel discussion is being
7 recorded by the Library of Congress. There
8 will be a short question and answer period at
9 the end of the session.

10 If you decide to participate in
11 the question and answer period you are giving
12 us permission to include your question or
13 comments in future webcasts and broadcasts.

14 At this time I'd like to ask you
15 to turn off any cell phones or electronic
16 devices that might interfere with the
17 recording of this event.

18 As I mentioned, the issue we are
19 going to discuss next is the type of works
20 subject to any orphan works legislation
21 including issues related specifically to
22 photographs.

1 I think a lot of the conversation
2 that was started in the previous panel was a
3 good segue into some of the issues that we
4 will want to address today.

5 I know that we alluded to the
6 fact that overseas there have been proposals
7 to address orphan works. And some of those
8 proposals have dealt with, for example,
9 different types of works in different ways.

10 In the EU Directive, for example,
11 they exclude photographs unless they're
12 embedded into another work. The UK model,
13 however, would include photographs as well.

14 So, some of the questions we're
15 going to have is: what types of works should
16 be included in any particular orphan works
17 solution? And are there areas of works or
18 types of works that should not be incorporated
19 into an orphan works legislative proposal?

20 Before we begin, I just want to,
21 as we have in the past, go around the table
22 and have everyone introduce just their name

1 and the organization that they represent.

2 I'll start with Barbara.

3 MS. NATANSON: I'm Barbara
4 Natanson. I'm the Head of the Prints and
5 Photographs Reading Room at the Library of
6 Congress.

7 MS. ROGERS: Kelly Rogers, Rights
8 Manager, Johns Hopkins University Press.

9 MS. GOODYEAR: Anne Goodyear,
10 President of the College Art Association.

11 MR. FRENCH: Alec French
12 representing the Directors Guild of America.

13 MR. OSTERREICHER: Mickey
14 Osterreicher, General Counsel with the
15 National Press Photographers Association.

16 MR. MOPSIK: Eugene Mopsik,
17 Executive Director, American Society of Media
18 Photographers.

19 MR. SEDLIK: Jeff Sedlik from the
20 PLUS Coalition.

21 MR. SANDERS: Charlie Sanders
22 from the Songwriters Guild of America.

1 MS. MATTHEWS: Maria Matthews,
2 Professional Photographers of America.

3 MS. SHAFTEL: Lisa Shaftel,
4 Graphic Artists Guild.

5 MR. MCGEHEE: Alex McGehee,
6 Association of Recorded Sound Collections.

7 MS. FERTIG: Rachel Fertig,
8 Association of American Publishers.

9 MR. HANSEN: Dave Hansen, UC
10 Berkeley Law and the Orphan Works Best
11 Practices Project.

12 MR. COHEN: Dan Cohen, Digital
13 Public Library of America.

14 MR. LEHMAN: I'm Bruce Lehman and
15 I'm here today for the Association of Medical
16 Illustrators. And perhaps we could just
17 correct the record because it says American
18 Medical Illustrators and that, I think,
19 probably was my mistake originally. But it
20 should be the Association of Medical
21 Illustrators.

22 MS. CLAGGETT: Thank you, Bruce.

1 So, I was going to just throw it out to the
2 panel: should we follow, for example, the EU
3 model and exclude any types of works in any
4 orphan works legislation? And if so, what
5 types of works and/or is there any reason to
6 actually try to do that? And will that
7 undermine, for example, the actual
8 effectiveness of an orphan works solution?

9 So, should we exclude works in
10 any orphan works solution, or should we try to
11 cover all types of works and subject matter?

12 MS. FERTIG: Rachel Fertig,
13 Association of American Publishers.

14 I think AAP has consistently
15 advocated in our interactions with the
16 Copyright Office processes reviewing an orphan
17 works solution that we should cover all types
18 of works, that it should be a broad-based
19 solution.

20 And we would see the EU Directive
21 as sort of -- if that model were implemented
22 in the U.S. we would be leaving a lot of the

1 problem unaddressed. And if we're going to
2 have spent numerous years talking through this
3 process, then let's come up with something
4 that actually addresses the problem.

5 And I think we've heard
6 throughout the panels today that there are
7 serious issues with trying to find rights
8 holders for different visual and photographic
9 works, but that's exactly why we need to come
10 up with a good solution.

11 MS. CLAGGETT: Anne?

12 MS. GOODYEAR: Thank you very
13 much. The College Art Association concurs.
14 CAA represents a broad spectrum of artists,
15 scholars, curators, art publishers. And like
16 the AAP we feel that any solution that does
17 not take into account all copyrighted works
18 would be incomplete.

19 MR. HANSEN: So again, I'll repeat
20 that, in general for the library and archive
21 community, we've seen that there's a general
22 feeling that fair use does enough.

1 But one of the things that it
2 does, that proposed legislation could do, is
3 treat different works differently based on
4 similar principles to what fair use already
5 kind of analyzes.

6 The second fair use factor looks
7 at the nature of the work. And there are some
8 nuanced factors within that that a proposed
9 piece of legislation could examine.

10 One that's come up repeatedly
11 throughout the morning and the first session
12 this afternoon was the reason for which the
13 work was created. If it was created for a
14 commercial purpose versus if it was created as
15 a letter to a friend or a photograph or a home
16 movie or something like that.

17 MS. CLAGGETT: Yes, Mickey.

18 MR. OSTERREICHER: Mickey
19 Osterreicher with the NPAA.

20 You know, we heard a lot about
21 fair use this morning. And unfortunately our
22 position really is that copyright seems to be

1 becoming the exception to fair use.

2 But, that said, I think some of
3 the things that need to be looked at is
4 whether this is a public entity or a private
5 entity. And I also think we need to consider
6 certainly commercial versus noncommercial use
7 if we're going to be looking at these bills.

8 MS. CLAGGETT: And we will talk
9 about that even in more detail in the next
10 panel, which will focus on the type of uses
11 that any orphan works solution should focus
12 on. Yes, Bruce.

13 MR. LEHMAN: Well, on behalf of
14 the Association of Medical Illustrators I'd
15 like to say that we actually have a very clear
16 answer to the question and that is certainly
17 that medical illustration should be excluded.

18 And we would also think that
19 illustration in general should be excluded.
20 I can't really speak to photographs, though
21 they share a lot in common.

22 But I'd just like to say a word

1 about why, if I can, in the case of medical
2 illustration. And that is that the comment
3 was just made that the purpose of the use is
4 important. And that there's a distinction
5 between commercial use and something not
6 created for commercial use.

7 And I would think it's fair to
8 say that in the case of medical illustration,
9 medical illustration is always created for
10 commercial use. The way medical illustration
11 comes into being is that medical scientists
12 and researchers, doctors, publish articles
13 that are published in peer-reviewed medical
14 publications. These are very high-end, very
15 expensive publications.

16 And, naturally, if you're writing
17 an article about something having to do with
18 the human body you have to illustrate that,
19 provide illustrations. So medical
20 illustrators, for example, not only have to go
21 to art school but they also have to have a lot
22 of training in anatomy and various medical

1 subject matter. So, their work is always
2 created for commercial purposes.

3 So why or how would a work of
4 medical illustration be an orphan work? Well,
5 the only way it would become an orphan work is
6 that if for some reason it were separated from
7 the journal that it was a part of.

8 And that might happen if the work
9 in some kind of unauthorized way, for example,
10 got out online in a digitized format and then
11 the identifying material that almost always
12 would have that would be credits in the
13 medical journal were somehow or other stripped
14 out.

15 And to treat those as to, in
16 effect, reward that behavior by limiting in
17 some way the right to sue for infringement and
18 the right to enforce one's copyrights would be
19 really completely inconsistent with what the
20 copyright law is all about, which is to reward
21 creators and provide an incentive for people
22 to go to school, spend the money, get into the

1 business and then actually try to make a
2 living from it.

3 MS. CLAGGETT: Thank you.

4 MS. NATANSON: I'd like to speak
5 on behalf of researchers in my custodial
6 division and in many historical societies and
7 libraries around the country. Because
8 uncertainty about historical photographs is a
9 serious problem for those researchers trying
10 to shed light on trends and events from the
11 late 1800s onwards.

12 So, I guess one of the things I
13 would like to raise -- without talking about
14 the term of copyright -- but should the age of
15 the material be taken into account in
16 considering its orphan work status?

17 Just to take a couple of examples
18 of items I looked up this morning. Images
19 often come with no photographer names, no
20 definite title, and no easy way to determine
21 whether or not they were published.

22 One of the images I looked at

1 today was a picture from the La Follette
2 family papers, a wonderful picture of Belle
3 Case La Follette doing grassroots suffrage
4 campaigning in 1912 in Wisconsin.

5 I've spent hours trying to search
6 for the name of the photographer that was
7 written, penciled, on the back of one of these
8 photographs. And if I come up with the right
9 Emily Chenoweth, she died in 1972, which means
10 that this unpublished image would be under
11 copyright until 2042 and I have more hours of
12 research to try to do genealogical research to
13 figure out where are her heirs.

14 The lack of certain information is
15 a dilemma our researchers face every day and
16 they're looking for reassurance from us to use
17 their school project on YouTube, or to make a
18 documentary, or to use an image in a textbook
19 and we cannot give them that reassurance.

20 So because they fear legal
21 consequences, they walk away from the
22 opportunity to understand the images and to

1 share that understanding with other people.

2 Copyright considerations are having a
3 seriously chilling effect on poorly documented
4 historical photographs.

5 So the same safe images are
6 getting used over and over. We're getting a
7 skewed view of history and truncating our view
8 of history.

9 Custodians of historical
10 photographs, like my division, are also losing
11 the opportunity to benefit from the public's
12 knowledge and research energies.

13 We've found that our best chance
14 of identifying poorly documented photographs
15 is to share them on the web. We've shared
16 images that because of their date or source
17 have no known copyright restrictions and
18 viewers have helped us to learn who and what
19 the pictures show. They've helped identify
20 the photographers. They've helped us
21 understand the context in which the materials
22 were made.

1 But we cannot make available the
2 very photographs that would benefit most from
3 crowdsourcing because the images lack the
4 information that we need to establish their
5 rights status. So hundreds of thousands of
6 photographs at this point are being lost to
7 history.

8 MS. CLAGGETT: Yes, Dan, then
9 David.

10 MR. COHEN: I just want to
11 underline what Barbara said which I really
12 appreciated. And I'll put on my historian's
13 hat, which is what I am by training.

14 Historians and students in the
15 past few decades are increasingly looking at
16 visual material in addition to textual
17 material in their work. And that's true
18 across the board -- from K-12 researchers who
19 want to find and want democratic access to the
20 historical record all the way through to
21 professors like myself.

22 And so when you exclude certain

1 kinds of information, I think what you do is
2 you return us to an age where all the
3 knowledge was considered to be transmitted
4 textually.

5 And I think we live in a very
6 visual age. I think the 20th century and the
7 early 21st century has a tremendous visual
8 record that it would be a real shame to
9 exclude from these kinds of new research
10 methods. And so I think we do need to take
11 what Barbara said greatly into consideration.
12 Thanks.

13 MS. ROWLAND: I wanted to ask a
14 follow-up question to Ms. Natanson. You
15 mentioned the age. And can you be a little
16 bit more specific about timing of that?

17 MS. NATANSON: Well, just to pick
18 a number out of my head I was looking at
19 photographs 70 years or older, older. So
20 that's 1944.

21 We have plenty of images in a
22 newspaper photograph collection. You would

1 think a newspaper photograph collection would
2 have been very consistent about crediting
3 images.

4 But going back to the nineteen
5 thirties no, they were not. I found a great
6 image of a homeless man on Brooklyn Bridge,
7 1931, just as the Depression was getting
8 underway. Absolutely no credit on the back,
9 no way to know what the right status is of
10 that image.

11 MR. COHEN: If I could just add
12 another brief example on this. On Halloween
13 last fall, Digital Public Library of America
14 provided access to hundreds of photographs of
15 kids wearing Halloween costumes from the past
16 century. And this included photographs from
17 every single decade going back to 1910.

18 And I think it's a really good
19 example of how you can look at trends over
20 time, what kids wore in different times. I
21 think gives everyone, from a kindergartner
22 really interested in what kids their age wore

1 in the thirties or the seventies or the
2 nineties, a good sense of that.

3 These don't need to be full-scale
4 images, but I think providing, again, that
5 access provides a real view into history that
6 would be lost if we didn't have that kind of
7 democratic access.

8 MS. CLAGGETT: David, then
9 Charlie.

10 MR. HANSEN: So, first I just
11 wanted to clarify, I didn't mean to imply
12 earlier that commercial versus noncommercial
13 intent with the creation of the work should
14 factor into whether certain works are
15 excluded. I think all works should be covered
16 if there is a piece of legislation. That's
17 just one of the things that might go into a
18 determination about the use later.

19 The second thing I wanted to say
20 was that when you're talking at least about
21 library and archive uses they're not --
22 libraries and archives don't make uses of

1 individual works ordinarily where they're
2 separated out and categorized differently as
3 photographs and movies and texts. They make
4 collections available.

5 And that's increasingly -- the
6 way that libraries and archives get funding to
7 do digitization projects, they digitize
8 collections to tell a story about whatever the
9 subject of that collection is. And to
10 artificially remove specific types of works
11 really devalues the collection and the real
12 public benefit that you get from making those
13 available.

14 And a lot of that, again, is tied
15 together with the actual use of the work. I
16 know we have these split apart. This session
17 is on the nature of the work. But I do want
18 to just get out there that splitting those
19 apart is in some ways an artificial
20 distinction. And so we should keep that in
21 mind for this discussion.

22 MS. CLAGGETT: Yes, and we made

1 that artificial distinction just to foster the
2 conversation, but I think you're right in
3 terms of some of these issues do have
4 interconnection. Charlie and then Mickey,
5 then Jeff, and then Jane.

6 MR. SANDERS: Charlie Sanders,
7 counsel for the Songwriters Guild.

8 There are certain communities of
9 creators, songwriters among them, who have
10 done a pretty good job over the past century
11 in creating a database in which the tracing of
12 origin and ownership is readily available to
13 members of the public and the business
14 community. And that's been out of necessity,
15 in part, and opportunity.

16 With that said, and taking note of
17 the fact that the performing rights
18 organizations in the United States and around
19 the world have an almost universal database of
20 musical compositions, we would as a community
21 wonder how it would be possible if a standard
22 of due diligence was put in place that did not

1 protect all of these works from being
2 considered orphans. So, in essence, we'd like
3 to reserve our rights to ask that if the
4 standard of due diligence is not high enough
5 that musical compositions might be withdrawn.

6 The second point I want to make is
7 that, even though the community of songwriters
8 deals in the music area, there is tremendous
9 concern for photographs and fellow individual
10 creators. And our community, I think, stands
11 right next to the photographs and all of the
12 other creators in saying exactly what we said
13 before, that fair use cannot dominate
14 copyright and copyright be the exception to
15 what was formerly the exception. And we're
16 standing with you on that.

17 MS. CLAGGETT: Mickey, Jeff, and
18 then Jane and Alec.

19 MR. OSTERREICHER: Mickey
20 Osterreicher, NPPA.

21 We appreciate the concerns that
22 you all have in terms of trying to find old

1 pictures, pictures where you can't find who
2 might have taken them.

3 But we would also ask, on the
4 other side of the coin, for an appreciation
5 for us with hundreds of millions of images
6 being uploaded every single day to the
7 internet, and the fact that many times the
8 metadata of those images is stripped out and
9 we have instant orphans in terms of the
10 picture was just created but nobody has any
11 way of figuring out who that image belongs to.
12 And yet under possible orphan works
13 legislation, those images would be again
14 susceptible to the same type of remedy
15 limitations that you're seeking for the older
16 works. So we need to figure out a way to have
17 that conversation to protect our members and
18 be able to have them earn a living while still
19 understanding your desires as well.

20 MS. CLAGGETT: Jeff.

21 MR. SEDLIK: I agree with Mickey.

22 I was about to make that instant orphans

1 comment.

2 The PLUS Coalition is neutral on
3 the issue of what should or shouldn't be in
4 the legislation, so I won't comment on whether
5 photographs should or shouldn't be included.
6 We're not an advocacy organization. We
7 represent the libraries and the museums as
8 well as the publishers and the creators, et
9 cetera.

