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
SALLY 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 HARBESEN, 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
SESSION 3: THE ROLE OF PRIVATE AND PUBLIC REGISTRIES
MICHAEI 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,
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 SHAFTTEL, Graphic Artists Guild
CHUCK SLOCUM, Writers Guild of America, West
A-G-E-N-D-A

SESSION 1: THE NEED FOR LEGISLATION IN LIGHT OF RECENT LEGAL AND TECHNOLOGICAL DEVELOPMENTS ................................................. 16

SESSION 2: DEFINING A GOOD FAITH (REASONABLY DILIGENT SEARCH STANDARD) ................................................................. 92

SESSION 3: THE ROLE OF PRIVATE AND PUBLIC REGISTRIES ................................................................. 189

SESSION 4: THE TYPES OF WORKS SUBJECT TO ANY ORPHAN WORKS LEGISLATION, INCLUDING ISSUES RELATED SPECIFICALLY TO PHOTOGRAPHS .................................................... 254

SESSION 5: THE TYPES OF USERS AND USES SUBJECT TO ANY ORPHAN WORKS LEGISLATION .................................................... 338
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
orphan works legislation.

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

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

Our goal today is not to come up
with a consensus on one solution that everyone
will be willing to agree to today. The issue
is just too complex for that and there are no
easy answers or legislation would have been
enacted years ago.

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

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

And we recognize that just because
one solution may work for one party or group
does not mean that it is a solution that will
work for the broadest interests as
comprehensive legislation should try to do.
Also, a brief word about the issues that we really do not plan to explore in detail today. I know some of your comments raise broader concerns about the copyright system as a whole such as the length of copyright term, formalities, moral rights, and the level of statutory damages allowed under the law.

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

So, we ask that you focus your comments on our specific questions and issues raised in our NOI and save broader comments if necessary for some of the further written comments that we are going to request. We obviously cannot turn today's discussion into a debate about how long the copyright term
Before we begin I'd like to go over some quick logistics. First, a note about video recording. The panel discussion today is being video recorded by the Library of Congress. There will be a short question and answer period at the end of each session.

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

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

At this time I'd like to ask everyone in the audience and the participants to turn off any cell phones or electronic devices that might interfere with the recording of the event. That's not our
policy, that's the policy of the people who are currently videotaping it.

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

Given time constraints we will limit responses from each panelist to no more than about two minutes. So, in advance I apologize because at times we might have to cut some of you off. But again, we will provide further opportunity for you to elaborate on some of your comments in
subsequent written comments as well as in possible times to participate either through the audience participation question and answer period at the close of the session on the second day.

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

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

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

As I noted previously, we expect
there to be a variety of opinions. Some library communities, for example, may believe that at least for them fair use already provides an appropriate solution for the uses that they would like to make.

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

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

So, I will start first with our introductions by my Copyright Office colleagues and then I'll just go around the table starting here with just brief introductions of your name and title from the participants.
MS. CHARLESWORTH: Jacqueline Charlesworth, General Counsel at the Copyright Office.

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

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

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

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

MR. LOVE: Jamie Love, Knowledge Ecology International.


MS. PILCH: Janice Pilch, Copyright and Licensing Librarian, Rutgers University Libraries.
MS. BESEK: June Besek, Executive Director of the Kernochan Center for Law, Media and the Arts at Columbia Law School.

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

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

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

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

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

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

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

MR. HARE: James Hare, President,

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

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

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

So, our view is certainly for the library community that the answer is yes, that the fair use jurisprudence as it has evolved
over the past 5 to 10 years, certainly since
the last roundtable, has really diminished the
need for orphan works legislation.

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

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

MS. CLAGGETT: And I actually have
a question for Janice. Just because I know
that she represents a library as well and I
wanted to explore that a little bit further to
see if that position really has any regard
with respect to the type of library that might
be involved.

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

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

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

Recent legal developments have
addressed digitization of published books
including display of excerpts, preservation,
text search, and accessibility for the
visually impaired.

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

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

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

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

MR. HANSEN: Dave Hansen. So,
kind of echoing what Jonathan said, over the
last year the Berkeley Project has been
involved with an effort to develop some best
practices in fair use for libraries and
archives that want to make available orphan
works.

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

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

And, in general, that tracks the
same rationale -- we've heard the same
rationale from all of those groups that
Jonathan just talked about. There's a strong
sense that those uses that libraries and archives are making are transformative. And then for orphan works in particular within the collections there's a strong argument that there's very little market harm.

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

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

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

I think it was Kyle and then Allan.

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

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

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

Additionally, I think libraries would be more comfortable making digitization assessments if the level of risk were diminished, so we could do that through a 504(c)(2) to indicate that courts have discretion to reduce or remit damages,
statutory damages. And I know we're getting off a little bit though. But that's the kind of legislation we might be more comfortable with.

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

MS. CLAGGETT: Allan?

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

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

In any event, even if you use a fair use approach, you would need to have some
notion of reasonably diligent search if the concept of orphan works is actually being maintained and we're not simply talking about an assertion of fair use as it would apply to any other use of a copyrighted work, whether the copyright owner is known and available or not.

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

If you can understand why the internal market in the EU would want a common approach and harmonization, you can certainly understand why in the United States we don't want rules for orphan works or determinations for uses of orphan works to differ from federal district to federal district or circuit to circuit and state to state. And
for that reason, we think that legislation is basically necessary.

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

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

Our concern is we're rather between the devil and the deep blue sea here with orphan works. We would be content to rely on current law, but we see this coming. The
recent technological changes have created many difficulties for us centered around the fact that publishers so often disappear.

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

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

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

But we are very concerned that the decisions about these works will essentially become something that are made by corporate entities without the supervision of independent parties or under regulations that would be derived by the Administrative
Procedures Act. And we're very concerned about that.

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

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

MS. CLAGGETT: Yes. Yes, Emily.

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

But I do know that some law libraries do continue to be risk averse. So,
for that reason, we did take the position that legislation would be needed, of course with the caveat that Congress is a difficult place right now, as we all know, and it would potentially be dangerous to open something like this up to legislation.

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

MS. CLAGGETT: James and then June.

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

So, Wikipedia is very observant of copyright and we wish to follow copyright laws to the greatest extent possible. And we believe that legislation would be useful in letting volunteers better comply with the
wishes of copyright holders if they can be located.

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

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

MS. BESEK: I don't think that existing law really provides sufficient guidance for users because there is a wide variety of users -- not only nonprofit
libraries, but also nonprofit libraries that are linked with a for-profit organization, and they're very concerned about the relationship between the two. And then there are individual users, small libraries, and so on.

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

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

So I think that one of the reasons we need new legislation is we need to decide, for example, what should the search standard be specifically with respect to orphan works? And, with respect to orphan works and mass digitization, who should be allowed to make
these unconsented uses and under what terms?
What should be the safeguards?
And then with orphan works I think there should be a means by which right holders can somehow reclaim rights if in fact their work has been wrongly deemed to be an orphan work.

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

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

What we saw in 2006 and 2008 was the excuse of orphan works used to go far past orphan works uses into commercializing the
uses of artists who are working and trying to
manage their copyrights.

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

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

In 2008 the Small Business
Administration conducted a roundtable in New
York City at the Salmagundi Club. And it was
the first time to my knowledge that any branch
of the United States Government has actually
inquired into how the orphan works proposals
in 2006 and 2008 would actually affect the
small business owners who were creating the
work.
This panel was held at the Salmagundi Club. Many people came as far as from across the country to spend a few minutes saying their few words about the subject. But the rest of them submitted papers, which we submitted to the Small Business Administration.

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

And to the best of my knowledge none of these people, despite the fact that the SBA provided a roadmap of the issues that concern creators and people who can speak out from the various disciplines about this, to the best of my knowledge not one of these people has been invited to testify before.
And I think that would be an oversight, that Congress ought to be looking into this and invite some of these people to testify so that they get a broader perspective of how this affects the creative community, not just libraries and museums.

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

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

MS. CLAGGETT: And not to interrupt. I was going to ask -- my second question would be -- would opinions change if
either HathiTrust, Georgia State, or Google Books were reversed on appeal?

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

(Laughter)

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

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

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

And I think that this is really, the idea that we are changing fundamentally the contours of fair use and a new public interest test is being introduced has really activated a lot of folks to look at maybe we have gone too far in a fair use context in the
The second point is that while we have always taken the position that music should be out, from the last time we had all of these hearings and roundtables there have been technological advances in the free market.

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

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

We are not against the idea of going forward with orphan works legislation
but it's got to be in context of all of that. That fair use is not the place to go. You know, we need more protections for copyright owners.

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

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

Both U.S. law of fair use and the Berne Convention require consideration of what is the normal exploitation of a work.
Technological developments over the last decade have multiplied the means by which an author or other creator may commercially exploit his or her work.

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

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

MS. CLAGGETT: And I have one quick follow-up question to you specifically before I open it up. Would your opinion change, for example, if courts felt that they had to rely on fair use and expand, perhaps in some people's view, fair use to accommodate
uses that they feel are socially beneficial because there is no alternative exception?

MS. HOFFMAN: It's possible.

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

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

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

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

And I just want to add that
societal benefit isn't a new consideration, but it's been given new weight. There are many things in this world that provide a societal benefit, but that doesn't give them a free pass. And I think that's true with fair use as well.

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

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

But in the landscape of mass digitization we believe that fair use too easily becomes an opt-out system that offers little recourse outside of costly and time-
consuming legal action because, as is well known, the takedown system is really ineffective. Fair use does and will unfairly affect many right holders.

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

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

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

Our final comment, which is best practices can work very nicely and sometimes
they do. But when they're used as a way of "doing it anyway" until you get caught and the only people who can catch you are wealthy right holders, the system has broken down.

MS. CLAGGETT: Jonathan.

MR. BAND: Well, I guess a couple of things. First of all, I think to the extent that the system has broken down, we all know that the root cause is something that we're not really supposed to be talking about here. But it's the very, very lengthy copy term and the absence of formalities, and as a result that so many things are covered by copyright where there was really no intention and there's no economic sense, no reason for things, especially we're talking about ephemera and all the kinds of photographs and the things that are -- some of the things that are in our archives it really makes no sense for them to be subject to copyright in the first place. But we're not supposed to talk about that so we won't.
MS. CLAGGETT: Please put it into your comments. We just don't want to have a huge debate. That could be a long conversation.

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

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

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

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

That's not to say that, again in a perfect world, one couldn't sit down and come up with a legislative solution. Again, in a
perfect world, there are lots of legislative
solutions to lots of problems.

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

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

And, as a result, it's so complex.
The likelihood of legislation--really as a
practical matter, even if we could ever get
there -- but the likelihood that that
legislation could really provide anyone any
more certainty about whether they did a
reasonably diligent search or whatever the
other framework was, I think it's illusory.

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

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

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

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

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

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

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

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

We heard this in the first roundtables in 2005 where Christopher
Sprigman, for example, insisted that infringers needed certainty that if they infringed a work they couldn't be pounced upon and penalized for the maximum penalty.

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

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

If you do find out that you've been infringed you may not be able to track down the infringer. And while the infringer may have to do a reasonably diligent search to find you, if you've been infringed you have to do an absolutely successful search to find the
infringer. And then you have to make him respond.

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

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

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

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

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

    Going to Salley as well.

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

    (Laughter)

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

    I'm heartened by some of the things --

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

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

    I'm particularly taken by what
Jay said, that perhaps the pendulum has swung too far on fair use. Of course that's our belief.

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

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

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

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

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

MR. ROSENTHAL: Okay. Just a
couple of points.

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

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

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

And I think we've always taken
the position that if we're going to go down
this orphan works road, we would much rather create best practices. And I know we're probably going to talk about this more in the reasonably diligent search panel, but we are much more interested in creating best practices that would allow folks to be educated on how to find these works than to rely on some amorphous fair use concept that might land them in court later on.

MS. CLAGGETT: Kyle?

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

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

What are the chances that legislation will be passed that satisfies everyone at this table? Zero. What are the chances that legislation will be passed? I mean that's up to Congress.
But what we have now is we have best practices now. And David's going to talk about this. We have fair use now. It's not perfect, but it's good enough.

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

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

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

This is cost- and time-consuming.

Janice mentioned litigation is time-consuming and costs money. Absolutely, but so does searching for a book that's an orphan work or
a photograph, or trying to find it out. There was some study that we did at Harvard where someone spent 400 hours on 5 or 6 books to really try and find who owns this. And that costs money and time too.

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

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

Because we're talking about if
they want to take advantage of the market that
they've had for creating these works, they may
or may not have registered this stuff.

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

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

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

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

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

What people would like to have is
something that expands access to orphan works.

For us fair use is -- it's gone a good way from our point of view. But I think that there are a lot of uses that it will not go to. I think that there's a lot of things, particularly the commercial publishers, would do that we would find beneficial from our point of view in terms of including works.

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

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

And these mass digitization projects have really opened up a whole area of research for people of just things that they
didn't even really -- gaps in their knowledge
and things like that.

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

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

If you look at the trade
agreements like the TPP, the trade agreements
have these requirements which are completely
unnecessary and overbroad. The published leak
Article QOH4 on Civil Procedures that required
that judicial authorities have to have the
authority to consider any legitimate measure
of value the right holder submits, including
such things as suggested retail price.
If you have, in trade agreements,
things that obligate you to do things which
are contrary to legislation, you're just
creating a problem. Particularly when that's
subject to investor-state dispute resolution
where private parties, including the people
around this table, can actually sue and get
damages against the U.S. Government for
violating the terms of the trade agreements
it's entered into.

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

Now, if you wanted to sort of --

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

And also just to give another
cautions. Obviously, I know that there's
separate issues with respect to trade
agreements and the TPP, for which there's no
official text out there right now. So, that's
kind of one of the areas where we're not going
to be able to explore in a lot of detail
today.

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

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

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

The TRIPS term for photographs is
very short and for published works, other
works, it's 50 years from the calendar year of
authorized publication. It's not even 50
years after life.

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

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

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

Now, if I look at the rulemaking
that takes place in the DMCA, the DMCA has
people make proposals for exceptions
effectively to the rights of copyright owners. They have to be empirically-based proposals. They tend to be narrowly crafted. There's kind of a debate. It's kind of done by the Copyright Office instead of the Congress. And they're modified from time to time.

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

So that you don't have to put photographers, illustrated work, news text, everything into the same basket. Things that were published commercially first versus things, like Jonathan mentioned, that nobody really intended to be commercial products in the first place all under the same basket. You can kind of like -- and if Congress could give you the authority to adopt rules and
exceptions and special treatments for orphan works, and then you could sort it out through this rulemaking process and then iterate it as technology changed.

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

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

Because I think one of the problems on the mass digitization problem is an economic issue of who pays for the mass digitization. Because I think one of the problems with the Google works thing is we've sort of shifted to private companies the cost of doing the mass digitization and that's led to sort of concerns about the monopolization
of the output of that. Thank you.

MS. CLAGGETT: Thanks, Jamie. And

some of what you said with respect to

regulations is something that certainly we've

heard from some of the comments as well as

some of the foreign governments that have

considered having a high-level sort of detail

in the actual statute and more detailed

regulations that would be more flexible in

terms of addressing the conduct.

I think Allan was the next.

MR. ADLER: I just want to make

sure that this type of conversation doesn't

mislead people by creating a false dichotomy

about the need for legislation and the

availability of fair use. They're not

mutually exclusive.

The simple fact of the matter is,
as I said at the beginning, fair use is there

and fair use is always there for somebody to

be able to assert that they can make use of a

work without permission from the copyright
But in the 2008 legislation that Jamie mentioned there was a savings clause with respect to fair use because it was understood that if a copyright owner were to come forward and claim the rights with respect to his work, that shouldn't prevent the user from asserting that the use was fair use in any event.

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

And they're going to have to forego arguing the notion that market harm factor is to be assessed on the basis of the idea that, well, there's no copyright owner evidently available and the work itself doesn't appear to be currently being marketed because it's out of print.
In those events, you're going to have to get into the issue of whether or not there was any actual inquiry for a copyright owner. And once you do that you're already down the path to having to decide what would constitute a reasonable inquiry.

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

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

MR. ADLER: I worry about best practices. Best practices provide greater certainty only to the people who create the
best practices and who actually favor the way
they work.

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

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

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

And they proved to be
dramatically wrong on a number of the
conclusions that they made. And part of the
reason for that was because they had not gone
through the effort to try to develop as a
legislative process would and indeed did do in
2008 all of the various kinds of sources that
it would make sense to say should be checked as part of a reasonably diligent search.

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

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

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

MR. HARE: Thank you. And I'm noticing this thread between fair use versus legislation that could arguably limit or
rather limit the remedies that are available
to current copyright holders because it would
allow for safe harbor provisions and so forth.

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

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

And as an example of this there's
a photograph of the poet Ezra Pound as a young
boy. The picture is from 1898 but it was
never published so under U.S. law it is still
copyrighted. And a lot of effort has been
expended into figuring out who is the
copyright holder of this picture. And no one
can figure this out.

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

MS. CLAGGETT: David, then

Matthew.

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

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

I think it's worth noting that
there are no cases that I know of where we
have an instance where a user has actually
used an orphan work, made it available, and then an owner has shown up. And I think that's notable because that speaks to this whole risk aversion issue of whether there is--it's just--a real or a perceived risk there.

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

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

But the second thing is throughout this best practices project where we've gone around and talked to all sorts of different librarians and archivists, the thing about risk aversion that we hear more often than not is it's not just the copyright issues that are
preventing them from using these works.

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

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

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

The one other thing I wanted to say is kind of in defense of the best practices. Like orphan works, there are no cases that I know of where someone has relied on these sets of best practices that have been
developed over the last few years and been successfully sued.

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

What we've seen go into that is sort of a high level of concern not just about the perceived risk of getting caught but the perceived harm that is done to a potential owner. And it's a lot more nuanced and interested in kind of the underlying preservation of the integrity of the copyright scheme than it is just whether we will get caught or not. And I think that's worth mentioning.
MS. CLAGGETT: I'm going to go to Matthew, June, and Salley.