10 But I will say that, having spoken
11 with photographers all over the world and also
12 being a professional photographer myself, that
13 as soon as you push an image out to the web
14 it's going to be an orphan within the hour.
15 It's going to be picked up by a search engine
16 spider. It's going to appear on a search
17 engine and then it's going to be virally
18 distributed all over the world without its
19 metadata. No matter what a photographer or
20 illustrator might do to identify their works
21 short of putting a big stamp right over the
22 center to obliterate the image itself, you're

1 not going to be able to keep your work from
2 being orphaned.

3 The second part of my comment and
4 your question in this first question is
5 looking at the European Commission's Directive
6 on orphan works.

7 And the Directive had to do with
8 noncommercial use for cultural heritage
9 purposes. And we've seen the UK pick it up
10 and add commercial use. And also we've seen
11 the UK adopt the Canadian system, which your
12 office determined in 2006 to be a failed
13 system.

14 The Canadian system was started,
15 I believe, in 1988 or so -- became functional
16 in 1990, and in the years between 1990 and
17 2008, 18 years, it collected \$70,000 in total.
18 And I don't believe that any of that went to
19 any rights holder, any individual creator. It
20 was distributed to collecting societies. It
21 was used to operate the system itself, and is
22 generally considered to be a failed system.

1 I wouldn't want to see that system under
2 strong consideration here again today.

3 And that Canadian system is: you
4 find an image, you go to the Copyright Board
5 of Canada, you make a deposit. And they
6 determine how much that deposit is going to
7 be. And if the creator ever surfaces, the
8 money would go to the creator. But the
9 creators don't surface.

10 In the UK, what they're doing is
11 you pay a fee in advance based on the usage
12 type and then it's for a limited duration.
13 And you don't have the right to sub-license.

14 The copyright holder can then go
15 in and search which images have received
16 payment or which works have received payment
17 and then make a claim and receive that money.

18 I don't have a high level of
19 confidence that that's going to function well.
20 My organization, the PLUS Coalition, is
21 involved with the UK Intellectual Property
22 Office and we're also part of the UK Copyright

1 Hub to enable searchers to find images rights
2 holders and rights information.

3 I believe that the UK is really
4 going about it in a good way in bringing all
5 the stakeholders together to come up with a
6 solution. I'm not quite confident that the
7 Canadian system as implemented there is going
8 to fly.

9 MS. CLAGGETT: Thank you. Gene,
10 and then Alec.

11 MR. MOPSIK: I was struck by Mr.
12 Cohen's use of the phrase "democratic access."
13 And I'm not quite sure what that means, but I
14 guess, on one level, I'm not sure it's good
15 for photographers.

16 But I guess I would ask any of
17 the folks from the library or folks who have
18 these older collections. So I'm not talking
19 about current works. If, in fact, they were
20 able to use the work without penalty of
21 anything other than what might be considered
22 a negotiated reasonable fee for the use, would

1 that be some part of a system that they'd find
2 acceptable? Or do they want to be able to use
3 these works without compensation?

4 MS. CLAGGETT: I think you threw
5 that out to everybody. So, after Alec
6 answers, then any response in response to your
7 question to the panel.

8 MR. FRENCH: Do you want the
9 response first since it follows?

10 MS. CLAGGETT: Sure, if you're
11 willing. Yes. Anyone who wants to respond to
12 what Gene just said? David and then Anne.
13 David.

14 MR. HANSEN: Sure. So, no, in
15 terms of paying license fees for those works,
16 for a couple of reasons.

17 One is that it's difficult even
18 to identify within a collection what group of
19 works you would be talking about to obtain a
20 license.

21 So, like I said earlier, when a
22 library digitizes things and puts a collection

1 up online, it's not just photographs in there.
2 There's newspaper clippings, there's record
3 books, there's letters, there's diaries.
4 There's all sorts of things put together
5 there.

6 And so going out and trying to
7 parse that collection and split it apart into
8 these atomic little parts here and pursuing
9 licenses for each of those different types in
10 and of itself would be a huge cost on the
11 library.

12 MR. MOPSIK: But if the rights
13 holder -- I guess I should have been more
14 specific in what I meant. And I don't know if
15 it was understood. That if, in fact, that
16 work were still in copyright and those rights
17 were owned by some, either the estate or some
18 rights holder.

19 MR. HANSEN: Oh, yes. And
20 libraries do that now. When they find works
21 that are owned by someone who they can
22 identify they go and seek permission.

1 Although more often than not, in the cases
2 that we have heard about, people are more than
3 willing to give permission for free. When
4 they hear that it's a nonprofit use and that
5 it's going to be used in a library collection,
6 very seldom are rights holders asking for
7 fees.

8 And that, I think, is something
9 that's generally worth noting is that
10 libraries and archives have been putting up
11 orphan works online for awhile now. The
12 Library of Congress American Memory Collection
13 has orphans in it.

14 And when rights holders come
15 forward the responses are typically either
16 positive -- they're happy to see that their
17 works are being made available online -- or
18 they have some concerns that are usually not
19 copyright-related. It's very seldom, in the
20 reports that we've heard, that copyright
21 holders are actually coming forward and are
22 concerned about copyright issues with those

1 works.

2 MS. CLAGGETT: Anne and then Dan.

3 MR. COHEN: I'll explain my
4 democratic access comment. I think for a lot
5 of students, researchers, and scholars around
6 the world you have to physically go to these
7 archives to see some of these images that are
8 in this gray area.

9 I mean, I think if we step back a
10 little bit, what we're talking about here is
11 we don't want to infringe. As Dave just
12 mentioned I think libraries do not want to
13 infringe on the rights or on the living of
14 illustrators or photographers or anything like
15 that.

16 But what we are dealing with here
17 is a tremendous gray area where unless, as
18 Barbara I think so eloquently put it, we are
19 able to provide more democratic access to more
20 of this gray area where it is hard to find
21 works. After all, that's the whole point.

22 Without someone buying a plane

1 ticket, coming to the Library of Congress,
2 going to a specialized archive to find it. If
3 we can't provide more democratic access, not
4 fully infringing maximal access of the kind
5 that infringes, we're not talking about that.

6 But we are talking about spreading
7 the availability more in this gray area in a
8 sensible way. And I think if it's difficult
9 to understand my example of the Halloween
10 costumes then I don't think we're getting what
11 that democratic spirit means.

12 MS. CLAGGETT: Anne and then
13 Alec.

14 MS. GOODYEAR: I would, on behalf
15 of the College Art Association, echo Dan
16 Cohen's point that members of CAA I think are
17 extremely -- are not interested in infringing
18 upon the rights of rights holders.

19 I think what we're interested in
20 promoting, with respect to proposed
21 legislation on orphan works, is simply access
22 to visual works that might not otherwise be

1 subject to scholarly scrutiny, to extended
2 creative use on the part of artists.

3 And, of course, if there were
4 legislation proposed that would enable the
5 creators of works to identify themselves to
6 possible -- or to identify uses of those
7 images that may have been inappropriate, if
8 fair use is not found to be an adequate
9 defense, we understand that it might be
10 reasonable to look at some licensing scheme
11 that would enable a rights holder to come
12 forward and claim that. But of course we are
13 interested in limited liability of course so
14 that risk can be averted and these works are
15 not bottled up.

16 MS. CLAGGETT: Alec.

17 MR. FRENCH: Thanks. So, again
18 on behalf of the Directors Guild, I'm not here
19 to advocate that motion pictures be excluded
20 from orphan works legislation.

21 But I think, again going back to
22 the conversation this morning, you have to

1 figure out ways to treat different types of
2 works differently because they present
3 different challenges.

4 And when you're trying to figure
5 out what the balance is, I was kind of struck
6 by the democratic access comment of Dan's and
7 the public benefit comment that David made
8 because that was reflected this morning.

9 And I think, again, you've got to
10 take a step back. I mean, we're hearing a lot
11 about the public access, democratic access,
12 benefit of different user communities being
13 able to use works that might be orphaned or
14 might be hard to find the copyright holder
15 for.

16 But we're not hearing a whole
17 lot, again, about the creator's rights here.
18 And that's what I think we need to balance
19 that against.

20 I mean, again, we're talking
21 about, when it comes to directors, we have not
22 just economic rights, not just internationally

1 recognized moral rights, we have
2 internationally recognized human rights.

3 The 1996 International Convention
4 on Economic, Social and Cultural Rights
5 recognized the human right of all people to
6 the protection of the moral and material
7 interest derived from any scientific,
8 literary, or artistic production of which he
9 is the author.

10 Universal Declaration of Human
11 Rights, the same. Et cetera, et cetera.
12 Every internationally recognized human rights
13 document says we have human rights in the
14 moral and material interest.

15 So when you're figuring out, gee,
16 it's a little bit hard to find the author,
17 it's a little bit hard to track this down,
18 yes, maybe. This goes to Eugene's comment
19 earlier.

20 But maybe it should be when
21 you're talking about implicating, affecting,
22 degrading someone's human right. So, let's

1 have the discussion on both sides, understand
2 their interest on both sides that are
3 implicated here.

4 MS. CLAGGETT: And I'll go to
5 Charlie in one moment but that is a good segue
6 into my next question, which is assuming, for
7 example, that we do cover all works and don't
8 have an exclusion of any particular types of
9 works -- should there be specific provisions
10 in the legislation that address different
11 works differently?

12 I know in previous bills there
13 were specific provisions that did attempt to
14 address photographs, for example, having --
15 waiting until a database had been established
16 and that type of thing. So, if we do include
17 all works, are there specific provisions that
18 we should take into account depending on the
19 type of work implicated? But I'll go with
20 Charlie first before we start on that
21 question.

22 MR. SANDERS: You know, I was

1 going to comment on Alec. So maybe if you
2 want an answer to that you could come back to
3 me to follow up on Alec.

4 MS. CLAGGETT: Okay, great. So,
5 does anybody have any response to that general
6 question? If we do include all works, should
7 there be specific provisions in terms of how
8 we handle the variety of works that would be
9 covered under a legislative solution. Lisa?

10 MS. SHAFTEL: Lisa Shaftel,
11 Graphic Artist Guild.

12 I know that we all realized years
13 ago when we were discussing this, there is no
14 one size fits all solution. There's no one
15 size fits all solution for visual works, or
16 any other classes of works, or any type of
17 user, or any type of search.

18 It seems to me, in all that we've
19 discussed over the years, there's three
20 different categories that we're discussing
21 here that we're all calling orphan works.

22 And it seems to me that there's

1 really only one true category of orphan works
2 under the law, which are works when the
3 copyright owner was a corporation or some sort
4 of legal entity that wasn't an individual.
5 And that legal entity doesn't exist anymore.
6 They went bankrupt. They shut the doors,
7 walked away. Whether it was a publisher, an
8 ad agency, a production company, a small
9 studio. Maybe they filed for bankruptcy.
10 Maybe they just gave up one day and shut the
11 door and stopped paying rent and walked away.

12 And those works, quite literally
13 the copyrights are owned by a legal entity
14 that doesn't exist anymore. Those are true
15 legal orphans.

16 And then we're in the area of
17 what Jay Rosenthal brought up, which is
18 termination rights, or reversion of rights.
19 And maybe that needs to be revisited because
20 the creator or the authors still exist but
21 that legal entity doesn't. That seems to me
22 to be a pretty easy solution.

1 Then we're off into unlocatable
2 copyright owners. We have a name. We can't
3 find them for any number of reasons.

4 Then we have the unidentifiable.
5 And that's what we're talking about in visual
6 works is that more often than not there just
7 is no name. And then how do you search? And
8 the age of the work is entirely irrelevant.
9 Because something could be created last week
10 and not have the creator's name on it.

11 For example, the average American
12 supermarket, and we've all been there, has
13 47,000 products for sale on the shelves. And
14 every one of those products has product
15 packaging that has an illustration or a
16 photograph on it. Because the vast majority
17 of Americans buy products by looking at the
18 pictures on the package.

19 It's just standard industry
20 practice that none of those images have the
21 creator's name on it. And you could call up
22 Kraft and say, I want to find the illustration

1 of that rotini. Good luck. And that could
2 have been created, you know, a month ago and
3 that product has been for sale, you know --
4 commercial use in the marketplace -- for I
5 don't know how long. So, just to say that
6 something is old.

7 And we've all seen the popularity
8 of older photographs and older illustrations
9 and graphics being used again in the
10 marketplace, because retro is cool.

11 And if anyone's worked in the
12 photographic industry and television and film
13 production we all know how easy it is to
14 create scenery and props and costumes that
15 look old-timey. So just because something
16 looks old -- Downton Abbey -- doesn't mean
17 that the photograph or the film was actually
18 made a long time ago.

19 And we are sympathetic to the
20 users of old photographs, old films, old
21 music. I mean, there are genuinely orphan
22 works and there are noncommercial uses.

1 But in terms of any sort of
2 distinction of the intent of the work when it
3 was made to be used commercially or not every
4 illustrator creates a plethora of works and
5 maybe one or two end up being used by the
6 client who commissions us. The others are
7 rejected.

8 Those were created with the
9 intent of them going into the marketplace but
10 they weren't used.

11 And we all know that, whether
12 it's a photograph or an illustration or fine
13 art, there is a lot of works that were created
14 a long time ago by someone that had no
15 commercial value for any number of reasons at
16 that time and at some point in the future
17 become valuable. So none of those are cut and
18 dry, one size fits all qualifiers.

19 MS. CLAGGETT: Thank you. Maria,
20 then Bruce, then Charlie. Or Charlie after
21 Maria I guess. Maria.

22 MS. MATTHEWS: Professional

1 Photographers of America, Maria Matthews.

2 For us, our 27,000 members and
3 about the same number in direct members are
4 primarily portrait and wedding photographers.
5 So for us, the vast majority of creative works
6 that are produced are to hang in people's
7 homes and offices as mementos and family
8 documents.

9 These works may or may not be
10 marked for aesthetic reasons but it is
11 industry practice for our photographers to
12 either watermark the images, emblazon their
13 studio name on it, or mark it on the back.
14 After a number of years of hanging on a wall
15 framed or being adhesed inside of an album,
16 that information disappears.

17 Recognizing that this is a
18 reality, something that my office does on a
19 daily basis is talk to users, or would-be
20 users, of these images in trying to locate a
21 photographer -- be they a current member, past
22 member, or somebody that may have purchased a

1 studio. So this is something that we grapple
2 with on a daily basis in recognizing that
3 photographs do need unique treatment under any
4 orphan works legislation or best practices
5 that are developed.

6 MS. CLAGGETT: And just to follow
7 up really quickly, you mentioned unique
8 treatment. Is there a specific way that you
9 want photographs to be treated under an orphan
10 works system?

11 MS. MATTHEWS: Having a clearly
12 defined reasonably diligent search requirement
13 and ensuring that reasonable compensation is
14 attainable by the photographer.

15 MS. CLAGGETT: I'm going to go to
16 Charlie because I know that you had your hand
17 up earlier. Then Bruce and then I think Jeff
18 over here.

19 MR. SANDERS: Yes, two quick
20 points to follow up on. I thought Alec's very
21 cogent comment about creator's rights
22 sometimes being lost in panels like this

1 because there are no actual creators most of
2 the time on these panels.

3 We have on the one side advocates
4 for fair use as part of democratic process.
5 And on the other side we often have attorneys,
6 some of whom have practiced in the arts and
7 some of whom have not.

8 If we had a combat photographer
9 sitting here, whether it was a 90-year-old
10 woman who got off a Higgins boat in 1944 on
11 Omaha Beach, or somebody who went into
12 Fallujah with a camera with the 1st Marines,
13 it would be a lot more difficult to make the
14 argument with a straight face that this is a
15 one-sided affair in terms of what serves the
16 democratic purpose and how broadly we want to
17 interpret what an orphan work is and what the
18 standard of due diligence should be. I think
19 it's important to make that point.

20 And hearing directly from creators
21 who put themselves on the line whether
22 economically, physically, or otherwise, when

1 they're actually sitting in the room it's a
2 lot harder to be dismissive of that.