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

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

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

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

MR. SCHRUERS: Right. So in that sense I think we may have sort of the cart before the horse because there isn't a whole
lot of certainty about what it is we're
talking about here.

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

I just wanted to make a comment.

I was really surprised with Jamie's suggestion
about the notion of a DMCA-like process for
dealing with orphan works. Because when the
solutions that we're considering seem to
reflect the sort of increasingly regulatory
approach of copyright that makes me very
nervous.

And yet I understand the appeal
of it because it seems like something that we're familiar with and that could work.

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

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

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

MS. CLAGGETT: And before we get to June and Salley, who I think I have as the last people, we do want to have the opportunity to open it up for the last few minutes to people from the audience to ask questions.
So, I'm going to throw out my last two questions to the panelists to respond to after June and Salley speak and then we'll open it up to the -- and Jim--and open it up to the audience as well with any final thoughts.

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

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

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

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

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

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

I just want to mention a few different things that have come up. One of the reasons I favor legislation is I think the Copyright Office should have a role in
developing the guidelines rather than this
being done sector by sector by users.

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

One point I wanted to discuss.

There was a point earlier about mass
digitization designed to make available legacy
works that otherwise would not be available.

And one question that I had if we
rely only on fair use and not on any
legislation is what happens going forward?
What happens when the reasoning for putting
something in your database isn't, well, no one
can get access to it, but instead it's not
part of my database and my database has to be comprehensive? So I think there are some problems with that as well.

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

MS. CLAGGETT: Salley.

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

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

When the HathiTrust folks came forth with their list of orphan works I was no further than halfway down the first page before I saw two working writers whom I
personally knew and it took me less than 10 minutes to find a phone number and address for one of them.

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

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

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

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

What you're talking about is
prescribing business models for people in businesses in which frankly most of you don't know enough about to be creating business models.

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

I've been in this business since 1961. Now, for me this is a huge learning curve to jump over. After more than 50 years of working in this business I have to digitize 50 years' worth of analog works. Paintings 5 feet by 7 now have to be digitized. Metadata has to be dug up from as far back as half a century. Can't be done.
The marketplace will create business models. It can move faster than Congress. It can move faster than the Copyright Office, can move faster than lobbyists and legal scholars.

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

Leave this to the marketplace.

This is the best laboratory for creating the business models. Don't allow Congress, which has done no investigation whatsoever into the way we work, into the way writers work, into the way songwriters work, into the way photographers and small business owners work. There has been no study whatsoever of how we work. And they are not prepared, they're not qualified, to write business models for us.

MS. CLAGGETT: Thank you. And we certainly will take any comments that you want to submit during our process and make sure
that they are analyzed and presented to
Congress as well. Ann.

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

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

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

But I have to note that even the
existence of savings clauses in -- let's say
Section 108 -- rights-holders still assert that
that savings clause doesn't mean what everyone
thinks it means or what its plain language
means.
And even June before was saying that if you interpret fair use too broadly it swallows up the exception. Now, we don't think that that's right but the point is that the mere existence of savings clauses, by itself, is not sufficient to eliminate concerns.

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

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

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

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

But I think just sort of like collecting money for works where you can't find the owners and giving it to somebody that didn't write the work or doesn't really have
a legitimate claim is something that we would oppose.

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

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

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

But as a last point, I just want to jump on what Allan said a while ago about best practices. And while I am one who is very critical of them, I think if this is all going to work here the idea of creating best
practices in a way where all the stakeholders are in a room possibly facilitated by the Copyright Office to come up with the right questions and the right guidance.

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

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

MS. CLAGGETT: Allan?

MR. ADLER: Well, I think that one of the problems here is that you can see the circular reasoning involved in these
efforts to decide that you don't need legislation. You can rely on fair use, or perhaps a limitation on damages that authorizes a judge to consider orphan works status.

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

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

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

MS. CLAGGETT: Thank you. And with that I'm going to open it up very, very briefly to anybody from the audience. There
will be microphones right here on stands. So if anybody from the audience has a few questions or comments that they would like to impart please do so now.

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

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

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

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

This panel discussion is being recorded by the Library of Congress. There will be a short question and answer period at the end of the session.
If you decide to participate in that question and answer period, you are giving us permission to include your question or comments in future webcasts and broadcasts.

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

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

And so I wanted to start with just a really broad question about what should a reasonably diligent search be vis-a-vis the 2008 --
MS. PRAGER: Do you want to go around the room?

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

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

MS. ROWLAND: Sure.

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

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

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

So, I guess I'll start with Karyn. You probably know her already.
MS. CLAGGETT: Karyn Temple
Claggett, Associate Registrar of Copyrights
and Director of Policy and International
Affairs.

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

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

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

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

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

MS. PRAGER: Nancy Prager of
Prager Law.

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

MS. HOFFMAN: Ann Hoffman,
National Writers Union.

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

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

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

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

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

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

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

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

MS. MICHALAK: Sarah Michalak.

I'm Chair of the Board of Governors of the HathiTrust Digital Library.

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

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

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

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

And not really in the case law,
about, but more in kind of the technical mannerisms and how we would do a search. So, I'm going to open up the floor to anyone who has any thoughts on that. Any changes? Mr. Harbeson?

MR. HARBESON: Sure, I'll lead.

I think that one of the things that has changed for us, for the Society of American Archivists, is that we've increasingly come to the conclusion that the definitions of "reasonable" in the reasonably diligent search are increasingly not reasonable.

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

So I'd like to point to one study, for example, that shows how costly the definitions of reasonably diligent search that
were in the previous legislation are.

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

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

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

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

And we haven't sat on our hands.
We've been working in support of what's known as the PLUS Coalition to try to make search of visual content that does not have attribution be able to be found.

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

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

But it is a big process to register and identify owners. But it's definitely images having a reverse search is helpful. And getting a registry, which is sort of next on the agenda, up and running and then get participation in that I think will be helpful.
I don't think there's any one registry that's going to solve all their problems. I think there will need to be hubs.

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

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

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

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

Which gets back to, I think, a point I made in a prior panel--that there are free market solutions here. And companies
that certainly should be incorporated within
whatever best practices, whatever guidance
that an orphan works law could create.

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

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

    But I think that again these
technologies would be very helpful in finding
the folks. Because that's what we want. We
want them to be found. And this is part of
the solution in our mind.
MS. ROWLAND: Ms. Michalak?

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

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

Having said that, we at HathiTrust continue to believe that most works are findable and that a diligent search -- depending on what kind of subject area it is, what community the material comes from, and on
the skill and capability and intuition of the
searcher -- most searches under those
circumstances will be successful and rights
holders will be identified. Naturally there
are some exceptions.

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

MS. CLAGGETT: I have a follow-
up.

MS. ROWLAND: So do I. I think
a lot of people do. I may be speaking for a
lot of people with this question, but so if
you could explain a little bit about what
happened, I guess. Why were you guys not able
to find the authors that some other people
were? And why do you think that that
experience wouldn't lead to having some sort
of guidelines from outside?
MS. MICHALAK: The idea in the beginning was to put up a couple of hundred works that Hathi felt were not -- that were truly orphan works. And very shortly, after a very short period, they discovered that they may have appeared to be orphan works but in actuality they were not because rights holders corresponded with the library.

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

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

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

But do you think, in light of the
fact that after the works were listed you were
able to get through crowdsourcing and other
contacts some guidance in terms of what
copyrighted works were included and who were
the authors and owners of those works, would
guidance about crowdsourcing or who to
contact, some type of best practices that had
been taken into account prior, would that have
actually helped you think in terms of reducing
the likelihood that some of the orphan works
that you posted were in fact erroneously
posted?

MS. MICHALAK: I would say not.

We are opposed to having minimum searching
instructions or directions. We feel that
there is so much variety among all of the
different kinds of works that could be called
orphan works today that the searchers need to
be able to make decisions depending on their
sense of how -- what sources to use.

And it is true that some works
require many, many, many hours to determine.
But in the end most works can be -- most at
least printed and published works -- can be
identified. Rights holders can be identified.

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

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

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

I'm a lawyer. I'm here on behalf
of my own experience representing a range of
clients including a very important cultural
participant who publishes a music compilation
every year on -- that highlights -- the music
of the American South.

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

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

There need to be minimum
standards. Because other people would say
this -- good faith -- that's part of the language that's been used that I pray today is removed from that language. Because it needs to be a reasonable objective standard that everyone, whether you're a librarian with years of experience or a student documentary filmmaker doing their first student film, can have some assurance that they are doing the research that will satisfy.

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

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

But I do really, really hope that we stop saying that this is a library-focused situation because we need to look at it from a broader perspective. And that's all.
MS. ROWLAND: Thank you, Ms. Prager. Mr. French?

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

And I think looking at that is instructive, particularly because one of the things that is in the Directive is that you have to seek to identify all rights holders.

That's part of, in a sense, a reasonably diligent search there.

That's something that frankly reflects a proposal that the Directors Guild, in conjunction with the Writers Guild, has been making in this process since 2005 -- that you shouldn't, at least in the circumstance of motion pictures, have to look for only the copyright owner, but you should look for other rights holders like the directors and the writers.
We have -- and in the European Directive we are part of that definition of rights holders. You have to look for us too.

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

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

So the idea that if you look for, in a reasonably diligent search, and don't find the copyright owner and that's all you have to do and you don't have to come and find
us and account for the fact that we have under
collective bargaining agreements economic
rights, residuals, health and pension
contributions that go on for the life of the
work, that we have human rights, that we have
creative rights in our contracts but also
obviously in our international agreements.

   We should be part of that chain.

We can help you find the copyright owner but
you also should have to come find us because
we have rights tied up in this that need to be
accounted for other than the rights of the
copyright owner.

   MS. ROWLAND: Mr. Lerner?

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

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

Neal R. Gross and Co., Inc.
202-234-4433
for a living. And we're here today because we think an orphan works solution will benefit the creative community and society at large.

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

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

And so we think that if you have an orphan works solution and particularly if you have best practices, it will actually end up with more people getting licenses and more people being able to actually monetize their content both as original rights holders and as downstream creators who want to license
I don't think -- to answer your question because we're still on the first question, right -- but to answer your question what's happened now is that a lot more ways to find rights holders are developing every day. And I'm happy to see Ms. Wolff here. We talked about this in 2012. The MPAA talked about this in 2012. There's a lot more ways to find rights holders and all of these should be rolled into best practices. But one of the things that we don't want to do is have an ossified or a slow or a cumbersome regulatory regime that can't keep up with all of the developments. So, I think we need lean, generally applicable principles that folks can then go into the private market and develop best practices around. And then actually begin to monetize those best practices, or, not monetize them, but actually use those best practices.
And Brad Holland said the market can move faster and we agree. But the difference is that we think that the way to do that is through best practices.

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

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

And when we went and created the
documentary filmmaker statement of best practices and fair use, it was with that in mind. And that's why it's been such a success, because you have people with both of these incentives there creating these best practices.

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

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

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

MS. COX: Thank you. I agree with much of what Jack Lerner said about best practices being an excellent way forward.

Best practices created by the communities that are familiar with these uses, familiar with
the type of circumstances that arise.

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

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

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

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

And our fear is also that with rigidly defined standards, it can reduce the use of orphan works and result in institutions
not taking advantage of legislation and orphan
works becoming relatively inaccessible to the
public, basically creating a chilling effect
if they are too narrowly defined.

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

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

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

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

MS. PRAGER: Fair use is not a
catch-all for every use. There are certain
uses that are specifically not going to be fair use. And there are cases. So every time you have to go to court -- we need -- so, fair use isn't the balloon that's going to save everyone in this case.

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

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

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

The point is to facilitate voluntary licensing transactions. In other words, or the flip side of that, the point is to minimize the population of orphan works. I do think that best practices can play a
major role and a very important role in doing so.

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

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

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

Of course, they're going to differ among the types of work. It's one thing to look for the owner of a major motion picture. There's probably going to be few, if
any, orphan works. I realize the situation is
much tougher with photographers and other
visual artists.

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

It'll advance the discussion.

Again, it'll help minimize the population of
orphan works by giving people who legitimately
want to find the copyright owner instructions
and guidance on how to do it.

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

It'll give them comfort to see
that these things actually work in practice.
And as Jack was alluding to -- well you know what, maybe there is not much evidence that people are misusing them. Maybe it turns out that -- you know what, once they have these best practices, they actually do a much better job of searching.

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

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

Which is basically we talk about flexible versus rigid standards. And people are very concerned about having minimum standards. But as Mr. Sheffner was saying,
you could have some sort of combination.

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

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

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

And with that, Mr. Cram, I'll turn it to you. And I think Mr. Rosenthal is
MR. CRAM: Thanks, Catie. So, I'm Greg Cram. I'm from the New York Public Library.

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

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

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

So we're really concerned about
having a prescriptive search that calcifies
and ossifies, that doesn't take into account
some of the changes.

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

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

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

MS. ROWLAND: Mr. Rosenthal?

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

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

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

But the artist that we were talking about, a number of the releases of
this label, the artist was playing in town that week.

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

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

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

And what happens if you find the artist and you don't find the owner? That has to be discussed as well and thought through.
I'm not quite sure what the answer is. But just to ignore it and not to have that part of the conversation, I think, is the wrong way to go.

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

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

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

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

And I have to tell the panel that in my experience the efforts that librarians make to identify a rights holder are very sincere and are very broad and encompassing. To the point that you wouldn't even believe what someone would do to try and find a rights holder.
They also, if they can't find a rights holder, often refrain from using the work altogether.

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

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

Furthermore, I wanted to mention that over the years the libraries have been very aggressive in developing best practices. And I don't mean just the ARL best practices. I mean other sets of rules and suggestions.
If you look at the 16-page report of the Society of American Archivists on how to conduct a search, you can tell that people are really taking this quite seriously.

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

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

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

The problem with setting minimum standards is because sometimes you have
nothing to do at all. You might have a work
that has nothing on it, a photograph. You
can't identify where it was taken, who took
it, at what time, you have nothing. So, it's
kind of ridiculous to ask people to look for
facts that have never existed in the first
place. So that's a problem with minimum
search. I'll stop there.

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

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

Because Ms. Michalak said, you
know, in the books context most searches can
eventually be successful. And in our
discussions with libraries and archivists,
that's completely dependent on what types of
materials you're working with -- both the

types of materials within the collection and
the focus of the collection.

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

And in the context of the

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

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

So you might be able to trace a
group of letters and find out who you think
the rights holders might be, but then get a very, very low response rate from those sort of cold calls. And so in that environment having a single reasonable search standard would be very hard.

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

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

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

Of the rights holders that were found, most of them of course were more than
happy to let us use the materials. And of those, most of them weren't even concerned about compensation or something.

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

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

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

MS. ROWLAND: Mr. Capobianco?

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

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

But in many cases -- especially with book, text, artworks -- the author is the
only one who knows who owns the rights. And in many cases, especially when you're talking about digital rights, the author or creator is the owner of those rights. The publisher either never licensed those rights or those rights have reverted to the author. So I don't know if this even sounds like something unusual to everybody else here, but it's the authors that you're looking for. It's not the other rights holders. It's not the publishers. It's not the licensees. It's the authors. 

MS. ROWLAND: Mr. French?

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

MS. ROWLAND: I think so.

MR. FRENCH: Okay. I guess I'd be a bit of a broken record and kind of say the European Directive, I think did a little bit of both. It certainly has the flexibility
of pushing things off to best practices, but it starts with the principle that as part of a search you have to try to identify all rights holders and defines rights holders as not only the copyright owner but other rights holders. In our case that would be the director who has economic rights. So, I think you can have a mix of both, but I think starting from the principle I've heard reflected by a few folks.

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

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

And hearing Ms. Jacob talk about
the difficulty in finding visual arts, I'm not sure what the solution is. I'm sure Ms. Wolff and others who will be participating on that panel will have a lot to say.

But I wonder if it's also a kind of a catch-22. Because if you have this many problems with a type of work maybe -- should it really even be in the orphan works solution at all? So, it can kind of cut both ways.

And that's something that we really want to pursue.

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

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

Which I want to emphasize that a
lot of public institutions who exist for the purpose of educating the public as to our cultural and historical heritage don't have a lot of resources to conduct extensive searches. And visual images are particularly challenging, as you've noted.

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

As a lawyer I would caution, however, that I don't think you're going to get any more certainty if you have a flexible
standard than you have now with fair use.

You're going to have judge-made law that will
develop over time about what constitutes a
reasonably diligent search in any particular
situation. So I'm not sure it actually does
solve a lot of the problems that we're hoping
to solve.

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

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

MR. KLAUS: So, in a total
commercial setting, especially the mass
distribution of audiovisual works, hitting a
standard that's both flexible and rigid I
think is really imperative.

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

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

So, by having a standard against
which insurance companies, for example, and
television networks can say -- you know what,
we've hit the minimum standard here and
there's some flexible items here we could also
include in our search. And to have that
guidance, I think, would facilitate moreso the
distribution of works that otherwise would not
be included.

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

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

MS. ROWLAND: Okay. Ms. Michalak?

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

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

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

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

And my third point is that a
flexible standard can never cover everything.
I couldn't even sit here and name all the
varieties of material that are out there where
the rights cannot be identified.

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

MS. ROWLAND: Mr. Lerner?

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

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

The private market actually is
working based on these best practices that
have been created by communities of creators who are also users. And so that's what we recommend.

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

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

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

The resulting best practices end up taking that knowledge and distilling it
into what the important points are and sharing that with wide groups of people.

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

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

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

I mean, if I have a photo of a person and I don't know who the owner is,
maybe I would talk to the subject of the photo, right? If there is a book and I can't find the publisher, why wouldn't I look for the author? Right?