3 The one other point that I wanted
4 to make was just a clarification of the title
5 of this entire roundtable grouping as orphan
6 works and mass digitization.

7 Because a lot of the people that
8 I spoke to in the songwriter community were a
9 bit confused on the one hand and dismayed on
10 the other that somehow a linkage was being
11 made between the discussion of orphan works
12 and those works, as we just discussed, might
13 truly be parentless as in corporations and the
14 idea that a massive corporate apparatus like
15 a Google might walk in and under some rubric
16 related to orphan works say that they had the
17 right to digitize every copyrighted work in
18 the world.

19 I just want to be sure that there
20 was no nexus intended or existing between
21 those two concepts.

22 MS. CLAGGETT: And we did receive

1 a lot of comments in terms of people wanting
2 to have the Office consider those issues very
3 separately, orphan works versus mass
4 digitization. Although that was an issue that
5 kind of was touched upon a little bit in our
6 2006 report but not explored in detail. And
7 obviously, given recent case law, mass
8 digitization, it is very timely to consider it
9 as well.

10 I think I had Bruce, Jeff, and
11 then David. So Bruce?

12 MR. LEHMAN: First of all, I
13 think the remarks that were just made were
14 excellent and would apply to our case as well.

15 And I would also point out that
16 we actually did have a creator here, maybe the
17 only one for these whole two days, with vast
18 experience. Brad Holland. And indeed he was
19 cut short and was only able to make one
20 intervention in the last panel.

21 Your question, however, is if
22 we're not going to exempt clearly certain

1 categories of works, then is there something
2 else, I gather, that we could do to provide
3 certain special kinds of treatment for certain
4 categories of work.

5 And let me start out by saying
6 that I don't think that's very easy to do at
7 all. I think it's virtually impossible. I
8 think that, to the extent that that is
9 something that's good to do, that the present
10 system of fair use largely addresses that
11 problem.

12 And I'd like to again just get
13 back to sort of some fact-specific situations.
14 Because I think it's very difficult to
15 understand what we're talking about if we deal
16 just in generalities.

17 And I tried to describe a little
18 bit about what the practical problems for
19 medical illustrators are.

20 But the argument that we seem to
21 be hearing for -- the strongest argument for
22 some kind of orphan works legislation -- is

1 that it is needed to -- because we have to
2 provide democratic access that permits users
3 to make maximum -- take maximum advantage of
4 new digital technology. And this puts us in
5 a completely different situation than ever
6 before in American history when everything was
7 print and libraries and so on and so forth.

8 Well, first of all I think we
9 have to question that. I think if we really
10 think that, then maybe we ought to go and
11 amend the Constitution, take out Article I,
12 Section 8 and perhaps we should repeal the
13 entire copyright law and go to an entirely new
14 system.

15 Mr. Love pointed out this morning
16 that he was working in the patent area on a
17 system of prizes. By the way, that is his
18 position. Now, perhaps we should abolish the
19 Copyright Office and set up a system of
20 prizes. And then we wouldn't have a problem
21 at all. Everybody could use anything they
22 wanted.

1 But I want to get back again to
2 fact-specific situations. The most
3 sympathetic case for orphan works is the case
4 of the archive of historical records where
5 works are involved that are very important for
6 researchers, or just important for people to
7 have access to, where it is extremely
8 difficult to determine the provenance of the
9 work --

10 largely because they were not really created
11 for public distribution in the first place.
12 They happen to be a part of personal letters.
13 They were photographs taken of family members,
14 or maybe even photographs taken of a
15 historical figure by some long-dead
16 photographer. And maybe they weren't
17 published and therefore, because of common law
18 copyright, they're still in the public domain
19 -- they're not in the public domain, I mean.

20 So I think that it is reasonable
21 to permit access to those kinds of works in a
22 digital archive that, for example, is a

1 library of a kind that we have heard.

2 The question is, however, is what
3 are going to be the limitations on that
4 access? This sort of gets into the fair use
5 question.

6 It may well be fair use for a
7 college library to basically digitize its
8 archive of historical records simply to make
9 it easier for researchers to have access who
10 otherwise would just come into the library.

11 The problem that we have, however,
12 with regard to a lot of works and that's
13 particularly true in this case of medical
14 illustration, isn't that, you know, I don't
15 think medical illustrators have any problem
16 with a doctor going to the library and having
17 access to a medical journal that contains
18 their work. And indeed it is the case that
19 many of those institutions do provide, at the
20 current time, digital access and that's not a
21 problem.

22 The difficulty is that if the

1 institution that has created the archive does
2 not properly provide protection for the
3 subsequent use of the work, you have a very
4 serious problem.

5 And in the case of medical
6 illustration, what that would mean is that
7 someone would come in, they would have access
8 to the digital library, and then they would
9 basically download that image and then reuse
10 it for some other purpose.

11 For example, they might even reuse
12 it to use in another medical journal. They
13 might think well, rather than hire a medical
14 illustrator, we're just going to basically rip
15 off this article. We will strip off the
16 credits or the copyright information and then
17 we'll use it in this new article that we're
18 writing where this particular illustration
19 would fit the subject matter of the article.

20
21 That is happening already, by the
22 way, because a lot of these images get out

1 online and it has an absolutely devastating
2 impact on the livelihood of medical
3 illustrators and other illustrators.

4 And I want to point out, finally,
5 that we've heard a lot about how these
6 archives and universities and so on and so
7 forth don't have any money. Now, by the way,
8 Harvard University, who was represented here
9 this morning, is one of the wealthiest
10 institutions on the face of this planet. So
11 let's not talk about poverty.

12 Who are the people who don't have
13 any money? Well, they're professional
14 illustrators, by and large. And visual
15 artists in general. There is not a single
16 visual artist that I know of, including the
17 most successful fine artists, who basically
18 isn't a sole proprietor. They're just one
19 person working in a studio.

20 And in the case of medical
21 illustration, sometimes you have a small
22 studio with three, six people working

1 together. But they are virtually sole
2 proprietors.

3 They're having a hard enough time
4 making a living right now. And then the
5 burden is supposed to be put on them basically
6 to go out and enforce their rights. And in
7 previous legislation, actually basically we
8 would have had a compulsory license for
9 anything that found itself as an orphan,
10 whether it was through no fault of the artist.

11 And their remedies would be
12 restricted to actually getting sort of a
13 proper royalty fee.

14 Well, one of the big problems we
15 have in copyright in general is that it's a
16 federally preempted right requiring you to go
17 into U.S. federal district court. I've been
18 a lawyer for 40 years. I've been in a lot of
19 big law firms. I know what law firms cost and
20 what federal litigation costs.

21 You can't even get a lawyer
22 basically to draw up the complaint, even

1 remotely get it, probably get him to sit down
2 in his office and have a discussion with you
3 -- a lawyer competent to go into U.S. federal
4 district court -- who wouldn't cost you more
5 than the royalty that you would get under the
6 previous legislation. So I think we have to
7 keep those things in mind.

8 We talk about democracy. We have
9 to be looking at the people who actually
10 create stuff in this country.

11 MS. CLAGGETT: I appreciate it.
12 And I will say that previous legislation
13 talked about having a small claims study to
14 address some of those issues. And we'll get
15 into that perhaps tomorrow when we talk about
16 remedies. But we do have an outstanding
17 report and recommendation to address small
18 claims.

19 I last, I think, had Jeff, then
20 Rachel, then Mickey, and then David.

21 MR. SEDLIK: Okay, Jeff Sedlik
22 from the PLUS Coalition.

1 Bruce, just one correction. You
2 said that Brad was the only creator to have
3 appeared on the panel. I've been a
4 photographer for 32 years. Gene's been a
5 photographer for 32 years. Mickey. We've got
6 Graphic Artists Guild illustrators over here
7 and photographers over there. If anything, we
8 have a rather disproportionate number of
9 people in these proceedings. And thank you
10 very much for giving us these seats.

11 The question on the table is, if
12 all the different kinds of works were to be
13 added, should there be any distinction between
14 them in the legislation?

15 And I would only say that because
16 of the particular concerns that Mr. Holland
17 brought up earlier, which have to do with just
18 the quantities of works created by artists.
19 I have close to 850,000 images that I would
20 have to determine how to get into a registry,
21 even though I'm leading the charge to build
22 the registry.

1 Photographers, photojournalists,
2 might create 2,000 images a day, 10,000 images
3 a week. How do they keep up with getting
4 those into registries? And so, whatever is
5 passed, there needs to be some kind of
6 provision that allows sufficient time, if
7 registries are part of the diligent search
8 process, for the rights holders to get their
9 works up and into the registries.

10 The previous round of legislation
11 did have that. I think it needs to be a bit
12 longer.

13 And secondly, I think that there
14 needs to be a notion of repeat diligent search
15 but in such a way that it does not generate
16 undue cost for the people searching.

17 One example, and the way that
18 we're approaching it within PLUS, is when you
19 do a search of the PLUS registry network you
20 can save that search and you can ask the
21 registry to repeat that search automatically
22 and notify you should the rights holder emerge

1 and eventually register that work. So it
2 gives the rights holder a fair shot.

3 Lastly, one particular concern
4 about visual works and particular photographs
5 is that photographs often picture individuals.
6 Individuals have rights, they have the right
7 of publicity, right of privacy.

8 And just because a work might be
9 cleared for use through some kind of orphan
10 works scheme doesn't mean you can actually use
11 that work. And then we get down into state
12 law. But I do think that it does need to be
13 part of the conversation.

14 MS. CLAGGETT: I think Rachel,
15 then Mickey.

16 MS. FERTIG: Rachel from the
17 Association of American Publishers.

18 In our most recent comments we
19 reiterated our support for the framework of
20 the 2008 Act and we still think that's an
21 appropriate way to balance wanting to have a
22 high-level set of principles that guide the

1 diligent search for all types of works.

2 But then there could be more
3 flexible standards and best practices that are
4 developed under the guidance of the Copyright
5 Office in order to keep pace with the
6 technological changes that we've heard a lot
7 about this morning and that are surely to keep
8 coming.

9 So I think that strikes the
10 middle ground in order to be able to provide
11 as simple a solution as possible that applies
12 to all of the works but then addresses the
13 significant concerns that there are with the
14 various types of works.

15 MS. CLAGGETT: Anne, and then
16 Gene.

17 MS. GOODYEAR: College Art
18 Association likewise supports a great deal of
19 the 2008 Shawn Bentley Act.

20 However, Karyn, you had raised
21 specifically the question of whether a
22 registry should be a requirement of orphan

1 works legislation and that would not be
2 something that CAA would see as a necessity.

3 MS. CLAGGETT: And I'm sorry,
4 Gene, actually I had called Mickey and forgot
5 to ask for him. So Mickey and then Gene.

6 MR. OSTERREICHER: Just real
7 quick, just a point of clarification. One of
8 the most difficult things I think an attorney
9 has to do is to understand what his clients
10 do. And, having been a photojournalist for
11 almost 40 years, fortunately at least my
12 clients don't have to explain to me the
13 problems that they see being squeezed from all
14 sides. So, I mean that's probably why I'm as
15 passionate as I am about the advocacy here.

16 We really appreciate the fact
17 that the Copyright Office issued their report
18 in favor of a small claims board and I guess
19 we're going to have that panel tomorrow so I
20 won't go into that. But certainly we see a
21 linkage there as if there's going to be any
22 type of orphan works legislation, there needs

1 to be some buy-in of the people that want to
2 participate in that to also agree to
3 adjudicate any claims in the small claims
4 board.

5 MS. CLAGGETT: Gene?

6 MR. MOPSIK: I guess I want to
7 support what Mr. Lehman said earlier, without
8 going into any detail.

9 But I think ultimately the real
10 question that we're looking at here is whether
11 or not creators can profit in some ongoing
12 manner from their creations, and whether they
13 have the ability to sustain a living today.

14 And whether or not, with the
15 continued expansion of fair use, whether or
16 not there is ultimately any value to
17 copyright. I know that for many of my members
18 -- between their inability to bring action in
19 courts, as Bruce pointed out, with the cost of
20 federal litigation and the erosion or the
21 appropriation of their works under a fair use
22 mantle -- they feel pretty disenfranchised.

1 MS. CLAGGETT: David.

2 MR. HANSEN: Yes, I just wanted
3 to make a comment about the framing of the
4 question. So we've heard a couple of things
5 about human rights and kind of the integrity
6 of authors. And I think it's important to
7 keep the focus of the purpose of proposed
8 orphan works legislation.

9 So in the Copyright Office's 2006
10 report there was a nice statement in there
11 about how really this whole thing is intended
12 to alleviate situations where productive uses
13 of copyrighted works are foregone because
14 owners cannot be located.

15 And I think that falls well in
16 line with the constitutional purpose of
17 copyright. Copyright in the United States
18 exists to promote the creation and
19 dissemination of created works. The owner is
20 a secondary consideration and the public is
21 the primary beneficiary.

22 And I think that's important to

1 keep in mind when talking about how
2 legislation is potentially designed to
3 alleviate those concerns.

4 And we just heard a comment about
5 participation and those who are interested in
6 this legislation. I think it's important also
7 to keep in mind -- on the library side,
8 because they are some of the largest holders
9 of orphan works -- that if they're not willing
10 or able to make use of proposed legislation,
11 it's really not achieving its intended
12 function.

13 And so, for example, diligent
14 search and item-by-item level that has a high
15 standard similar to what the European Union
16 has put in place with the Directive wouldn't
17 be of much use to U.S. libraries and archives.

18 MS. CLAGGETT: Charlie?

19 MR. SANDERS: Yes, forgive me for
20 being blunt but that was a series of
21 conclusions unsupported by fact or
22 Constitution.

1 The United States Supreme Court
2 said, in the Nation case, that copyright
3 protection is the very engine of free
4 expression. That is the law of the land and
5 regardless of however you want to couch it,
6 your interpretation of Article I, Section 8 is
7 not supported by fact.

8 I also want to go back to say that
9 the music community, songwriter community
10 anyway, supports the small claims issue and is
11 very pleased that that's been raised in the
12 context of this conversation.

13 MS. CLAGGETT: I think I'm going
14 to go to Barbara. You're going to get a
15 response from the secondary comment. But if
16 you want to respond and then we can go to
17 Barbara on that.

18 MR. HANSEN: Sure. So, I
19 actually have Sony v. Universal Studios up in
20 front of me and I was reading from that.

21 MS. CLAGGETT: We're going to
22 have a legal debate here.

1 MR. HANSEN: "Copyright law, like
2 the patent statutes, makes reward to the owner
3 a secondary consideration. . . . The sole
4 interest of the United States and the primary
5 object in conferring the monopoly lie in the
6 general benefits derived by the public. . . ."

7 MS. CLAGGETT: And we could get
8 into a long debate about whether artists and
9 authors and creators are part of the public
10 and should be considered in there as well.

11 MR. KASUNIC: We can take
12 administrative notice they've said both
13 things.

14 MS. CLAGGETT: Right. Barbara?

15 MS. NATANSON: And I will frankly
16 confess I don't know what the solution is.
17 But again, just addressing the age of the
18 materials, I just wonder whether there could
19 be some sliding scale or some different best
20 practices depending upon the age of the
21 materials. Because different kinds of
22 sources, and different relevance of certain

1 kinds of tools, is going to be affected by the
2 age of the materials. It's certainly possible
3 to make materials look old.

4 And I would think one of the
5 criteria is how do you prove that the material
6 is old. Because in many archives and
7 libraries we know when we got the materials,
8 so we know it's got to be older than when we
9 received it.

10 And oftentimes, whereas you don't
11 have much other information, you do know the
12 date of the material because of what it
13 depicts or because of internal content.

14 But I would say that some of the
15 registries, while they may really help our
16 researchers who are trying to use more
17 recently made materials that could be very
18 useful, it's hard to envision some of this
19 historic material -- 70-75 year old material
20 -- getting entered into a commercial registry
21 that would be of any use to the researchers
22 and the kinds of images our researchers are

1 seeking.