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

And I want to go back to the insurance point for just one second. And that is that one of the key checks on whether these best practices are going to work, and one of the things that enable them to work is that there are lots of gatekeepers involved who are, to use a term that was bandied about a lot in the last panel, risk-averse. Broadcasters, distributors, and insurance companies are very risk-averse. And they've got to sign off on a lot of these uses. And that would happen with filmmakers, but I think it would also happen with lots of other groups.
So we support -- I mean, I think that the statement of best practices and fair use, not just particularly the documentary filmmaker statement, but other statements are the greatest success story in copyright over the last 10 years and should serve as a model for how to handle orphan works.

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

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

There have been two terms used. One is minimum standards and one is minimal standards. I think minimal standards make a lot of sense -- basic standards with
flexibility so that they can be applied in
lots of different areas.

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

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

MR. LERNER: No, thank you.

MS. ROWLAND: Ms. Hoffman?

MS. HOFFMAN: I want to speak to
the American public. If they knew that people
were considering making use of their family
photographs that they're posting on the
internet, or their internet jottings, or their
YouTube videos and thinking that they had the
right to do it without ascertaining who owned
it, I think there would be a revolution.
And I hear -- I mean, the use of letters and photographs I think is particularly troubling. I think they don't fit into a discussion of orphan works.

The other point I want to make.

Mr. Lerner went through a number of directories that are available that people can search to find out who rights holders are.

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

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

MS. COX: So, I think that studies since 2006, when a lot of discussion was being had around orphan works, have shown that sometimes the search can actually be harder than expected. Sometimes the results are more ambiguous than one might expect.
In particular, just because one identifies the author doesn't mean that they identify the rights holder. And, as several panelists mentioned on the first panel, that the elephant in the room is the age of the work. When you have these extended copyright terms sometimes the, you know, when it's left for 70 years that it's the authors heir, or the heir's heir that actually are the rights holders. And it's not always easy to identify that.

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

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

I think the studies show that, particularly for archival works, that it is ambiguous and it is hard to find those works.
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.
And also, just one thing that I wanted to add to that, is we agree with what Greg said. And from our perspective we don't really think there is a need for orphan works legislation.

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

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

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

So I wanted to see in terms of the best practices that we might use for purposes
of a diligent search, for example. Would that
benefit from some additional support by the
Copyright Office or others to make sure that
they are done in a way that both the users and
the content owners who, obviously, we would be
searching for are comfortable with the type of
best practice guidelines that are developed?
So that's just a question I have. After the
people who are waiting, anyone else can
respond to that or the question that's on the

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

(Simultaneous speaking.)

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

One, I think that the Copyright
Office should play a role in dealing with best
tactices and diligent search because they
will, and I think you can, take into account
all stakeholders.

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

And going back to maybe some
comments from the last section is that I think
there should be some basic guidelines from the
Copyright Office and then best practices
developed that -- so, for example, one, a
diligent search should be made. Two, that
just if there's no attribution that that
doesn't mean that no diligent search at all
should be made. Something more has to be than
just that there's not a name on a photo.
I mean, there are many reverse image technologies available now. You can go to TinEye and look up images. PicScout has reverse images. A number of organizations and companies that have been developing reverse image search.

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

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

Even getting back to the insurance question. I mean, I vet a lot of works for documentaries too and I think vetting for fair use and vetting for not
finding and being able to find a rights
holders are two different things. And I think
you can't just lump them all in one place.

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

MS. ROWLAND: Ms. Prager.

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

And I was sort of taking the
approach of users of content for what I would
deem noncommercial but courts have considered
what some of my clients do as being commercial
even though it's in a noncommercial context.

So that distinction, between commercial and noncommercial, to me is a little bit of a red herring and also a little bit undefinable.

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

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

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

You go and you research it and
you find a clear-cut history in the United States that that label, through 16 acquisitions, is now part of Sony Records.

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

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

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

Coming up with a clear approach to orphan works could incentivize them to go into their catalogs and clean them up. And identify yes, we do own made-up label number 1 through 16 acquisitions.
Because right now I could make an argument that there are orphan sound recordings from 1980 out there because we can't get the labels to admit that they own it.

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

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

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

And I guess when I call on you, Mr. Lerner, now it's you. The question being about the best practices and what -- obviously Mr. Lerner's talked about it -- was both the
users and the owners who kind of got together and developed their best practices.

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

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

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

So we heard a concern earlier about the issues around the digitization of letters or family photographs. And the strength of the best practices project that we're doing -- working with librarians and archivists that work with people who have
experienced professional training and ethical
guidelines for dealing with those materials --
it's not being created in a vacuum.

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

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

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

MS. JACOB: In the archival
context that's an interesting question because
there really, you know, in the issue of sort
of letters or in the types of sort of ephemera
in a lot of these collections, there is no
content industry. And that's, I think, a part
of the problem that those people are dealing
with is that it's a very different thing if
you have a sort of, you have the music
industry, or you have the film industry.

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

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

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

MR. HARBESON: That was actually
a lot of what I wanted to say. But I did want
to respond to the comment to my left. The archives community takes very seriously the trust that's placed in them when people donate letters and family photographs and the like to us. And so the archives community has spent a lot of time researching and worrying about the problems that come up when you make very, very personal documents available to the public, whether -- we've been dealing with this since long before the online access issue was even an issue -- this is something that we've researched very well.

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

But I think, to the extent that there is concern about this, what we're talking about here is a copyright issue, not a right of privacy issue. Those are issues that are best dealt with elsewhere.
MS. ROWLAND: Okay, Mr. Sheffner.

MR. SHEFFNER: Ben Sheffner with the MPAA.

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

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

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

And I just want to commend the Copyright Office. I know you're undertaking
studies right now about modernizing the
recordation process. I'm sure there will be
future proceedings on registration.

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

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

MS. ROWLAND: Thank you. We
agree.

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

And again, the modernization of
these records, making the databases more
searchable, more accurate, will again go to
minimizing the population of orphan works
which is, again I think, should be the overall
goal of this process.

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

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

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

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

MS. RUSSELL: In terms of the Copyright Office's role in developing search, I think the Copyright Office should focus its
energy entirely on updating its records.

Because if people could find the rights holder
this would really -- when people want to ask
permission, they already know their use isn't
fair. They want to find the rights holder.

They want to engage with that person. So I
would focus on updating the records.

I also wanted to point out that

with audiovisual materials librarians,
teachers, everybody, they can easily find the
rights holder.

The problem with audiovisual is
that the rights holder doesn't respond. And
the reason why they don't respond is because
a library or a school wanting to use some
footage from a film, they're not going to be
able to really collect the kinds of money they
can versus NBC wanting to use footage from
their film. So they often put the nonprofit
kind of requests over to the side. And maybe
that is a problem that they need to address.

Because we never hear back from these people.
MS. ROWLAND: Thank you, Ms. Russell. And I had one final question for the panel. I'm not sure who wants to talk about this a little bit.

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

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

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

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

I think that however we proceed with orphan works in the United States, taking
the advisement of how they're doing it in the
EU is important.

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

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

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

MS. ROWLAND: Mr. Rosenthal?

MR. ROSENTHAL: Yes. I would
probably, if you're going down the road of trying to think of using a registry of some kind, is again to look at the free market.

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

And therefore you have an opportunity like in the Creative Commons approach where once I register I know that all the libraries can use it. And all the, you know, maybe noncommercial uses, maybe even commercial uses, they can go down that road and use it.
And just the last point. I just
want to say to Nancy -- I've never heard of a
label disavowing ownership of a track, but I
have heard of tracks where multiple labels
claim ownership. And that's where you have a
lot of mom and dads --

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

MR. ROSENTHAL: Yes, no, I
understand.

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

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

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

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

MR. ROSENTHAL: I understand the problems with SoundExchange.

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

MR. ROSENTHAL: That's a different topic.

(Laughter)

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

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

Before I went forward I wanted to make clear when I talk about the EU Directive they're not trying to make -- their intent does not appear to be to make a list of things
that can people just use freely. It's more to make a list of works so that the owners can find out if people are using them.

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

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

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

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

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

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

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

MS. ROWLAND: Mr. Lerner?

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

You know, I think the experience with the best practices has been a good one,
we see, because there haven't been a lot of problems. In fact, there haven't been a single problem that I know of with these best practices. And so I think we should replicate that process.

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

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

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

So if you want these to actually get used, the best way to do it is to let the private market do its thing. Let insurance
companies and other gatekeepers serve as a check to that.

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

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

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

And just very quickly to respond
to give my view on the question about the best practices and who should be involved in that process.

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

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

So, again, in this world a much better solution is to do exactly what's been happening, which is user communities come up with their best practices. So far the owner community has sort of complained about the fact that the user community has come up with
their best practices, but they've never actually come up with any specific objections to those best practices.

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

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

But the notion of trying to sort of delay this process at the outset by trying to basically have the Copyright Office supervise 50 negotiations between rights holders and users I think is just a complete
waste of time for everyone involved.

MS. PILCH: I have a question.

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

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

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

MS. ROWLAND: That is a good point, Ms. Pilch. That was actually something that was raised in some of the comments. I
think the opposite of what you're saying, though.

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

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

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

There has to be a way not only to make a decision based on an individual item
search but also a folder of letters from a particular person or something like that.

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

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

The more that the content industry can educate the user industry on where these rights are and how to get to them. And again, I come back to music and I'm thinking of terms of well, how does a library know about digital samples within a sound recording that might trigger other ownership issues. How would you know that unless you really communicate with the content owners?
And I think it's a very positive thing to do.

MS. ROWLAND: Mr. Capobianco.

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

MS. ROWLAND: And then I think we have one final question from the audience.

Mr. Hansen.

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

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

And I just wanted to give a word of caution about that. Because from what I have heard so far from European libraries and
being involved in workshops there and things like that is that they view that approach, and at least the standards that are built into the Directive right now, as being for the most part unworkable for them and not very useful at least for digitization efforts.

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

MS. ROWLAND: Okay, with that I would, unless anyone else has a question. I don't think I see anyone else coming to the podium. So with that, thank you to our panelists for coming.
Right now we're going to adjourn until 1 o'clock so you can have some lunch. There's a cafeteria right next door -- remodeled just a couple of years ago. So you can go there. We have a lot of different eating establishments right around. Thank you.

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

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

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

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

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

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

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

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

MR. HILL: Doug Hill. I'm
Managing Partner of RightsAssist, a copyright
clearance company.
MR. HARBEson: I'm Eric Harbeson from the Society of American Archivists.

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

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


MR. MOPSik: Eugene Mopsik, Executive Director, ASMP, the American Society of Media Photographers.

MR. SEDLIK: Jeff Sedlik, President and CEO of the PLUS Coalition.

MR. CAPOBIANCO: Michael Capobianco, past President of Science Fiction and Fantasy Writers of America.

MR. KAUFMAN: Roy Kaufman, Managing Director of New Ventures at Copyright Clearance Center.

MS. GRAY: Megan Gray, former attorney for visual artists.
MR. MCGEHEE: Alex McGehee,

Association of Recorded Sound Collections.

MR. SCHRUERS: Matt Schruers,

Computer and Communications Industry

Association.

MR. SCHROEDER: And I'm Fred Schroeder, First Vice President, National Federation of the Blind.

MR. HOLLAND: I'm Brad Holland,

American Society of Illustrators Partnership.

MR. KASUNIC: Okay. Well, welcome, everyone. And it's nice to see some of you again. As some of you may recall, I'm a veteran from the original orphan works roundtables back in 2005. So, interesting that we're still at this.

(Laughter)

MR. KASUNIC: So, I guess I'd like to start by sort of giving a little summary of what I'd like to look at in this session, in addition focusing a little more from what was in the Federal Register notice.
I think one thing we saw from the original orphan works report is that there are at least one or two things that everyone can agree on. And one is that an orphan works problem exists. Another is that the problem is pervasive.

The focus of this panel will be to discuss how registries, first starting with public and then private, can ameliorate the orphan works problem.

We'll discuss private registries in the second half of our discussion including ways that private registries may supplement or be integrated with or interoperate with public registries.

First, I'd like panelists to focus on what can be done to modify or enhance the current U.S. Copyright Office registration and recordation systems to reduce the orphan works problem.

The Office is already aware of certain improvements that either can be made
under existing statutory authority, such as
the provision of a relatively simple low-cost
option to update, address, and write some
permissions information in existing
registration records.

And also expanding offerings and
incentivize the provision of unique
identifiers for authors in particular works
for newly registered works, and possibly for
preexisting records as well.

Other changes that the Office has
recommended considering include additional
incentives or requirements to register
transfers of ownership in works or divisible
exclusive rights in order to provide the
United States Copyright Office registry with
adequate chain of title information that is
built into many other property registries,
such as real property, or motor vehicles.

This may require statutory change
but Berne-compliant incentives or requirements
do appear to be possible.
Moreover, after the initial Orphan Works Report, the Office considered establishing an intent to use registry allowing or requiring users to register their intended use of works prior to use. Should this continue to be considered?

So again, let's first focus on what can be done to modify or enhance the current Copyright Office registration and recordation systems to reduce the orphan works problems.

And please keep your comments concise and on point. We don't have a lot of time and we have a lot of participants. And if you give me some indication, I'll note your name and we'll call on you in order.

Eugene.

MR. MOPSIK: Yes, happy to jump in. So, there are a number of things that I think could be done from a photo standpoint, photography standpoint, to make things more efficient.
The current registration practice
and in particular the group registration,
while particularly convenient for
photographers who in fact register more works
or I believe certainly create more registrable
works than any other class of rights holders,
ends up with a registration that's fairly
meaningless from a search or enforcement
standpoint because there's no searchability.

You can't identify -- if you
submit a registration with 700 images on it in
thumbnail and it's not searchable -- the value
from an orphan works standpoint or for
identification purposes is minimal. So I
think that ultimately that practice is going
to be needed to change or modified so that
images are registered with appropriate
metadata and are ultimately searchable.

I think the other thing that
we've been speaking to you about, and other
folks in the Office, for years is a creation
of an API that would allow photographers to register works from within their digital asset management workflow.

So when they ingest a job, they process X number of images, there would be an action within that digital asset management program that would then allow them to register those images and simultaneously deposit them into an orphan works registry, because they would have all the information that they would need at that point. I would imagine the information that you would need for registry would certainly serve to identify from an orphan works standpoint.

And then again, anything that the Office or anyone else can do to create persistent, actionable identifiers that would stay with photos would be fabulous. And that's why we've been working with the PLUS Coalition, who I think has been working closely with the Copyright Office in this regard.
But if there are ways to integrate the PLUS data or PLUS information fields into registrations, that would go a long way to helping to identify photographs.

MS. WOLFF: I just agree that -- Nancy Wolff, PACA -- there are ways to make things easier on a going-forward basis. And having an API in some way that's easy to register without necessarily having to use the process that's in place with the Copyright Office.

I mean, I understand that there is a review that must be done to make sure the works are subject to copyright. And I know that still needs to take place. But trying to work it in with current software would be great.

I have so many people coming to our office and you don't really want to have lawyers trying to do registrations. But I can't tell you how many complications, particularly with older works.
It's so difficult to register older works. And people inherit their father's or mother's works and they want to protect them. And trying to figure out when something is published, not published. There are lots of hurdles.

And maybe that leads me into the next issue. I mean, I would hesitate trying to make copyright registration as technical and as binding as real estate chain of title. I would hate to have formalities that make it even more difficult to claim ownership and just keep that in mind.

I think that real estate and authorship in some ways are two different things. Chain of title is great and helpful in the orphan works situation but it should be something voluntary I think and not something that would deprive someone of their registration.

MR. KASUNIC: Nancy?

MS. PRAGER: Nancy Prager, Prager
So, I hate to disagree with Ms. Wolff, but I actually think having a process for assignments and everything, Rob, you said, Mr. Kasunic, you said, I completely 100 percent agree with.

I was prepared today to sort of say the negatives but you want positives, so it's switching focus. I think, moving forward, if we could build a database that could provide for links to works within the Copyright Office or even to external so that you can see which work is being claimed.

In the music industry there is a long history, in the nineteen fifties and sixties, seventies probably too, of an artist recording the same song with slightly different titles for a variety of reasons. To make more money. Also to get out of contracts that maybe were bad for them.

And so you go on the Copyright Office database and you're not really sure
which work you're looking at.

Similar to over in the trademark world where you have to file specimens and also a drawing. So you see it two different ways. I think that would be fantastic.

But I do think having a way of building into a chain of title would allow for avoidance of orphan work problems where the works are actually still being utilized but the copyright records are not up to date.

And my concern, and what I was prepared to talk about, was how the copyright database wasn't up to date. And if you do a search on it and you don't see any assignment information, well, you're done under a diligent search perhaps. If we went sort of with a very lax system.

Where if you took it one step further and you went to PLUS or you went to ASCAP or you went to something else and you could find that there's a new owner in place. So the copyright database should have an
incentive to record everything. Thank you.

MR. KASUNIC: Megan?

MS. GRAY: So, to follow up on that, I think the first step that the Copyright Office could take is just retention of the deposits. So, it is -- so far hasn't been practical for those deposits to be copyrighted and digitized and made easily accessible. But at some point maybe it can. And I think we're all anticipating that it will within our lifetime.

And I think the first step in making sure that can become a reality is making sure that the deposits that we have on file now are not destroyed in the routine course of making space.

I think the next thing is for the deposits that we do have, and I'm sure everybody here already is aware of this, but those deposits are public records. There's no question of confidentiality or otherwise. So the public has a right to see those deposit
materials.

But it currently is inaccessible for the public, as a practical matter, because they have to physically come to the Copyright Office to get those records, assuming that the deposits are still on file.

So, for some deposits it would be relatively easy to get them online. Because they're submitted digitally. And so I don't know why that hasn't -- more progress hasn't been made in that direction. Going backwards and being retroactive with the deposits of course is going to be a much bigger hurdle. But given the e-filing incentives that we have now, if they're being submitted digitally already they ought to be viewable just like the main copyright registration record is. So that's -- I think those ideas could be implemented if not outsourced. Some components of those can be implemented now.

MR. KASUNIC: Roy?