2 MS. CLAGGETT: Dan?

3 MR. COHEN: Sure, yes. We're
4 kind of getting here toward the end. I'll try
5 to bring us together a little bit.

6 MS. CLAGGETT: Yes, please do.

7 MR. COHEN: Rather than the
8 spirit of division.

9 And I'll start by saying I'm also
10 a creator. I've written a few books.
11 Actually, one of them was published by Johns
12 Hopkins University Press. And so I think for
13 a lot of people they're actually on both sides
14 of this equation here.

15 I think most creators are also
16 consumers or readers. I think illustrators,
17 for instance, take inspiration from older
18 illustrators. And so really what we're
19 talking here about is how can we both be.

20 And I really do want the
21 illustrators and the photographers to make
22 money. I mean, I would love to make money off

1 of my non-best selling book from Johns Hopkins
2 University Press.

3 (Laughter)

4 MS. CLAGGETT: If anybody wants
5 to go out and buy it now.

6 MR. COHEN: It's on the history
7 of mathematics in the 19th century.

8 (Laughter)

9 MS. CLAGGETT: Very, very
10 scintillating topic.

11 MR. COHEN: You can gauge the --
12 but after all, right, most things are not
13 those famous photographs or perpetually
14 commercial works from 70-75 years ago.

15 And so, I think, what we're
16 really trying to get at here I think, really,
17 is in the middle -- someplace where people
18 like me, we might want to be authors, we might
19 want to write, we might want to be
20 photographers, but we also want an expanded
21 realm of access to things.

22 Again, as best as we can do, I

1 think as we come together on this point of how
2 we can expand some reasonable amount of
3 access.

4 I was actually very heartened by
5 Bruce's comments about -- and I should have
6 emphasized early on about those Halloween
7 photographs -- they indeed do come from
8 archives and they are of sort of unknown
9 provenance.

10 And so there are realms like that
11 that I think we can work together -- where
12 we're saying we don't want to be like, and in
13 fact Digital Public Library of America hates,
14 the Twitter accounts that steal the
15 photographs from these commercial publishers
16 and publish them. We are only publishing
17 stuff where we have had a sense of who wrote
18 this stuff -- is it okay to re-publish? All
19 those things brought into the metadata, all
20 that stuff.

21 And so I think we need to work
22 together to think about what is the maximal

1 realm that we can put into that which, after
2 all, all of us as creators also need to draw
3 from as a common storehouse, right?

4 That is, I think, in some ways
5 part of the copyright law. I am not a lawyer,
6 but it is to draw from something to also
7 produce something, to learn about the history
8 of photography, to learn about the history of
9 illustration.

10 Even things that are commercial
11 -- I can tell you as a historian of science --
12 fade into a point where they're also in some
13 sense a work to be drawn from. Vesalius's
14 diagrams of the human body were at some point
15 a commercial book, actually sold quite well.
16 But then at some point they became the stuff
17 for historians and other illustrators to work
18 from. And so we need to figure out where that
19 midpoint is as things recede into the past how
20 can we provide maximal access to that record,
21 wherever it may be, so that others can draw
22 from it. And indeed be creators and make

1 money from it as well.

2 MS. CLAGGETT: I think we're
3 actually getting close to the end. I'll go
4 with Kelly and other final panelists, Mickey,
5 who want to speak. And then we're going to
6 open it up to the audience for a few minutes.
7 So, Kelly.

8 MS. ROGERS: I'd just like to say
9 that I think, at the Press, I come from both
10 angles of this. Because I not only license
11 permissions but we also obtain them and
12 acquire them.

13 So I've spent -- the Press is 100
14 years old -- we spent hours researching
15 historical images to see if we can trace
16 heirs, estates, family members. I think it is
17 important to do that background work and not
18 just to say it has a certain date, it's free
19 for someone to put in a commercial product and
20 make 10,000 copies of it without any due
21 diligence at all.

22 On the other hand, I do get a

1 little concerned about mass digitization,
2 especially since I have seen certain books of
3 ours that are assumed to be public domain and
4 aren't. But vendors are picking them up and
5 then binding them and then selling them. So,
6 a lot of my time is now chasing those
7 companies that are popping up all over.

8 I think that if you use the same
9 criteria that you do for fair use in
10 considering those special exemptions --
11 images, letters, whether they're pieces of
12 poetry -- when we're trying to decide
13 legislative concerns I think that would be
14 helpful.

15 MS. CLAGGETT: A flexible
16 approach.

17 MS. ROGERS: Right.

18 MS. CLAGGETT: Mickey.

19 MR. OSTERREICHER: I think our
20 fear is that, while we understand what it is
21 that your needs are, that should orphan works
22 be enacted that the language be so broad that

1 it would allow -- and we all recognize that
2 there are many people out there that are very
3 predatory, that infringe with impunity, and
4 they would use this as another tool to limit
5 any type of recovery by people who truly --
6 those works are not orphan, they just have not
7 been able to be identified even though in good
8 faith they put that metadata in there, they
9 did everything within their power to do it.
10 So we've got that on one hand.

11 As Bruce said, you know, trying
12 to bring a copyright infringement claim when
13 you're a press photographer and only want \$100
14 or \$200 for your work and somebody says that's
15 fine, but it'll be a \$10,000 retainer to bring
16 that into federal court, it makes absolutely
17 no sense. Because, even if you pay that,
18 there's no guarantee that you'll get your \$200
19 back if you were silly enough to enter into
20 that type of an agreement. So we really do
21 have to try and work together.

22 And I really commend the

1 Copyright Office for having this roundtable
2 discussion so that we can better express our
3 concerns to one another and maybe find a
4 middle ground here.

5 MS. CLAGGETT: Thank you. David?

6 MR. HANSEN: So, when the
7 Copyright Office issued its 2006 report on
8 orphan works it had a really nice list of
9 factors that would have gone into the
10 consideration of whether a given search was
11 reasonable.

12 And I won't read them out here
13 but I just wanted to note that they were a
14 very thoughtful set of considerations that
15 really were pretty flexible but gave some
16 leeway within them for organizations to kind
17 of figure out and feel for themselves what
18 would be acceptable.

19 And one observation that I've
20 seen several people make is that the nice
21 thing about those factors is they track pretty
22 well to the fair use factors that we all know

1 and know how to deal with in a pretty
2 consistent way.

3 MS. CLAGGETT: Thank you. Any
4 final comments from the panel? Because I'll
5 open it up for the last nine minutes to the
6 audience in case they have any.

7 So I will open it up to the
8 audience with any specific comments that would
9 you like to make about the type of works that
10 should be or should not be included in any
11 orphan works solution.

12 MR. COURTNEY: Kyle Courtney.
13 I'm from Harvard University. And so I just --

14 (Laughter)

15 MS. CLAGGETT: He does have a lot
16 of money.

17 MR. COURTNEY: I mean, we have
18 money. The library does not have an endowment
19 that is as large as this. We're a nonprofit.
20 We employ medical librarians. We employ
21 research, teaching, photograph fellows who
22 make medical illustrations for research, for

1 teaching, for classroom study. So you know,
2 medical illustrations do exist for educational
3 research purposes. And we hire and pay these
4 people to do this. But we are a nonprofit
5 academic library.

6 If we find a rights holder, we get
7 permission. I mean, we do. The majority of
8 that exists there, if the use necessitates it.

9 I just want to -- we are
10 information professionals. We are not crimson
11 pirates. And I just want to make that very
12 clear.

13 (Laughter)

14 MS. CLAGGETT: Thank you, thank
15 you.

16 MS. PENROSE: Hi, I'm actually
17 from the Museum of Fine Arts, Boston, and I
18 think we have a special interest in
19 photography because we want our photographers
20 to be successful. We need artists that are
21 represented in our collection to be successful
22 at what they're doing so that they continue to

1 create and, hopefully, we can continue to
2 session their work.

3 At the same time, we're also
4 interested in making sure that the public has
5 access and, for that reason, I hope that we
6 share similar interests in creating a nice
7 balance with copyright offices.

8 My concern, I guess, was some of
9 the more extreme positions -- of categorically
10 excluding works from orphan works legislation
11 -- is not wanting to throw the baby out with
12 the bath water.

13 And I'm sure both sides will
14 argue about what the baby is, whether it's the
15 copyright holders' rights or public access.

16 So I guess I would just encourage
17 the Copyright Office -- in whatever
18 legislation, if legislation is ended up
19 crafted -- to make sure that however you do it
20 that you're really looking at -- bad actors
21 are always going to be bad actors. If someone
22 doesn't want to pay a license, they will find

1 a way around it.

2 And is it worth sacrificing public
3 access in order to protect further harm from
4 these bad actors that aren't going to pay
5 licensing fees anyway?

6 I don't feel, personally, that
7 there's going to be a huge amount of people
8 that would be good actors and would go get a
9 license able to use orphan works and a way to
10 get around it especially if the diligent
11 search was clearly defined and you had to meet
12 that burden.

13 MS. CLAGGETT: Thank you.

14 MR. SADOWSKI: Hi, I'm John
15 Sadowski from Wikimedia District of Columbia.
16 I want to talk a little bit about how the
17 Wikimedia projects use photographs, especially
18 since it's a somewhat unique setup.

19 So the Wikimedia Foundation has as
20 its mission to make educational material, such
21 as Wikipedia, available to the world for free.
22 And how we illustrate most of our articles are

1 by individual users from around the internet
2 contributing photographs.

3 Sometimes these are public domain
4 works. Sometimes these are works that are
5 user-generated that have been freely licensed.

6 Since there have been some
7 comments about medical illustrations, that's
8 a good example. We have a lot of articles
9 that are illustrated by pictures from the 1918
10 edition of Grey's Anatomy. Well, in 1918,
11 everything after -- almost everything after
12 1922 is under copyright.

13 And then we have images that are
14 fairly recent. For example, if somebody has
15 a medical condition, they might take a
16 photograph of themselves and use it to
17 illustrate that article.

18 Our interest in orphan works is
19 that there is a huge gap in between -- of
20 works that are simply not at all available to
21 us. And, obviously, we care very much about
22 copyright. We routinely check the images that

1 people upload to make sure that they conform
2 to copyright.

3 And we don't want to have people
4 take an image off of Tumblr, for example, that
5 somebody else had taken out of a medical
6 journal and stripped out the metadata. That's
7 not what we want.

8 What we want is to be able to use
9 these images where, truly, the author is not
10 known. Because they're maybe not 1918 old, but
11 somewhere in that gap to be able to use it,
12 not only for medical illustrations but for
13 historical images especially is very important
14 to us. Thank you.

15 MS. CLAGGETT: Thank you. Jan.

16 MS. CONSTANTINE: Hi, my name is
17 Jan Constantine. I'm with the Authors Guild.

18 I'd like to talk about the
19 HathiTrust -- not the lawsuit, but what led us
20 to the lawsuit. And one of the reasons why we
21 sued was because the HathiTrust, in the
22 infinite wisdom of many of its members, which

1 were higher education institutions, decided
2 that they were going to take the orphan works
3 issue in their own hands after the Google case
4 settlement was not approved.

5 And what they did was they
6 decided that they were going to identify
7 several books, 167 to be precise, that were
8 orphan under their eight-point, eight-step due
9 diligence. And if nobody came forward in the
10 90 days that they had put them on their
11 website -- that I'm sure was not looked at by
12 90 percent of the world -- they were going to
13 issue them as full display use to their
14 community which, we believe, is over 250,000.

15 Within one week of filing that
16 lawsuit we found six living authors, two
17 candidates that were actually in print,
18 literary rights that were left to charitable
19 or educational institutions. The James Gould
20 Cozzens estate was left to Harvard, so maybe
21 that will make you better off than you are
22 now.

1 (Laughter)

2 MS. CONSTANTINE: One was a
3 literary agent. And some of them actually had
4 e-book contracts that were in place, waiting
5 to be published.

6 We had these books -- and we
7 only, we found 50 of the 167 in one week. And
8 then HathiTrust decided also, in its infinite
9 wisdom, that they were going to suspend the
10 program because of the lack of efficient due
11 diligence.

12 So, this is the danger of having
13 institutions like libraries and even ones that
14 are so distinguished as the University of
15 Michigan's library to take things in their own
16 hands in terms of orphan works, because that
17 would have been devastating.

18 And that was just the beginning of
19 the program. They were going to research what
20 was in the public domain, or what was an
21 orphan, and then they were going to let them
22 go for the world to see. So this has to be

1 stopped.

2 And that's why it's important,
3 what you're talking about, to get some kind of
4 consensus as to what a due diligent search is
5 and not let amateurs do this and potentially
6 destroy creators' work and marketplace. So
7 thank you very much.

8 MS. CLAGGETT: Thank you. With
9 that, I think we're actually going to close.
10 Oh wait, do we have one more? Yes, of course,
11 HathiTrust. Thank you very much.

12 (Laughter)

13 MS. MICHALAK: I'm Sarah
14 Michalak. I'm the chair of the board of
15 governors with the HathiTrust Digital Library.

16
17 And I have to say that we did the
18 project that was -- we put out the project
19 that was described. But it was determined
20 that that project was not working right, we
21 pulled it back.

22 So in a sense we learned a lot

1 and I think we taught the community a lot. It
2 is a benefit to all of those rights holders
3 that they were readily uncovered. Again, this
4 is -- readily discovered -- a benefit of the
5 technology that we utilized. Crowdsourcing is
6 one of the best ways to get to the truth that
7 there possibly is.

8 So, I recognize what the speaker
9 says from her perspective, but I think that
10 HathiTrust and the University of Michigan did
11 the right thing.

12 MS. CLAGGETT: Thank you very
13 much. With that, I want to thank all of the
14 panelists and participants for this session.
15 We'll have a quick 15-minute break and go with
16 the last panel. Thank you.

17 (Whereupon, the foregoing matter
18 went off the record at 3:31 p.m. and went back
19 on the record at 3:44 p.m.)

20 MS. ROWLAND: Okay, thanks for
21 coming back. We're going to have a really
22 exciting panel this time, I think, because

1 we're going to be talking about the types of
2 uses.

3 And yet again, before I start I
4 have to read the thing about the video so
5 please bear with me. I will try not to do a
6 dramatic reading although I think it would be
7 nice at this point.

8 This panel discussion is being
9 video recorded by the Library of Congress.
10 There will be a short question and answer
11 period at the end of the session.

12 If you decide to participate in
13 that question and answer period you are giving
14 us permission to include your question or
15 comments in future webcasts and broadcasts.

16 At this time I'd like to ask you
17 to turn off any cell phones or electronic
18 devices that might interfere with the
19 recording of this event.

20 And with that, I think we'll go
21 around and say our names and the organization
22 we're with very briefly. I don't think you

1 need to hear who we are anymore at the
2 Copyright Office. We'll start with you.

3 MR. CARROLL: Okay, great. I'm
4 Michael Carroll. My day job is a Professor of
5 Law and Director of the Program on Information
6 Justice and Intellectual Property at American
7 University.

8 I'm also on the board of Creative
9 Commons, Inc., which is a nonprofit
10 headquartered in California and the Public
11 Lead of Creative Commons USA, which is the
12 U.S.-specific country project of Creative
13 Commons.

14 And I'm here in my dual capacities
15 as a scholar of copyright law who's studied
16 the ways in which we tailor the law through
17 statutory licenses or otherwise, and sort of
18 -- I've published some guidelines about how
19 and when that does and doesn't work and want
20 to contribute that.

21 And then Creative Commons USA has
22 a particular interest in knowing when you need

1 a license and when you don't because a lot of
2 people get confused about that.

3 MS. PRESCOTT: I'm Leah Prescott,
4 the Associate Law Librarian for Digital
5 Initiatives and Special Collections at
6 Georgetown Law Library.

7 MS. GOODYEAR: I'm Anne Collins
8 Goodyear, President of the College Art
9 Association.

10 MS. GRIFFIN: Jodie Griffin from
11 Public Knowledge.

12 MS. COX: Krista Cox with the
13 Association of Research Libraries.

14 MS. KOPANS: Nancy Kopans,
15 General Counsel, ITHAKA which houses JSTOR,
16 Portico and ITHAKA S+R.

17 MS. RESS: Manon Ress, Knowledge
18 Ecology International.

19 MR. COLLIER: Dan Collier, Chief
20 Legal Engineer for the Durationator at Tulane
21 University.

22 MS. SHAFTEL: Lisa Shaftel,

1 National Advocacy Chair of Graphic Artists
2 Guild.

3 MR. SLOCUM: Chuck Slocum,
4 Writers Guild of America, West.

5 MR. ADLER: Allan Adler, General
6 Counsel, Association of American Publishers.

7 MR. COURTNEY: Kyle Courtney,
8 Copyright Advisor, Harvard University
9 Libraries.

10 MR. COHEN: Dan Cohen, Executive
11 Director of the Digital Public Library of
12 America.

13 MS. ROWLAND: Thank you. I will
14 say we do have an extra microphone. I don't
15 know if anyone wants to move. If you don't,
16 that's fine. But we have an extra one if
17 anyone ever gets crowded.

18 So right now, we're going to talk
19 about the commercial versus noncommercial
20 uses. As everyone knows, in the prior
21 legislation it covered both commercial and
22 noncommercial.

1 In the time that's passed there
2 have been other countries that have done other
3 things. The EU has only limited their Orphan
4 Works Directive towards noncommercial uses,
5 but the UK has expanded it.

6 So I wanted to start off in, I
7 guess, a very broad question before we get
8 into the nitty-gritty of what is a
9 noncommercial use is. What do people think
10 about having any orphan works solution be
11 applicable to both commercial and
12 noncommercial uses? Ms. Cox?

13 MS. COX: So, from our
14 perspective, it's very important to have any
15 orphan works solution apply to both commercial
16 and noncommercial. Because the distinction,
17 from our perspective, doesn't really make
18 sense. It can become fuzzy really easily.

19 And there's also arguments that
20 not-for-profit uses are still commercial and
21 vice versa. So I think actually defining
22 noncommercial and commercial gets very, very

1 tricky. So, we think that any legislation
2 should apply equally, that any narrow carve-
3 outs for certain types of commercial uses or
4 noncommercial uses could reduce the value of
5 that type of legislation.

6 One of the solutions that we
7 think might be better than making a
8 distinction between commercial and
9 noncommercial is kind of taking a lesson from
10 the fair use factors, in particular the fourth
11 factor which looks at the effect on the
12 potential market. And that might be a more
13 appropriate way to look at it rather than
14 trying to say that commercial uses are not
15 applicable.

16 MS. ROWLAND: Okay, Mr. Courtney?

17 MR. COURTNEY: Sure. I'd agree
18 with a lot of what my colleague says. Library
19 digitization projects -- which we talked
20 about, you know, mass or collections or
21 otherwise -- are not initiated, generally, to
22 be developed or sold as commercial products --

1 generally -- but to stimulate new scholarship,
2 new findings, getting the very part of what we
3 talked about earlier, promoting the progress
4 of science and the arts. That's why we do
5 that.

6 Digitization, mass or collection-
7 specific is a form of leveraging technology
8 that can resuscitate old materials, derive
9 valuable new information. And this clearly
10 sits in the field of noncommercial.

11 However, we understand that
12 commercialization may happen later as the
13 market dictates.

14 And I would just echo that the
15 first panelists mentioned there was the
16 possibility of nonprofit libraries, et cetera,
17 kind of serving as a commercial front maybe to
18 get stuff digitized and then introduce it to
19 the market. And, you know, we don't take that
20 approach. We take a similar approach to fair
21 use where we already have in the tests a
22 balancing and the first factor actually,

1 commercial versus noncommercial.

2 So I'd agree that while the
3 initiation of these mass digitizations that
4 are occurring at our libraries are
5 noncommercial in nature, I don't think there
6 would be an objection to having commercial
7 uses which may satisfy everyone at the table
8 as well. Thank you.

9 MS. ROWLAND: Ms. Shaftel, and
10 then we'll go around the table that way.

11 MS. SHAFTEL: Lisa Shaftel,
12 Graphic Artists Guild.

13 I think that any professional
14 illustrator, photographer, or graphic artist
15 would have absolutely no problem explaining to
16 you what commercial use is. This is how we
17 earn our living. We create visual works and
18 we license them to different users to use in
19 different uses in different media. And the
20 value of the work is determined by its use,
21 what media it's being used in, and for what
22 purpose. And what has little use today may

1 have a lot of use in the future.

2 And our value in licensing is
3 also determined on exclusive rights and
4 licensing exclusive use to certain clients or
5 certain users.

6 No author or creator can compete
7 with free work. And once copyrighted works,
8 copyrighted images, are allowed to be used in
9 the marketplace as alleged orphans, it's going
10 to result in a very quick accumulation of a
11 large collection of images that are still
12 protected by copyright that most likely have
13 very living, working, and breathing
14 illustrators, photographers, and graphic
15 artists who aren't getting paid for the use of
16 that work. And we can't compete with free
17 work.

18 Free erodes copyright protection
19 and it erodes the value of the works. Someone
20 is taking something of value without paying
21 for it.

22 We're not asking for more, we're

1 asking for enough. We're asking for enough to
2 make a living. Not to survive, but to make a
3 living selling our work -- creating and
4 selling our work.

5 MS. ROWLAND: Okay, I think Ms.
6 Ress was the first to raise her hand over
7 there.

8 MS. RESS: We work for consumers
9 and we are a consumer organization.
10 Nevertheless, we believe the distinction
11 between commercial and noncommercial uses
12 could be okay as long as the noncommercial
13 uses have more liberal procedures and greater
14 access, of course.

15 We also believe that commercial
16 uses need a path to access. In a way
17 consumers, consumer groups too, believe that
18 there needs to be a path, a path to access for
19 more stuff that's over there, but legal
20 access.

21 So we rely on commercial,
22 commercial publishing, whether it's for

1 textbooks or for all sort of activities and
2 uses. I'm thinking, for example, of YouTube,
3 which is a commercial publisher, for example,
4 that consumers love. So, consumers are always
5 well served -- not always, but very often well
6 served -- by private interests.

7 And we think it's important to
8 find a path that would reconcile both
9 commercial and noncommercial uses.

10 MS. ROWLAND: Ms. Kopans?

11 MS. KOPANS: Well, I think a lot
12 of it is contingent on the use involved, too.
13 And I find myself really on both sides of this
14 divide. I think maybe for preservation,
15 there's value in a commercial entity
16 undertaking preservation services.

17 Access might be different. And
18 there are different types of access. There's
19 large-scale access. There's access that's
20 monetized. Sometimes it's monetized for the
21 sustainability of a project that could be for
22 a nonprofit. That could be a public good.

1 Sometimes it's monetized for individual
2 enrichment.

3 So I think these are some of the
4 things we'd want to be considering taking into
5 account -- the very real interest of the
6 rights holders in wanting to make a
7 livelihood.

8 MS. ROWLAND: Ms. Goodyear, Mr.
9 Carroll, then I'll go to Mr. Adler and Mr.
10 Slocum.

11 MS. GOODYEAR: The College Art
12 Association believes that orphan works
13 legislation should apply equally to the
14 commercial and noncommercial sectors.

15 And this has to do, really, with
16 the uses that our members may wish to make of
17 orphan works. Many of our members, which
18 include practicing artists, art historians,
19 curators, art publishers operate in
20 noncommercial sectors.

21 But often their activities shade
22 into commercial sectors as well. For example,

1 practicing artists may seek to sell their work
2 in galleries, and scholars or curators may
3 wish to publish with commercial presses. And
4 for this reason, we think that it becomes
5 extremely difficult to try to bifurcate these
6 categories of practice. So we advocate equal
7 coverage for commercial and noncommercial uses
8 of orphan works. Thank you.

9 MR. CARROLL: Yes, I want to
10 agree and suggest that that framing of
11 commercial versus noncommercial is unlikely to
12 be productive for some of the reasons you're
13 hearing.

14 If you're going to have a license,
15 a license should pick up where fair use leaves
16 off. And we can have disagreements about
17 where that line is. But we should be talking
18 about licensing uses beyond fair use and then
19 ask the question -- is there a problem that
20 the market's not solving with respect to those
21 uses?

22 Because, certainly, just the act

1 of digitization is reformatting -- it's save-
2 as. It's no different from taking a WordStar
3 file and turning it into a .doc and taking an
4 analog file and turning it into a .doc.
5 You're just reformatting the document. That
6 doesn't need a license. That's a fair use.

7 Text mining and doing
8 computational research on that data doesn't --
9 that's a fair use -- doesn't exercise the
10 exclusive rights because it's not even
11 reproducing the work in copies.

12 But it's when you make it public
13 that we have the fair use conversation. If
14 you're now making it publicly accessible --
15 for what purpose, to what audience, under what
16 terms? And there's going to be a fair use
17 zone with respect to, certainly, to the
18 librarian archives.

19 And then we've heard that the
20 commercial sector feels like they're likely
21 not to qualify for a fair use. And so there
22 might be a targeted zone in that space for

1 some kind of legislative solution where the
2 author or rights owner cannot be identified,
3 where the use is clearly commercial, and
4 therefore we can't get a negotiated solution.

5

6 That would be the place of market
7 failure. That would be the place for
8 legislation to find a fix.

9 MS. ROWLAND: Thank you. Mr.
10 Adler, and I'd like to add something on that
11 perhaps you guys can also respond to.

12 It is how do commercial
13 enterprises use these orphan works? How often
14 does it come up for the commercial enterprises
15 and how has that worked within the business
16 models that you guys are involved in?

17 MR. ADLER: Well, just to answer
18 the first question before I answer your other
19 one. I think we have to be very careful to
20 avoid adopting these kind of caricature-ish
21 notions about the public interest and what
22 commercialism is about, and that the two are

1 somehow mutually exclusive.

2 What we're talking about here, in
3 its basic terms, is the idea that there are
4 many copyrighted works that society does not
5 get the benefit from because of these issues
6 involved with whether or not permission needs
7 to be obtained, and whether or not there's
8 somebody available who actually can provide
9 the permission that is necessary.

10 But the fact of the matter is
11 that there are a wide spectrum of interests
12 along what is considered the public interest,
13 and that includes commercial use of these kind
14 of works.

15 To answer your question, Catie,
16 for example, in the publishing industry --
17 where three-quarters of the players are
18 actually considered small businesses --
19 they're not the Simon & Schusters and
20 HarperCollins' of the world.

21 In that business, the way in
22 which these works would be used is as largely

1 embedded and incorporated works in the works
2 that publishers produce for the market.

3 They may range from photographs
4 and other images to small works like poems.
5 They may involve letters that people have
6 written. Some of that material may have been
7 published. Some of it may not have been
8 published.

9 But the point is that when you
10 publish a book on a subject there are many
11 times that there is the need to publish within
12 that work other works in order to be able to
13 fully cover the subject and to be able to
14 expose what those works' significance is to
15 the subject that is addressed.

16 And, for that reason, I think
17 that our interest as the Association of
18 American Publishers extends from the many
19 nonprofit publishers who are members of the
20 organization right through the work of the
21 commercial publishers. Because we are used to
22 having to license the use of other people's

1 works.

2 The issue of orphan works is
3 really just a question of whether or not,
4 ultimately, someone is going to have to obtain
5 a license, or whether or not they don't have
6 to use a license because they have followed a
7 scheme that is meant to address the situation
8 where there is no one who can grant the
9 license, at least no one who could be found.

10 MS. ROWLAND: Mr. Slocum?

11 MR. SLOCUM: I agree that the
12 distinction between commercial uses and
13 noncommercial uses is going to be problematic.
14 It's a very blurry line between those two.

15 And I would say the same thing
16 about the references earlier to whether
17 something was made with commercial intent or
18 not. Something that was made that may not
19 have initially seemed like it had value could
20 have great value.

21 But another terminology point
22 that comes up when I'm thinking about the

1 variety of uses is the terminology "orphan
2 works." It seems to me we're really talking
3 about orphan rights with regard to certain
4 works.

5 Because you can have works where
6 certain rights have been orphaned but other
7 rights not. It's very common in our
8 environment in film and television in
9 Hollywood that the writer retains certain
10 rights, particularly to an original work where
11 most of the rights are conveyed to the
12 producing company but they retain the right
13 to, for instance, the stage adaptation or to
14 write a novelization or whatever.

15 And so if the producer is
16 defunct, the writer may well still retain
17 other rights that the producer may, to the
18 public, seem to own but they don't. So the
19 split rights problem, I think, will come up a
20 lot.

21 One instance that I would point
22 out is where the right may not extend to just

1 anyone in the public, but a writer often will
2 sell a script to a producer. And if the
3 producer goes out of business, the writer has
4 a right to retain, to reacquire the right to
5 a script if it wasn't produced.

6 And so if the producer doesn't
7 exist they can't reacquire the right. And so
8 it may be actually not the right to take a
9 clip from the movie or whatever, but an
10 unpublished, unproduced work -- there may be
11 a rights holder who can't be made whole
12 because the work is orphaned. And so they may
13 have their rights that could be solved by such
14 a policy as an orphan work policy.

15 MS. ROWLAND: And are there
16 thoughts on how -- and I know Mr. Adler talked
17 about this and I think you did too, Mr.
18 Courtney, about how there's kind of an
19 intertwined nature of having a commercial and
20 noncommercial. And the difficulty in kind of
21 trying to parse those out.

22 So I'd like to hear a little bit

1 more about people in enterprises that you
2 might think are really noncommercial but,
3 depending on whatever the definition of
4 commercial might be, might also have some sort
5 of commercial aspect that, once you start down
6 this road, it might make it a little more
7 difficult to disentangle everything. Ms. Cox?

8 MS. COX: So, I mean I definitely
9 think that the commercial and noncommercial is
10 often -- can be intertwined.

11 For example, Google, as a
12 commercial entity, can make noncommercial uses
13 for the benefit, for example, of persons who
14 are blind to make accessible format copy of
15 works and are able to do so at a much faster
16 rate than some nonprofit institutions can.

17 And the reverse is true too. And
18 I think that some lessons can be taken from
19 the patent perspective.

20 And in the *Madey v. Duke* case one
21 of the concerns is that the plaintiff in that
22 case argued that Duke, even though it is a

1 nonprofit institution, was in the business of
2 education.

3 And that hasn't happened, to my
4 knowledge, in the copyright sector. But of
5 course sometimes those distinctions do get
6 very, very fuzzy, and I think that's part of
7 the difficulty.

8 And just aside from that, I think
9 we have to recognize that, as I mentioned
10 earlier, the Association of Research
11 Librarians doesn't really see a need for
12 orphan works legislation because from the
13 perspective of libraries, we're quite happy
14 with the recent fair use jurisprudence and we
15 feel like fair use is working quite well for
16 libraries.

17 So, in order to make -- if you do
18 have orphan works legislation -- in order to
19 make it effective, I think you really have to
20 think about the commercial users. If you're
21 thinking about libraries as nonprofit
22 institutions that can already avail itself,

1 and has successfully availed itself, of fair
2 use, you have to think about how to make this
3 legislation effective and not just redundant.
4 And I think you do that by applying it also to
5 commercial users.

6 MS. ROWLAND: Mr. Courtney and
7 then Mr. Adler.

8 MR. COURTNEY: So, to quote a lot
9 of -- we're quoting a lot of copyright's
10 greatest hits today. Even Harper & Row has
11 said copyright is intended to increase and not
12 impede the harvest of knowledge.

13 So we're talking about, you know,
14 let's say we go through a library digitization
15 project and we find some orphan works. We
16 digitize them, we put them online.

17 A scholar comes along, visits our
18 collection or finds it online and then
19 suddenly wants to write an article about that.
20 They write an article. Now, where does the
21 article end up? In the hands of a publisher
22 who's a commercial entity. So here we have

1 maybe not entangled, but we have a kind of
2 transformation from a noncommercial activity
3 that turns and uses that work and may have to
4 go into a publisher's hands.

5 And then a lot of times, as we
6 know, publishers will be like, well, where are
7 the rights that you need to use these images,
8 these works, these photographs so we can
9 publish this into a book and/or a journal?

10 So I view it as not so much as
11 tangled as a transformative kind of moment
12 where nonprofit activities turn into
13 commercialization activities.

14 MS. ROWLAND: Mr. Adler.

15 MR. ADLER: Well, one might have
16 hoped that some of these issues that we had
17 spent a lot of time discussing when the 2008
18 legislation was pending might have advanced a
19 little bit but I see this is one that really
20 has not.