MR. KAUFMAN: Roy Kaufman,
Copyright Clearance Center.

In keeping with Gene's API theme, you can have an API in for registration. It would also be very useful to have an API out so that the information that's in the registration can be brought out by those of us who would probably make use of it to find more commercial uses and make it more searchable.

The other thing is I love the idea of author identifiers, individual author identifiers. And there are plenty of existing author identifiers. In academic publishing there's something called an ORCID. Maybe if you had a field where people could put in optionally their identifier and state which identifier they wanted to use so that the ORCID identifier, which would be used for academic publishers, would be one thing. Maybe in music there would be a different identifier.

I don't think it's particularly useful to try to come up with a whole new
identifier scheme, but there are these schemes out there that are quite helpful and they are persistent.

MR. KASUNIC: And I should just add with that that there are certain kinds of unique identifiers that the Office does request. It's an optional field. For instance, the ISSN or the ISRC for sound recordings. So those are existing fields that we find are largely very underutilized.

And that's something we'd like to hear more about is how we might be able to get people to participate and provide either for works or for authors those identifiers. Michael?

MR. CAPOBIANCO: Yes, I would say that the single most helpful thing that the Copyright Office could do regarding preventing things from becoming orphaned is to digitize all of its records, especially the records from 1923 to 1963 where it's not clear whether something was renewed or not. It would be
great if a renewal could be linked to its original registration so that there was no confusion about whether things were registered and/or renewed.

And as you know Science Fiction and Fantasy Writers of America has been advocating that the Copyright Office produce its own author registry. Actually, we spoke about that in 2005. Technology has come forward a little bit. The internet is certainly more pervasive than it was back then.

We feel that it would not be an onerous job to provide a place whereby authors could register their copyrights separate from the actual registration process. Just to put in their name, put in their contact information and then put in some information about their works, if there was an author identifier number and a DOI for each individual work or some sort of a numerical way of distinguishing works and disambiguating
authors. It would be very, very helpful.

Right now the international community is doing some of this. I just recently discovered something called ISNI, the International Standard Naming Institute or something, I'm sorry. But they are assigning authors numbers. They are pulling in data from the Library of Congress authorities. They're pulling in data from the VIAF and trying to consolidate all this material.

And the best part about it, from an author point of view, is they have a procedure whereby the author can change and modify and fix the incorrect information that they might have for them.

MR. KASUNIC: And Michael, as to your first point, just to clarify, that the Office has been digitizing all of the old records. And we have digitized all of the Catalog of Copyright Entries that existed and have pretty much all of the -- or millions of the file cards digitally scanned.
And so at some point hopefully when funding is available to make those -- figure out a way to present those so that you can find that information. We're actively hoping to get those up in the very near future.

MS. GRAY: But none of that digitization is for the deposit material, for the actual copyright.

MR. KASUNIC: It's not for the deposits, right.

MR. CAPOBIANCO: And my only thing I would say is that my impression was that you haven't put the emphasis on the 1923 to 1963 material as much as I think is justified.

MR. KASUNIC: I believe we have scanned all that, but we can look into that. Matt?

MR. SCHRUERS: So, I'm encouraged to hear some of the things that when the PTO did the green paper panels. Some of these
issues were addressed on the licensing. And there I commented about the need for an outward-facing API. And it may have been in our comments actually, I don't recall.

But the fact is it's for precisely the same cost factors that you want an inward-facing API. In other words, the -- an API that facilitates the Office's ability to take information in. You want to have one that facilitates people taking information out. And I think the Copyright Clearance Center comments indicated that.

And one of the reasons why that's so important is that increasingly so many of the services we're talking about are working with very large portfolios of works. And so trying to do a work by work search for any service of relevance, just the transaction costs are going to swamp the potential benefits.

And, additionally, you're going to run into the kinds of problems that were
being discussed with photography where
different classes of works have different
characteristics. And so metadata about what's
in the image is going to matter a lot more in
photographs, for example, than other classes.

And so if you have the ability
for services to sort of take information out
on a regularized basis, different
constituencies will have the ability to map
their own data on top of that. That'll be
relevant for their markets or their user base
and facilitate new works as they come along.

And so then the Copyright Office
isn't in the business of always having to sort
of keep up with all the technological change.

And that means that all databases
in the universe are not going to be the same.
Some will have a lot of information that
others don't. But they will be sort of
customized for the constituency that needs
them.

And that might actually take a
lot of the burden off the Copyright Office to sort of keep adding its own voluntary identifiers. But none of that's going to happen if you don't have a standardized way of allowing people to take that base information out and work with it.

MR. KASUNIC: Thanks. Eric?

MR. HARBESON: So, I'm kind of seeing a couple of different kinds of materials that folks are talking about here. You have the works where, like Ms. Gray over here was talking about, where Copyright Office has received registration but the information from that registration may not be available to the public.

There's other material where the records were once current, they were registered, they were once current, but they're not now.

Those things I think we can largely get at with modifications to existing databases. And not to tell you folks how to
do your job, but I would point out that there are a lot of people in this very building who are doing a lot of work creating unique identifiers in authorities.loc.gov. I mean, I think that's a really first-rate database.

And that's kind of where I'd like to go with the concern of archivists because what the -- what we're looking at is material that was not only never -- that's not just -- it's not outdated. We don't have outdated information or inaccessible information, but we don't have any information at all.

This is a lot of what folks have been talking about so far, are published works where there was commercial intent, or possible commercial intent. Whereas archivists are worried about what is, I think it's probably safe to say, the vast majority of orphan works, which are things like my notes which I'm writing down right now which I have a copyright on but which no one will ever be able to trace, and which could one day end up
in my personal archives somewhere if they are deemed that important.

So I think that any talk about a registry solution for the orphan works problem really needs to consider, these materials that no one has ever heard, of very carefully. And that would require something like, well, I don't know how it would be done but it almost has to be a voluntary opt-in registry. I'm not thinking of another way to go about that.

The thing that is most important to us from a registry point of view is that there be one registry.

MS. CLAGGETT: Just to follow up. An opt-in registry from the notice of use standpoint? To say that you're about to use the orphan work? Or from the actual, I guess, orphan owner which would be I suppose somewhat theoretically difficult. So I just wanted to get a little bit more detail on that.

MR. HARBESON: I guess when I said that I probably was just speaking off the
top of my head and not necessarily for SAA.

But I think that -- I'm trying to think of a way that you could have a registry of John Smiths who may have taken -- sent a letter to an important person. And if you don't even know to -- I think that those kind of semi-anonymous people out there that are contributing these orphan works to our cultural heritage would kind of need to make themselves known somehow and then provide contact information, because a notice of intent to use would require that you know what the work is that might be being used, right? And I'm sure that I've sent letters to people that I've completely forgotten about.

MR. KASUNIC: Thank you. Gene?

MR. MOPSIS: A couple of quick points. In regard to the comment that was just made about the need to have a single registry, I don't think that's going to happen. But I think what's important is that registries are federated, that they can talk
to each other. And if that happens, you end
up accomplishing the same goal.

Beyond that, I think for
photographs the issue is not I guess the
ability to attach a discrete identifier. The
issue is making that persistent, something
that sticks with -- either sticks with the
photo or sticks in a database that can then
identify that rights holder or photo in a
manner again that PLUS uses.

And the comment, again, about the
activities in the EU. Last year Jeff and I
traveled on a number of occasions to the UK
and EU and worked with people who are working
on something called the RDI Project, the
Rights Data Integration project, and the
Linked Content Coalition.

And they have available -- I
think they were just awarded is it the
equivalent of $1.5 million? Close to $1.5
million to do a test project, this RDI project
where they'll be linking various databases
together for the purposes of image identification and to be able to monetize those.

And again, my point is that they have EU support for that and it's something that we don't get that. I mean you don't get that kind of budget to be able to front those kinds of projects here on a test basis, unfortunately.

MR. KASUNIC: Jeff?

MR. SEDLIK: First, the acronym API is being thrown around. It's application programming interface. And all it means is to allow one system to talk to another system. It's a specification and a way for these two systems or multiple systems to talk to each other.

And I really think that that's the direction that the Copyright Office should go is bringing stakeholders together and discussing a means to allow your system to communicate with other systems and then
relying on private industry and others to
develop interfaces and systems for search and
for registration where you hold the data that
you need to hold, but provide in and out
access.

And echoing everybody else's
comments here, much in the same way that the
Copyright Office came to industry and
suggested that we form this coalition that's
now called the PLUS Coalition, which has many
of the people seated on this panel and in
other panels from the libraries, to the
museums, to the photographers and illustrators
and advertising agencies, et cetera, just
working on the solution of identifying works
and creating a global registry hub.

That word, "Hub," is important.

I agree with Gene that a single registry will
not fly. We're looking at a global issue
here. A United States registry or a United
States identification system is not the
answer.
We need to work internationally on
adopting an identification system and on
linking multiple registries, both public and
private together, so that you can both submit
images and search, and that a search of any
one registry will search all registries.

MR. KASUNIC: Well, before I get
to you, Nancy, I just wanted to open this up
since we're in the second half hour is just
that we should -- let's specifically also
include some discussion of how private
registries and ways that they can play a role
in diminishing the existence or the orphan
works problem.