21 (Laughter)

22 MR. ADLER: We had discussed at

1 that time, for example, the quandary of trying
2 to deal with this idea of nonprofit
3 institutions like museums and art galleries
4 that nevertheless have shops that sell what
5 are essentially commercial, very high-quality
6 commercial books of their exhibits. And they
7 do so, of course, in competition with other
8 publishers of similar types of works.

9 And so there's a question of how
10 you would consider that situation when you're
11 dealing with an entity that has a nonprofit
12 tax status but is engaging in commercial
13 activity.

14 We also spent a lot of time
15 discussing questions of whether or not uses of
16 orphan works should be treated differently in
17 terms of whether or not, for example, on one
18 end of the spectrum it was somebody who takes
19 an orphan work and uses it to create a new
20 work of original expression as opposed to
21 whether or not a publisher would take an
22 orphan work, something that has sort of sunk

1 into obscurity over the years, and reintroduce
2 it to the reading public merely by
3 republishing that work without any alteration
4 in its content.

5 Both of those things have great
6 merit if you consider what the basic premise,
7 as I said before, is of orphan works. The
8 idea that these are works that are not
9 benefitting society right now because people
10 are concerned about whether or not they have
11 the right and ability, without running into
12 the potential for facing infringement
13 liability, to go ahead and make those works
14 available.

15 So I would hope that, if we're
16 going to consider the merits of orphan works
17 legislation, we would consider them in terms
18 of the broadest array of possible activities
19 that make works available to the public that
20 previously were not available to the public
21 because of the inherent problem of orphan
22 works.

1 Because that's really the benefit
2 that I think is maybe the one area we all
3 agree could come from orphan works treatment,
4 that works previously not available to the
5 public now can be made available to the public
6 in a variety of different ways.

7 MS. CLAGGETT: And I would just
8 interject there. Then maybe there might be
9 some people who would want to respond to this
10 directly. But I know that this was an issue
11 that was discussed and in the 2008 bill they
12 did have a provision in terms of kind of
13 addressing whether reasonable compensation
14 would be needed if it was a noncommercial
15 activity and actually preventing even the
16 reasonable compensation in those particular
17 cases.

18 MR. ADLER: And, if you remember,
19 we used the phrase that nobody likes, which is
20 "without any purpose of direct or indirect
21 commercial advantage." And the reason nobody
22 likes it is because nobody can agree on what

1 it actually means in practice.

2 MS. CLAGGETT: But, not to bring
3 up something that no one likes, the question
4 would be: would a provision like that that was
5 in the 2008 legislation address the various
6 concerns that we've heard in terms of not
7 actually creating a distinction between -- an
8 official distinction -- between commercial and
9 noncommercial as to whether it's covered at
10 all by the provision but having a unique
11 treatment under the provision for certain
12 types of uses? So, whether that proposal is
13 one that we should continue to think of as a
14 good proposal to think about in the future.

15 MS. KOPANS: So I think there is
16 potential for confusion between the activities
17 of a tax exempt and non-exempt organization,
18 and between conduct that's undertaken for
19 money or not. And sometimes exempt
20 organizations charge money for certain things.
21 There's just a private inurement issue there.
22 So whatever gets decided or proposed needs to

1 address these kinds of things.

2 And I can speak to an
3 organization, for example, that digitizes
4 content, some of it might be orphaned, and
5 charges a subscription fee for access. And
6 that organization is a tax-exempt
7 organization. There is no private inurement.
8 The funds are for the sustainability of the
9 project. But there is a fee-for-service
10 business model.

11 And I would worry that if
12 commercial activity were excluded, that kind
13 of activity could be, or at the very least the
14 definition of what is commercial activity
15 should be, carefully tailored to allow for
16 projects that insure the sustainability of
17 these kinds of activities.

18 I also do want to add on that I
19 think that part of the discussion here is --
20 a question I have is whether this is kind of
21 an embellishment of fair use and adding kind
22 of definition to fair use, or steps beyond

1 fair use. And that's sort of part of the
2 story and that's something Michael had raised
3 at the other end of the table.

4 Because there are instances where
5 fair use might more clearly cover some of the
6 activities.

7 MS. ROWLAND: Mr. Carroll?

8 MR. CARROLL: So, I mean the
9 language I would recommend is rather than use
10 this as an effort to try to do anything to the
11 scope of fair use, just agree that there's a
12 disagreement about the edge. But the language
13 could be very easy. Any use that exercises
14 one of the rights enumerated in Section 106
15 that does not fall within the limitation of
16 Section 107, dot dot dot.

17 Now we might disagree about
18 exactly what that use is, but you've said it
19 exercises an exclusive right and it's not fair
20 use. And now we can talk about diligent
21 search. We can talk about whether it's
22 compensated or not. But you can leave that

1 threshold showing to be litigated if
2 necessary. But just say there are clearly
3 going to be these uses that we will all agree
4 are not fair uses involve sort of commercial
5 entities making, selling a work.

6 And, as Allan says, but there's
7 this perfect piece to the puzzle of this new
8 work that's an orphan, that you cannot find
9 that copyright owner no matter how hard you
10 look. And should the public be denied access
11 to that piece of the puzzle? If that's the
12 problem to be solved, setting up the threshold
13 the way I just suggested leaves you the space
14 to solve that problem without trying to muddy
15 the waters around fair use.

16 MS. ROWLAND: And I think it will
17 be Ms. Griffin and then Mr. Slocum. But that
18 also brings me back to something that we
19 talked about in an earlier panel about the
20 savings clause.

21 And I don't know if anyone else
22 had anything else to say about that. It was

1 a little bit not exactly 100 percent supported
2 in our other panel because some people were
3 concerned about how it would interrelate. But
4 if people have thoughts about that as well,
5 that would be great. So I'll talk to Ms.
6 Griffin and then Mr. Adler. Or Mr. Adler, and
7 then Mr. Slocum.

8 MS. GRIFFIN: Well, what I was
9 going to say is actually kind of similar to
10 what Michael Carroll said, but I'll say it
11 anyway and I'll try to build on it.

12 The number -- the types of uses,
13 obviously, that you can make of an orphaned
14 work are just as varied as the type of uses
15 that you can make of any copyrighted work. So
16 we think that it's important to have an orphan
17 works structure that allows for several non-
18 exclusive approaches that run parallel to each
19 other and don't impinge on each other.

20 So you could, for example, have
21 a limitation on damages after a reasonably
22 diligent search that doesn't supersede fair

1 use and the robust economy of creation that's
2 built on the fair use doctrine.

3 So, I think it's important to
4 consider the uses or the approaches that we
5 could have in orphan works legislation that
6 build on making more works available for
7 subsequent uses, more creation that doesn't
8 take away from what the public already has in
9 the fair use doctrine.

10 MS. ROWLAND: And Mr. Adler.

11 MR. ADLER: As I said this
12 morning, I think that we shouldn't think that
13 there is this dichotomy between -- it's an
14 either/or choice between fair use and having
15 legislation that spells out the treatment of
16 orphan works.

17 Because fair use is always there
18 to deal with the situation where a use you
19 would like to make of a work requires
20 permission. And if you're not going to obtain
21 that permission -- if you're not going to even
22 bother to try to obtain that permission --

1 that's what fair use is there for you to
2 assert.

3 What we're talking about with
4 orphan works, though, is a different
5 situation. We're talking about a situation
6 where inherently you're dealing with a use
7 that would require permission, but for one
8 reason or another, you're thinking that you
9 don't want to assert fair use because if
10 you're wrong about that that leaves you fully
11 exposed to all the remedies of the copyright
12 owner if the copyright owner should emerge.

13 So we're still talking about a
14 situation that isn't addressed at all by fair
15 use and needs to be addressed if there is
16 going to be the ability to bring orphan works
17 to the public generally.

18 And that is the situation where
19 somebody wants to make sure because they can't
20 risk being subject to liability. They have
21 the ability to use a procedure that largely
22 avoids that liability.

1 Now, when we talked about the
2 savings clause on fair use there's some
3 controversy about that too. What I understood
4 the savings clause to be important for was the
5 idea that if, in fact, a copyright owner
6 emerged, that shouldn't preclude the would-be
7 user of that work from being able to assert
8 fair use.

9 A different question came up.
10 What about the situation where somebody
11 performed or claimed to perform a reasonably
12 diligent good faith search but in fact didn't?
13 Should they then -- when that is discovered,
14 when a court, in reviewing the way they have
15 conducted that search, decides that that isn't
16 a reasonably diligent search -- should they
17 then have recourse to a fair use defense?

18 Some people would say yes, other
19 people would say no. That's a policy decision
20 that would have to be made. But that's also
21 part of the notion of a savings clause.

22 MS. ROWLAND: Almost like an

1 unclean hands situation.

2 MR. ADLER: Yes.

3 MS. ROWLAND: Mr. Slocum and then
4 Ms. Goodyear.

5 MR. SLOCUM: Let me just agree
6 with the distinction that in thinking about
7 these uses, commercial and noncommercial -- to
8 me, it's not relevant whether the entity is a
9 not-for-profit entity. It's about the use,
10 and what use it takes away from the rightful
11 rights holders.

12 And my members, quite frankly,
13 are on both sides of this. They're creators
14 who have works that could be misused by --
15 misappropriated by -- someone trying to assert
16 an orphan right that may not be justified.

17 On the other hand, they're also
18 filmmakers who want to use clips or
19 photographs or audio in a film they might be
20 making, or might want to make a film of a
21 book, for instance, for whom they cannot find
22 an owner or rights holder. And so they might

1 want to make use of orphan work permission as
2 well as make sure their works are not unfairly
3 treated under it.

4 So anyway, it's -- I don't know
5 how the policy is ever going to be decided
6 with all these different uses and all these
7 different cases. It's definitely a
8 ridiculously complicated landscape.

9 (Laughter)

10 MS. ROWLAND: I guess unless we
11 say everything.

12 MS. CLAGGETT: Flexibility, it
13 sounds like, was one of the themes that came
14 across, at least so far, in terms of being
15 able to address the complexity.

16 MS. ROWLAND: I think it was Ms.
17 Goodyear and then Ms. Cox.

18 MS. GOODYEAR: Absolutely. Anne
19 Goodyear for the College Art Association.

20 There's no question that this is
21 an extraordinarily complex question. And,
22 actually, I find myself on behalf of CAA

1 agreeing with a lot of what has already been
2 asserted around the table.

3 And I think one of the points
4 that Nancy made, which is very important, is
5 that many not-for-profit organizations avail
6 themselves of commercial activities precisely
7 in the interest of sustaining the not-for-
8 profit mission. It's very often a vital
9 income stream.

10 And I think that's part of the
11 reason that it becomes very tricky to try to
12 parse apart commercial concerns versus
13 noncommercial concerns in this context.

14 And I think what a number of us
15 are arguing around this table, and certainly
16 CAA would want to add its voice to the chorus,
17 is that our goal is to ensure that works that
18 are perceived to be orphans are not cut off
19 from public discourse simply because their
20 rights status cannot be adequately
21 ascertained.

22 And it's for that reason that CAA

1 does not see orphan works legislation as being
2 incompatible with our very strong interest in
3 fair use. And, in fact, we wouldn't want the
4 two to be seen as being incompatible.

5 However, if a fair use defense is
6 not appropriate under a given circumstance, or
7 if it fails, we do feel that it's important
8 for orphan works legislation to provide some
9 sort of safe harbor. And indeed, we would
10 argue that not-for-profit organizations
11 deserve really a complete safe harbor from
12 liability for the use of orphan works.

13 And this is not a desire to shirk
14 our responsibility, or to shirk responsible
15 licensing. It's simply to try to reduce the
16 perceived risk. And to put things into the
17 arena of creative interpretation, creative
18 uses that we feel do serve the greater public
19 good. Thank you.

20 MS. ROWLAND: Ms. Cox, Mr. Cohen,
21 and then Mr. Slocum.

22 MS. COX: I just wanted to

1 respond to your question about the savings
2 clause. Certainly, I think that savings
3 clauses can be important and agree, in a
4 perfect world, that it should not be an
5 either/or choice between fair use and orphan
6 works legislation.

7 But from our perspective, one of
8 our concerns is that Section 108 does very
9 clearly have a savings clause. And some
10 people have argued that the savings clause
11 doesn't mean what the plain language says it
12 means. As Jonathan pointed out this morning,
13 they argue that 108 specifically enumerates
14 certain practice limitations and exceptions.
15 And by -- when libraries rely on fair use,
16 they're swallowing up the exception, they're
17 making this exception irrelevant.

18 And so our concern is that even
19 though we think a savings clause is very
20 important, that you're going to run up against
21 the same argument. So that's our concern with
22 why we think the savings clause might not be

1 completely adequate.

2 MS. ROWLAND: Okay. We have some
3 more people. That comment has generated some
4 responses.

5 I would say I think that that is
6 an interesting point, especially if you are,
7 depending how risk-averse your library is.
8 So, for example, if you're a library who may
9 not have the funds or the sovereign immunity
10 to litigate an entire case, you might find
11 some solace in having some more specified
12 exceptions like 108.

13 I think it was Ms. Cox and Mr.
14 Cohen, Mr. Slocum, then Mr. Adler. I'm sorry,
15 Mr. Cohen.

16 MR. COHEN: Thanks. I wanted to
17 just agree with Ms. Goodyear and expand a
18 little bit more, I think, about what's going
19 on in her comments, which I think are really
20 important from my perspective as well --
21 running a large digital library that's for the
22 public and that's open access.

1 I think that there's some things
2 going on upstream that, before we get to the
3 question of whether something is going to be
4 commercialized, it gets to questions of
5 intent, particularly around scholarly use and
6 student-based use.

7 There's often -- and especially
8 it does often revolve around orphan works
9 where we're trying to make wider access of
10 these -- a lot of question marks. Libraries,
11 archives, museums don't quite know what they
12 can do with the mass of materials that they
13 have.

14 But they do have some kind of if
15 you want to call it pure intent at the start,
16 which may down the road lead to questions of
17 sustainability and where it's going to be
18 published and these sorts of things.

19 But they do go into an act which
20 often is one of mass digitization, which might
21 catch in a very large net a lot of orphan
22 works where they are trying to enable certain

1 kinds of uses that, I think, would normally
2 fall under fair use or would be part of some
3 kind of broader scholarly use that we would
4 want to extend the realm to include under some
5 kind of legislation.

6 So I think that's really
7 critical, I think, to think upstream. And I
8 noticed that even just the title of this panel
9 is about users too and uses.

10 Before it gets to this question
11 of how actually something ends up in a gift
12 shop or just in a scholarly monograph or just
13 in a student paper -- before it gets to that
14 point, there's a lot that happens just from a
15 pure intent use standpoint that often involves
16 these works.

17 And that's where I think some more
18 focus could happen before we get into what is,
19 admittedly I think, a very thorny question
20 about what commercial or noncommercial use is.

21 MS. ROWLAND: Thank you. Mr.
22 Slocum?

1 MR. SLOCUM: Yes. I think I want
2 to go back to the comment about nonprofit
3 entities. I think any kind of blanket
4 exemption or protection for nonprofit entities
5 is far overbroad. It surely must be related
6 to certain types of uses being made by the
7 nonprofit entities.

8 I mean, you can't just have a
9 library, because it's a library, be able to
10 release a DVD of a Hollywood movie just
11 because you can't find who the producer was.
12 So it's with respect to certain uses perhaps.
13 But I think it's really related to, as is the
14 name of this panel, the uses, not who's using
15 it for that purpose.

16 MS. CLAGGETT: And I think that
17 was somewhat of the approach that was taken
18 actually in the 2008 legislation. It covered
19 libraries for certain uses -- the indirect or
20 direct commercial advantage that no one liked
21 apparently.

22 But if the panel has any specific

1 suggestions in terms of trying to address that
2 type of activity and define it in a way that
3 people would be comfortable with, that would
4 be good information to have as well.

5 MS. ROWLAND: Mr. Adler and then
6 Ms. Goodyear and then Ms. Griffin.

7 MR. ADLER: Yes, I think one of
8 the things that I would say, based on Mr.
9 Slocum's comment and some of the other
10 comments I've heard here today this morning
11 and this afternoon, is that we think of the
12 larger context in which the Copyright Office
13 is tackling this issue. We're now undergoing
14 this larger comprehensive review of copyright.

15
16 You know, it is the case that --
17 with respect to the way libraries, educational
18 institutions, archives are treated under
19 copyright law -- that to the extent we're
20 talking about whether or not their privileges
21 should be expanded or in other ways adjusted
22 for the digital age in order to accomplish

1 aims like the premise of orphan works
2 treatment, we may have to redefine what those
3 institutions are.

4 In this environment today, it's
5 very difficult to say what kind of a library
6 should receive certain types of privileges
7 under the law. We've been dealing with
8 libraries traditionally -- the notion of a
9 brick and mortar library which is a social
10 center in a community and a place where people
11 go to.

12 But we also now know that there
13 are libraries that have no physical presence.
14 They're completely virtual. And it's not
15 terribly difficult, apparently, to set
16 yourself up as a library on a website.

17 We see nonprofit educational
18 institutions, for example, many of them, some
19 that are members of the association are now
20 sitting on multi-million dollar funds that
21 they have acquired through programs like the
22 Bayh-Dole program that allows them to benefit

1 from funding of research by the federal
2 government.

3 And then they, even though
4 they're nonprofit institutions, are allowed to
5 commercialize those inventions in order to be
6 able to fulfill their obligations under that
7 particular program.

8 So I don't think we should all be
9 certain that we know exactly what these
10 institutions are today or what they could be.
11 And we shouldn't make assumptions about an
12 issue like orphan works or mass digitization
13 or any other by simply assuming that because
14 those labels meant something 25, 30, 40 years
15 ago, that they mean the same thing in the
16 digital era today.

17 MS. ROWLAND: Ms. Goodyear.

18 MS. GOODYEAR: I would just note
19 that, of course, the Shawn Bentley Act did
20 indeed contemplate the granting of a safe
21 harbor to not-for-profit entities. And
22 actually CAA thinks that perhaps the scope of

1 activities contemplated there may need to be
2 expanded, for example, to include scholarly
3 publishing. So that question of the scope of
4 activities would certainly be of interest to
5 the College Art Association and something that
6 we could consider expanding on in comments
7 following this.

8 MS. ROWLAND: Ms. Griffin?

9 MS. GRIFFIN: I just wanted to
10 point out I think so far in this panel we've
11 talked a lot about education and scholarly
12 uses by institutions. But there are also
13 personal uses. And after all, at the end of
14 the day copyright law cares about people
15 creating works and using works.

16 So, when we think about personal
17 uses, some of them have sprung up on their own
18 and some of them are building on the tools and
19 technology of institutions or for-profit
20 companies that make collections available.

21 So, I think that when we're
22 looking at the structure of orphan works

1 answers, we want to care about the uses by
2 institutions that help their users, but we
3 also need to make sure that the solutions are
4 usable by individuals who might not be as
5 savvy as an institution like a university
6 library.

7 MS. ROWLAND: That's a good
8 point, Ms. Griffin, and I wanted to actually
9 expand on that -- and then we can also talk to
10 Ms. Shaftel --

11 which is that there are a lot of individuals
12 who might be trying to make uses of orphan
13 works. We talked about the family photographs
14 in an earlier panel and that kind of thing.
15 And what do you do if you want to make a copy
16 for your child or something like that and the
17 photographer is -- you don't know who did it
18 anymore, you don't remember?

19 And so I wonder if we could talk
20 a little bit about what -- if orphan works, a
21 legislative solution was to apply to all types
22 of uses, would it be tailored in different

1 ways to different types of users? And I'm not
2 really talking about noncommercial versus
3 commercial versus nonprofit. More like large
4 company versus individual versus small
5 business entity.

6 And I'll turn to Ms. Shaftel but
7 also I'd really love to hear from everyone
8 else about that as well.

9 MS. SHAFTEL: Thank you. I
10 wanted to address this notion of educational
11 use and scholarly use. And, certainly, that's
12 already permitted in fair use, as is
13 preservation for archives.

14 I'd like to point out that there
15 are untold Americans who earn their living
16 creating educational materials, whether
17 they're written works, including photographs,
18 illustrations, motion pictures, musical works.
19 So any notion that anything for educational
20 use should be allowed for fair use, that's
21 ridiculous. You've just wiped out an entire
22 industry there and all of the creators'

1 licensing opportunities for educational use.

2

3 And we keep going back to the
4 discussion of mass digitization of collections
5 of libraries or archives. And again, a lot of
6 this is permitted under fair use. And
7 certainly not every archive and not every
8 library is entirely orphan works. There will
9 be some in there, but not the vast majority.

10 And I'd like us to remember the
11 importance between keeping the issue of mass
12 digitization of library collections and the
13 noncommercial use or preservation of genuinely
14 orphan works as two entirely separate issues.

15 The cost and the time involved --
16 of locating and contacting rights holders who
17 did not include licenses for digital use --
18 does not trump copyright law, nor does it
19 necessitate allowing the use and digitization
20 under an orphan works scheme. This is the
21 cost of doing business.

22 And I think that what most of the

1 cultural nonprofits want to do, in terms of
2 preservation and their collections and out-of-
3 print works and orphan works, is already
4 allowed under fair use.

5 And, certainly, a rights holder
6 would not object to, for example, a historical
7 museum putting up a poster or a photograph on
8 display in an exhibit about an event. But
9 once you take that photograph or that poster
10 and you reproduce it and you're selling it in
11 your gift shop -- and I know you need to do
12 this to pay your bills -- you're not making
13 your money from admissions at the door.

14 But that is clearly a commercial
15 use. And it's absolutely competing with the
16 market interest of the rights holder and it
17 may actually be violating exclusive licensing
18 contracts that that creator has with a client
19 either in the past or present. And the user
20 may have no way of knowing that.

21 So just simply saying that you're
22 a nonprofit -- that's a tax status and a

1 business model -- that has absolutely nothing
2 to do with how you want to use the work.

3 MS. ROWLAND: Thank you. I think
4 Ms. Kopans was next.

5 MS. KOPANS: So much will depend
6 on the remedies. That's a different topic.
7 But these things work in conjunction.

8 MS. ROWLAND: And I think you can
9 be -- I'm moderating the one tomorrow on --

10 MS. KOPANS: Yes, so I see
11 remedies is tomorrow.

12 MS. ROWLAND: So I think that we
13 can talk about that issue right now.

14 MS. KOPANS: Right.

15 MS. ROWLAND: Different types of
16 remedies for different types of users.

17 MS. KOPANS: As a placeholder
18 that there may be a different way to address
19 different types of uses in that context.

20 MS. ROWLAND: Did you want to say
21 something quickly about that?

22 MS. KOPANS: It just may mean

1 that things that are, you know, exempt-type
2 activities, and I'm not talking about gift
3 shops. I'm talking about collections of
4 content made available to other nonprofits for
5 scholarship. That might be one type of remedy
6 versus some type of activity that is seemingly
7 more commercial -- benefitting individuals,
8 not for a nonprofit purpose, and that's not
9 enrichment for individuals would have another
10 remedy.

11 MS. ROWLAND: Mr. Slocum.

12 MR. SLOCUM: I'll also have more
13 comments tomorrow on remedies, because I think
14 that's a very relevant aspect of certain of
15 these uses, that they should, if they're
16 permitted, be permitted with regard to certain
17 remedies being attached.

18 Like for instance, my members
19 convey the copyright of their scripts to
20 producers and are going to be paid residuals,
21 royalties, for the exploitation of that work.
22 And if someone's going to take up a work

1 that's orphaned later, a movie that's orphaned
2 let's say, and distribute it, they should have
3 to make those beneficiaries of the copyright
4 whole. Because, in fact, that aspect of the
5 copyright is not orphaned, it's owed to
6 somebody who's identifiable -- even if the
7 middleman is not found. So anyway, but that's
8 a little bit more for tomorrow.

9 I think on the question of
10 different users or different sort of, I don't
11 know, types of origination like home movies or
12 whatever, I mean I think that home video
13 "Charlie Bit my Finger" has probably paid for
14 the college of Charlie and his brother. And
15 surely that family has the right to that.

16 Well, that YouTube posting was a
17 home movie that was just posted for a family.
18 So it's very much like taking a photograph of
19 your kids in the backyard and wanting to put
20 it in a place where your family, who's far
21 away, can see it. And yet, it turns into a
22 commercially valuable thing. So I think it

1 has to be very carefully considered if there
2 are going to be carve-outs for sort of
3 personal uses. They could have commercial
4 value to those creators.

5 And it's a very blurry line where
6 you end up with things that are created with
7 a little bit more of an intention to -- for
8 commercial exploitation. Or by professional
9 creators who make their living from that, but
10 they do sort of a pet project or a personal
11 project that they put up on the internet
12 perhaps but it turns out to have value because
13 of their talent or whatever. So I think that
14 needs to be protected. It shouldn't be just
15 sort of released casually.

16 MS. ROWLAND: So there are two
17 different types of -- I guess we'll call them
18 personal for these purposes, personal creation
19 and then personal use. So I guess the
20 creation is the "Charlie Bit my Finger"
21 situation and then the use would be I get to
22 make my own copies of my family photos or

1 whatnot.

2 MR. SLOCUM: But the other blurry
3 aspect is what is publication? Because
4 putting it on YouTube is publication, but it's
5 often just for personal, you know, to share
6 with personal friends. But then it turns into
7 a commercial use.

8 MS. ROWLAND: Mr. Collier.

9 MR. COLLIER: Yes, I wanted to
10 just build a little bit on what Jodie Griffin
11 said a few minutes ago about how the voices of
12 private users are kind of getting lost in the
13 shuffle here.

14 One of the things that Tulane
15 University did in preparation for our reply
16 comment was to analyze the differences in the
17 initial comments from the first round of
18 initial comments between the reply comments
19 and the initial comments that were submitted
20 to this most recent request.

21 And we found actually that, first
22 of all, the initial comments for the first

1 round, there were over 700 of them, an
2 incredible number. And for this most recent
3 round we only had 91. So that's an incredible
4 drop-off in the number of people who are
5 participating in this discussion.

6 And, in particular, we found that
7 from the original 700-plus comments, only
8 around 10 percent of them were actually
9 submitted by formally identified
10 representatives of large interest groups. And
11 the rest were largely submitted by private
12 individuals who were speaking on behalf of
13 their personal concerns.

14 But with the most recent set of
15 91 almost none of those was actually a private
16 individual speaking on behalf -- and, in fact,
17 those few people who did seem to speak as
18 private individuals seemed to be saying
19 actually just in support of another group, you
20 know, I'm a private graphic artist and I
21 support the position of the Graphic Artists of
22 America.

1 So a lot of the private
2 individuals who don't feel affiliated with any
3 of the larger groups are simply no longer
4 participating in this discussion.

5 And we think, at Tulane
6 University, we thought that it was vital that
7 we not lose sight of these people.

8 And, in particular, we were
9 concerned about the idea of tailoring any
10 legislation towards particular users or uses,
11 even if they're nonprofit groups, even if
12 they're libraries, because that would have the
13 effect of separating the institutions who
14 serve people from the people themselves that
15 they're supposed to be serving.

16 MS. ROWLAND: Does anyone else
17 have anything to say about that? I think
18 that's a valid point, that it's hard to get
19 people who are individuals who are out there
20 using orphan works or wanting to use orphan
21 works to make comments to the Copyright Office
22 or try to participate.

1 Because a lot of times I think
2 people don't even know what is an orphan work.
3 They might have come across it in their day-
4 to-day life and they didn't know it's an
5 orphan work and they just kind of stopped
6 using it or didn't mess with it because they
7 didn't know what to do.

8 Does anyone have anything else to
9 say about that? Ms. Cox.

10 MS. COX: I guess I would just add
11 to that that the Shawn Bentley Orphan Works
12 Act, I think, when it finally came out, or you
13 know, when it came out of the Senate was
14 extremely long, extremely detailed. It was
15 like 20 pages long.

16 And I don't know that that makes
17 it -- that level of detail and that length is
18 a positive aspect for individual users, as
19 Jodie said, who sometimes aren't as savvy or
20 don't have the resources to understand what
21 all that means.

22 MS. ROWLAND: Ms. Prescott and

1 then Mr. Cohen.

2 MS. PRESCOTT: Speaking from a
3 practitioner perspective, I can verify that
4 this -- the nature of the conversation today
5 seems to bear out exactly what you found in
6 your study.

7 And I think that you can easily
8 include with the individuals very small
9 institutions. And that they're going to have
10 exactly the same fears and exactly the same
11 difficulty in really even understanding -- and
12 that's not meant to be insulting -- but to
13 have the resources to really understand the
14 nature of the conversation, never mind the
15 risk aversion, to actually take action. And
16 I think that that really is becoming more and
17 more of a problem rather than less of one.

18 MS. ROWLAND: Mr. Cohen?

19 MR. COHEN: Yes. You know, our
20 site serves a lot of just individual users who
21 are just out there on the web. I think
22 Michael Carroll and Creative Commons, as well,

1 I think is another place that people go and
2 look for that sort of stamp of approval.

3 I think individuals are already
4 super confused by fair use. I think anything
5 we add in here, if it's confusing a lot of
6 lawyers, it's probably going to confuse the
7 general public.

8 And so I think what happens in
9 that case is that I think most people are
10 actually -- we've talked a lot about bad
11 actors, but I actually think most people are
12 good actors. And I think we should try to
13 tailor any legislation toward them as well,
14 people who are out there using the Creative
15 Commons search engine, or using the DPLA to
16 find things where their rights are very
17 clearly specified.

18 And so what I think you can do
19 here is at least provide us with the tools.
20 We're trying to provide openly available
21 material with clear rights assigned to it. So
22 that there aren't infringers who are just

1 going to a Google search engine and finding an
2 image and cutting and pasting it, but actually
3 trying to find a place that has the correct
4 metadata and correct rights assigned to it.

5 I think it has to be done at that
6 level to at least be able to enable
7 clearinghouses and other places where it's
8 clear, for the average user who doesn't have
9 to go through a mental calculation of multiple
10 variables, to figure out exactly what they're
11 doing with this material.

12 MS. ROWLAND: And that raises a
13 question. I'll call on Mr. Carroll in one
14 second and maybe you can address this as well.
15 Which is that it brings up the treatment of
16 different users not just in whether they
17 should be covered but, for example, the
18 threshold of the reasonably diligent search.
19 Would it be good to have different types of
20 reasonably diligent searches for different
21 classes of users, or is that just going to
22 cause more confusion for people. How is that

1 going to work. And I'll turn to Mr. Carroll.

2

3 MR. CARROLL: Well, so I wanted to
4 follow up on Mr. Cohen's point which is I do
5 think that trying to solve the problem after
6 it's occurred is going to be very difficult,
7 which is why the registry discussion that was
8 taking place earlier may be a better way to
9 address the needs of smaller users in making
10 it incredibly easy to register your work and
11 be found and be identified. And so putting
12 some more energy and effort into that, and
13 then maybe having some consequences to the
14 rights owner who doesn't even, after we've
15 used digital technology to make it incredibly
16 easy to push a button and license -- or I'm
17 sorry, identify your work and register your
18 work, the choice not to do that might have
19 consequences.

20 So other -- we borrowed from
21 patent law before others -- other countries'
22 patent systems have what's called a working

1 requirement. If you have an invention and you
2 have a patent right but you don't actually
3 commercialize the invention, then the rights
4 to do so can be given to someone else.

5 So I might limit the proposal only
6 to published works because I think the orphans
7 we're talking about are published works whose
8 owners can no longer be found.

9 But where you've done that, where
10 there's an easy opportunity to register and
11 identify yourself and hold your hand up and
12 you haven't done any of those things, then
13 privileging the use in those circumstances
14 would be appropriate.

15 MS. ROWLAND: Mr. Adler?

16 MR. ADLER: I just wanted to
17 comment on this view that somehow this is all
18 becoming way too complicated for individuals
19 who would like to pursue use of orphan works.

20 It probably is, like many other
21 things in society, and that's another reason
22 why you need to have the involvement of

1 commercial interests in this.

2 Because you can't depend upon
3 individuals who want to pursue the ability to
4 use a particular work necessarily if they're
5 not going to have the time, the resources, or
6 the knowledge or sophistication to do it under
7 a scheme that would be fairly sophisticated
8 and complicated.

9 But, of course, that's what
10 happens in society all the time where
11 commercial interests grow around the need to
12 provide certain services that the public
13 wants.

14 In many instances, those services
15 here can range from whether or not there will
16 be commercial search services to commercial
17 databases to just simply the fact of people
18 being able to say that they have heard about
19 a work and ask a commercial service to be able
20 not only to track it down, but to be able to
21 clear whether or not it can be used as an
22 orphan work.

1 I think the mistake that we should
2 avoid making here is that we're talking
3 necessarily about whether people, especially
4 individuals, think that they're going to be
5 using an orphan works scheme to allow them to
6 necessarily use a work for free, without
7 charge.

8 In society today, in many areas,
9 people are willing to pay for value. If that
10 value means that they get to use something
11 that they otherwise would not be able to get
12 to use and they can do so for a reasonable
13 price through commercial interests providing
14 that service to them, that's part and parcel
15 of this picture.

16 MS. ROWLAND: Ms. Griffin?

17 MS. GRIFFIN: I think -- I agree
18 that there are benefits from commercial
19 entities coming up that can provide services
20 to users. But I think that when we're talking
21 about new legislation, we don't want to create
22 legislation that unnecessarily creates the

1 need for those intermediaries. And to the
2 extent that we can make the law as easy to use
3 and as understandable as possible for
4 individuals, that's the ideal solution.

5 MS. ROWLAND: And I wonder if
6 there are any types of uses that we haven't
7 already talked about today that are ones that
8 are most of concern to people around the
9 table.

10 If there are certain things --
11 obviously we've talked about library uses and
12 individual uses. We talked a little bit about
13 the commercial uses as well. But if there are
14 works or types of uses that people want to
15 discuss that maybe have not been talked about
16 so much. And, also, from the writers
17 community and the authors community to see if
18 there are ones they're particularly concerned
19 about. Ms. Goodyear.

20 MS. GOODYEAR: Well, an obvious
21 use for certain members of the College Art
22 Association might be the use of an orphan work

1 as an appropriated image in a work of art, in
2 a work of fine art.

3 This then, of course, would shade
4 into the question of whether it's a fair use.
5 And we acknowledge, as we mentioned earlier,
6 that we do not necessarily see an interest in
7 orphan works legislation as being incompatible
8 with the fair use.

9 But obviously fine artists, like
10 scholars, do seek to make use of visual
11 imagery of all stripes. And much of what can
12 be located may not have a rights owner readily
13 associated with it. And as I say, may
14 actually be an orphan, or may be perceived to
15 be an orphan.

16 And we recognize that, if
17 something is perhaps mistakenly believed to be
18 orphaned and a rights owner comes forward
19 after the individual using that work has
20 performed due diligence, that there may be a
21 limited scope of remedies available to the
22 infringed rights holder.

1 MS. ROWLAND: Anyone else have
2 any specific uses they wanted to talk about?
3 I think we can take a little bit of time if
4 anyone wanted to talk about the remedy
5 situation.

6 We will be talking about it
7 tomorrow; but, I think we're going to be
8 talking about so many different topics with
9 the remedies if anyone has something they
10 specifically want to talk about, commercial
11 versus noncommercial, now this would be a good
12 time. Okay, Mr. Adler and Mr. Slocum.

13 MR. ADLER: Well, I would just mention that
14 one of the issues that had come up -- that was
15 addressed in the Senate bill -- was the
16 problem that you have. This is one of the
17 difficulties of distinguishing commercial
18 versus nonprofit -- was the fact that many
19 nonprofit institutions, of the kind that some
20 people think should be sort of the focus of
21 this scheme, ultimately are state entities.

22 And due to a decision by the

1 Supreme Court, and some lower appellate courts
2 now, state entities have what I think most
3 people who work in copyright-based production
4 of works would consider to be a very unfair
5 advantage of not being sued for damages unless
6 they consent to be used for damages even when
7 they engage in the most blatant kind of
8 infringement.

9 And one of the things that is a
10 concern here is that if, in fact, we are still
11 talking about a trade-off between a reasonably
12 diligent search and limitation of remedies,
13 the limitation of remedies for such entities
14 is skewed then because they're not subject to
15 being sued for damages anyway. So, it's not
16 as if they get any particular benefit or they
17 need to follow the scheme in order to be able
18 to avoid statutory damages should a copyright
19 owner subsequently emerge.

20 So, for them, the issue was the
21 question of how do you deal with injunctive
22 relief in an instance where somebody isn't

1 subject to being sued for damages. And that
2 had to be addressed in this issue in the
3 legislation. And I think that will be an
4 issue that would have to be revisited again as
5 well.

6 There was also a provision in the
7 legislation that addressed the question about
8 the use of orphan works to create
9 compilations, essentially. Again, this was
10 what I was saying about the spectrum of uses
11 range from whether you take an orphan work and
12 use it to create a new work of original
13 expression, one that is in itself
14 copyrightable, or whether you simply use the
15 work in the condition in which you found it
16 and you benefit society by making it available
17 to society again so that they can have
18 whatever benefit that work provides.

19 But there's also the question of
20 whether or not, if you were to produce a
21 compilation of those kinds of works, that
22 would be entitled to copyright protection in

1 its own right under a scheme like this.

2 So, there are many of these kinds
3 of technical questions, which is why,
4 unfortunately, it's really difficult to think
5 of any way of addressing orphan works that
6 isn't going to be highly complicated and
7 legally technical.

8 MS. ROWLAND: I guess the same
9 thing could be said for derivative works.

10 MR. ADLER: Yes.

11 MS. ROWLAND: So it happens with
12 those as well. Mr. Slocum?

13 MR. SLOCUM: And I think that the
14 -- what's becoming clear is that the type of
15 use that is involved is going to be tied up
16 with what type of remedy is associated with
17 that.

18 Because it's one thing to say
19 that someone should be able to take a clip of
20 a film and put it into another film. And
21 maybe they can't find the owner of the
22 original to get it actually cleared.

1 It's another thing to say that
2 they can actually distribute that movie, that
3 other movie, from which the clip came and
4 actually publish it.

5 And, as I alluded to, often the
6 right to remuneration, which is not
7 established in law but is established as a
8 practice in our industry by contract and is
9 something that should be fulfilled. Just
10 because the publisher or studio is not
11 locatable, it doesn't mean that the actual
12 creators with an interest in that work are not
13 locatable.

14 And that also gets to the third
15 party registries or the nature of the diligent
16 search, because there are entities like our
17 guild which have a lot of information about
18 who these entities are. We know who hired the
19 original writer to buy the script from them.
20 We know who their legal agent for service is.
21 We know if there's a successor to them that's
22 filed a document with us to take over the

1 rights and the obligations. We know who the
2 heirs are to the actual human author so that
3 we can convey the royalties to the family.
4 So, there are entities out there that are
5 specialized, that will have a lot of
6 information about the obligations that are
7 attached to a work and who the various rights
8 holders or beneficiaries of copyright are.

9 But it's going to be, I think,
10 very highly related to what uses you're
11 talking about.

12 MS. ROWLAND: Ms. Kopans and then
13 Ms. Cox.

14 MS. KOPANS: At the risk of
15 conflating parts of the Copyright Act, I also
16 wonder if there are any lessons that can be
17 drawn from the termination provisions.
18 Because both instances involve activity taking
19 place -- assuming one is using an orphan work
20 and a rights holder appearing on the scene
21 saying wait, I want to change the framework
22 here.

1 And there are some interesting
2 lessons about remedies and how content is
3 handled when it is in the midst of being used
4 and a rights holder appears on the scene.

5 MS. ROWLAND: Ms. Cox and then
6 Mr. Carroll.

7 MS. COX: Just on the point on
8 remedies. I think this was brought up this
9 morning by Kyle and also by Jonathan Band in
10 the first panel.

11 Something that we think could
12 actually be a very simple solution to the
13 orphan works problem rather than having this
14 20-page Shawn Bentley Orphan Works Act is to
15 just make a small amendment to Section 504 and
16 to just say that courts -- give courts the
17 discretion to remit or reduce statutory
18 damages provided that the infringer shows that
19 he made a reasonably diligent search and was
20 unable -- in good faith -- and was unable to
21 find the rights holder.

22 We think that that solves some of

1 the problems of not needing to define with
2 specificity what a reasonably diligent search
3 is, because you're not ordering the court to
4 remit damages, you're just giving them the
5 discretion to do so.

6 And they can take into account
7 factors of what the best practices are, what
8 standards are being used in the community to
9 address reasonably diligent searches.

10 And that gives courts the
11 flexibility to adapt changing standards,
12 evolving standards in light of new
13 technologies or new ways of performing these
14 searches.

15 MS. ROWLAND: Mr. Carroll.

16 MR. CARROLL: Following up on
17 that a little. I think focusing on the
18 problem that needs solving. And this goes to
19 the earlier conversations about orphan works
20 versus digitization efforts and the extent to
21 which those two belong in the same
22 conversation.

1 So, with respect to remedies in
2 the case of the orphan that currently needs
3 reformatting from analog to digital, someone
4 has to invest in that reformatting. And what
5 I would hate to see is a remedies provision
6 that undermines the incentive to create -- the
7 value of the digitization in the first place.

8 So, I think it ought to be -- if
9 there's going to be some acknowledgment about
10 that sunk capital, basically which can then be
11 captured by a rights owner who emerges after
12 the fact, after somebody has digitized and
13 then used. And so accounting for the value
14 that was invested in the digitization ought to
15 be part of the scheme if there's going to be
16 a finely tailored remedies provision.

17 Otherwise, the amendment to
18 Section 504 seems like a more elegant way to
19 deal with this.

20 MS. ROWLAND: Okay. If no one
21 else -- oh, Mr. Adler.

22 MR. ADLER: Well, just since we're

1 sort of repeating this discussion. But if
2 you're going to take that approach, you still
3 need to inform the court to some degree --
4 with objectivity and for purposes of uniform
5 and consistent interpretation -- what is meant
6 by a reasonably diligent search.

7 And if you're not going to do it
8 through legislation, you would have to do it
9 through regulation. You would have to do it
10 some way.

11 Simply to say to a federal court
12 -- your Honor, you go out and find all of
13 these best practice statements and you decide
14 which of them makes sense in each of these
15 areas -- that's no way in which to provide for
16 an evenhanded way in which orphan works policy
17 can be administered.

18 MS. ROWLAND: Mr. Courtney?

19 MR. COURTNEY: I sort of agree,
20 but best practices are used in a lot of other
21 areas of law. They can be used in -- all
22 right, I'll agree with that, for good or bad.

1 But they are adopted.

2 So, malpractice -- what would a
3 lawyer do in your situation? That was faced
4 in the same case. Medical malpractice -- how
5 would a doctor, and a country doctor versus a
6 city doctor? And they kind of use best
7 practices.

8 Additionally, I think the UCC is
9 just a best practice document that has been
10 codified and it's gone through that cycle of
11 being codified. And I think that's important
12 too.

13 I think best practices can lead
14 to coherent rules, if you will-- aspirational
15 goals. The Society of American Archives has
16 had a best practices for orphan works since
17 2009. There's been no litigation regarding
18 that, and they seem to be following it.

19 So I think it can inform the
20 decision. It's not the end-all be-all, I
21 agree. One judge and one jury member can mess
22 that all up, absolutely, I agree. But I think

1 it can be a start.

2 MS. ROWLAND: Well, thank you.

3 And I think at this point we have time for a
4 few questions from the audience if you wanted
5 to do that. So, we're going to bring up the
6 microphones and see if anyone has additional
7 questions. It might be getting so late in the
8 day people are just falling asleep. But here
9 we have somebody.

10 MR. KATZ: My name is Ariel Katz
11 from the University of Toronto.

12 I just want to add a few words for
13 the distinction between fair use and orphan
14 works solution. I can see a possibility that
15 there also may be a timber line in the sense
16 that, okay, things, activities that you have
17 done before the owner emerges and then you
18 couldn't contact, there is a clear market
19 failure. You couldn't get permission because
20 there was no one to get permission for. There
21 ought to be greater leniency there.

22 But once the owner shows up and

1 says thank you very much for reusing my work
2 and telling me what great potential it has,
3 but now I want to get paid for it. Now there
4 is an owner with whom you can negotiate. And
5 then there may be a difference between how the
6 work or your use is being treated from that
7 point onward.

8 Now, there may be a difference
9 between type of uses. So if the work is being
10 incorporated in a book, right, it's an image
11 in a book or incorporated in a movie, it's
12 already there. You can't take it out. Then
13 the remedy should take that into account.

14 But if what you do is like Amazon
15 -- just print on demand the entire book and
16 the owner shows up and says look, I'm the
17 owner, stop doing that unless you pay me, and
18 you can stop. There's nothing -- you can
19 easily stop. Then you should, I think, have
20 the full range of remedies from that moment
21 onward.

22 MS. ROWLAND: Thank you. We have

1 another audience member.

2 MS. HOFFMAN: Ann Hoffman from
3 the National Writers Union.

4 I just want to take a minute on
5 these best practices. You say there have been
6 best practices for archivists since 2009. I
7 don't think that's a big deal. I think that's
8 pretty contemporary and hasn't borne the test
9 of time. I think to compare that to standards
10 for malpractice, which have been around for
11 centuries, for better or worse, is absolutely
12 nonsensical.

13 And in this room today we've
14 heard about probably 8 or 10 different codes
15 of best practices that have been developed by
16 somebody. I don't know if any author knows
17 about the best practices in the industries
18 affecting them.

19 And so I think we're putting the
20 cart ahead of the horse. I think the creator
21 of a work ought to have the rights that
22 copyright bestows on him or her. And the

1 person who wants to use that work without
2 permission oughtn't to be able to hide behind
3 anything at this point.

4 MS. ROWLAND: Do you want to
5 respond, Mr. Courtney?

6 MR. COURTNEY: So they don't hide
7 behind fair use, they have that as an actual
8 right. And that's -- they can use a portion
9 of a copyrighted work without permission. And
10 it's in the law, absolutely. As far as best
11 practices, they have been around for hundreds
12 of years, I agree. But we have to start
13 somewhere. So just because 2009 isn't 1950
14 doesn't mean that we should discount them. We
15 should allow them to develop in these fields.

16 And additionally, if these artists
17 or copyright holders should be paid for this,
18 absolutely, I agree, they should be paid for
19 their work when uses are outside the scope of
20 fair use or some other transformative fair
21 use.

22 The problem is they're not

1 registered. We can't find them. Because
2 we're talking about orphan works. I would
3 never try and encourage someone to take
4 someone else's work without permission if they
5 clearly are registered, findable -- either
6 through any of the stuff that we've talked
7 about here, whether it's databases that are
8 private or public, or the copyright records.
9 I think there is a diverse array of ability
10 for us to search for this. I think libraries
11 have that special role because Congress thinks
12 we're special. We have 108. We have
13 504(c)(2). We have lots of things that make
14 us information professionals and we want to
15 help with this.

16 But there are some areas we just
17 can't help in, and orphan works is one of
18 those, because we have no idea where to find
19 these folks.

20 MS. HOFFMAN: Except that we've
21 heard today of various organizations that
22 identified orphan works which were not

1 orphaned at all. And a very simple search
2 turned up that fact. So I think we're sort of
3 trying to deal with a problem that is more in
4 the heads of the users than in truth.

5 MS. ROWLAND: I think, with that,
6 it's the end of our session. And so thank you
7 very much for all of our participants and our
8 audience members. We're going to reconvene
9 tomorrow morning at 9 a.m. here in the
10 Montpelier Room.

11 We're going to be mostly in the
12 Montpelier Room tomorrow, but in the afternoon
13 sessions we're actually going to head on down
14 to our Hearing Room. So, please join us here
15 and we'll talk to you later about all of this.
16 Thank you.

17 (Whereupon, the foregoing matter
18 went off the record at 5:00 p.m.)
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21
22

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