So, and particularly what role
can private registries play to supplement
public registries. And I think we've heard a
lot about how those APIs can facilitate that
kind of interaction, but would like to hear
more.

Should private registries be
linked in some way to the U.S. Copyright
Office registry through APIs or otherwise?
And what role should the Office play in
certifying such third party registries?
Nancy?

MS. PRAGER: All right, thank you. I was very honored to be asked to be on
this panel because I do a lot of work with the
private registries on the music side and they
may have some of the oldest private registries
available.

I would tread very carefully in
doing anything that might put the imprint of
the federal government giving any
classification that the data in those
databases is good.

It is disheartening how difficult
it is when you're operating in that system and
you find information that not only is
incorrect but also potentially fraud.

An example I'll give. Colin
Rushing is here and I'm just going to put it
on the table. SoundExchange database, called
PLAYS, is littered with people who have filed as the rights holders for sound recordings for which there is no chance they own them.

They're European compilation labels that are claiming royalties on behalf of the labels that are orphans, the ones that I mentioned in the last -- labels that have been lost over time through acquisition or just bankruptcies or just people give up on their labels.

You can find works not available in the United States readily available in Europe because these labels know that rights holders have no opportunity or artists have no real chance of going over there to claim their rights unless they're the top 1 percent of music performers that make up 75 percent of sales.

So, I would tread very -- and it's not just SoundExchange PLAYS. ASCAP, BMI, SESAC as well, Harry Fox too. Information can be missing. It can also -- clerical errors.
Like we have an issue this year where a publisher who now operates under the name of a publisher that was around in the sixties is getting the performance royalties from the PRO on behalf of a songwriter who claims she never signed a contract with that original publisher anyway, so therefore why were they getting that money.

The PRO's response to her was prove to us you don't have a contract. Or get us something from the second one that says that they don't have the rights.

So, in an industry that's had a long history with these private registries I can point -- and I'm happy to sit down and go through data after data with you of these mistakes.

Additionally, there's a problem between the PROs that they will not play nice with each other. Unlike in Europe where there's only one PRO for each country and often only one for each right so they do both
the neighboring rights and the musical composition right. We have multiple players in the marketplace that are trying to protect their revenue streams.

There's some private players in the music industry that have very valuable databases that they're not making available even if someone offers to pay for it -- that they've collected all the data that people would need.

So we need a way of getting this information out of these walled gardens into a more public -- and that's going to take the Copyright Office. But I think you're going to have to start from scratch.

MR. KASUNIC: Okay, we'll go to Patrick and Jeff. But I wanted to just add that these are some things that we have been concerned about at least in terms of, one, the issue of fraud and for updating information in the registries.

There is some concern about
whether people could put in false information
and redirect all of the revenues to some
different source. And how do we deal with
that?

Also, the issue of the value of
distinguishing between the Copyright Office
record and if there is linkage between the
Copyright Office and private registries, how
do we distinguish those differences? There
can be add-ons that might be at least
informationally useful that private registries
can provide, but where -- the accuracy or
verification of that information -- the
government can't state -- put that
relationship too far. So, Patrick?

MR. MCCORMICK: We agree that
there shouldn't be a government fingerprint or
endorsement of any of these private
registries.

Where we differ, however, is that
if this reform were to pass, then with the
huge influx of registries and the need for
easy searchability with metadata and the massive amount of different kinds of media, that a single registry won't suffice, and that private registries are more nimble and better suited to adapt to new technological advances.

The Copyright Office should function as a clearinghouse for these registries and provide links to these and point them out to users who might want them. But not necessarily endorse them, just allow people to find registries that are established and that people are using.

I'd like to speak to some comments that were made earlier about the intent to use registry. Those registries seem to function well as an idea for archival houses or libraries or that kind of thing, where that may be part of their diligent search in finding the rights holder. But for individual users of different kinds of media such as documentary
filmmakers or journalists, that can raise serious confidentiality issues with projects if they have to announce what media they intend to use.

It can cause a huge problem with the timing of production if certain media has to wait for a mandatory waiting period in a registry like that before they can use it.

Other users will find it misleading if they see that there and fail to do their own diligent search, which is a further concern because they may be the best situated party to actually find the rights holder.

And after having performed a true diligent search, however we define it, if you still haven't found the rights holder that's not a likely party to show up and monitor a registry like this.

You're more likely to have trolls registering for this, looking for easy settlements, establishing themselves as the
rights holder, threatening injunctions, or however else it may be, and really driving up the costs of productions for things like this.

MR. KASUNIC: Okay. Jeff, Nancy, and then Brad.

MR. SEDLIK: Any system, any registry system or any system at all, there's going to be good actors and there's going to be bad actors. And there is little that you can do to absolutely prevent bad actors.

I would agree that the Copyright Office should not be in a position of running a global registry network. First of all, the Copyright Office is part of the Library of Congress and part of the U.S. Government and again, we're looking at a global issue.

Second of all, the Copyright Office is not really charged with verifying the accuracy of the information submitted to the Copyright Office on registrations currently. I could submit all the photographs ever taken by every person in this room and as
long as I fill out the copyright registration
application correctly, it's likely that I will
get a certificate that I am the copyright
owner of all of your photographs. However, it
doesn't mean I'm the copyright owner of all of
your photographs. The paper is worth nothing.

This is what the courts are for.

You have bad actors. You make their actions
either illegal or you kick them out of the
system.

The way that we're addressing it
within the PLUS registry is we are not going
to make determinations as to who owns what.
We're going to allow the users to place
records into dispute with public notification
and then people can come to us with a court
order from whatever country they're from and
we will pull things down, or edit them, or
remove them based on court order.

The other thing I wanted to
address was earlier there was a suggestion
about making all the deposits public. I want
to make sure that everyone understands that visual artists and other creators often register works that are not intended to be public at that time.

It might be a photograph that's going to go on a book cover, photographs of a car or automobile that's not yet out there, released. Confidential type information that is submitted. And, currently, the only way that you can get at those deposits is to either go to the Copyright Office and look at it on a computer sitting there in that system, or you can be either an attorney representing a litigant, or the owner. And you can get access to that deposit information.

But I think if we did make all the deposits public, we would have to have a means for masking the work back when it needs to be confidential. Similar to, I believe that there's another provision for another type of work, it might be architectural plans or something to mask it back so that you can't
actually see the deposits themselves. That was it.

MR. KASUNIC: Nancy.

MS. WOLFF: I was going back to the question of the role of private registries. And I think they will play an important part because there is no one size fits all.

For example, I think even if you look at many of the images that are available commercially -- if you want to do a search of many of the large databases, you can find things.

In fact, PACA has something, since we talked about this in 2005, orphan search. Actually, if you're trying to find an image, you can contact the director and he'll send out a request to every single member within it and they'll look in their database of digital images. So there are many private databases that are very helpful.

And again, yes, there always will
be, you know, anyone can upload a picture and say they took it. I mean, I recently was involved in a case with two Woodstock photographers and they both registered the same photographs here. We had this messy federal court case about it.

One thing that might be helpful with registries, if maybe there was a process that perhaps the Copyright Office could deal with, just an easy sort of dispute resolution. So any time there could be an author issue that maybe wasn't, you had to, you know, register, go to federal court, have something similar, more like a domain name dispute. Maybe some of those things would be helpful for keeping registries reliable.

I know I sat three years on the 108 committee and we talked a lot about having trusted depositories for preservation because you don't want everyone to be making databases of other people's works.

And I think, probably, sort of
the best use of the Copyright Office is
working with the different stakeholders in
having best practices and directing people to
the most reliable registries.

MR. KASUNIC: Brad?

MR. HOLLAND: Visual artists

have, I think, two major problems with
registries, with either commercial or private.

The first is the extent to which
work not registered in the registries would
come to be considered, either in statute law
or by practice, as an orphan. In other words,
if you can't find it in one of the registries,
does it become an automatic orphan.

The second one is that the
experience of artists with things like
stockhouses is that a lot of photographers and
a lot of artists entrusted their work to some
of these stock agencies and found that the
agencies were not only breaching their
contracts and infringing their work, dumping
their managed copyrights into the royalty-free
market and then using the work they were
entrusted with to go steal clients from the
very artists who had entrusted them with the
work.

If companies like that become
registries, and we know that some of them have
been lobbying on behalf of the orphan works
bill. We don't know what they've been
lobbying for because they've asserted
attorney-client privilege. But we've got
documentation from artists that their rights
have been abused, their copyrights have been
infringed, their contracts have been breached.

And they have begun putting out
work not only taking in high commissions,
anywhere between 50 percent to 90 percent in
some cases. They've been removing artists'
names from the work. There's even one case in
illustration of an artist whose last name
began with a C and who used his signature to
encase a copyright symbol.

So what did the stockhouse do?
They cut the C off of his name so that the copyright symbol was removed and dumped his work on the royalty-free market. He could sue, of course, but the agency is owned by the richest man in the world and who wants to go into court with a situation like that.

In the SBA roundtable there were a number of photographers who gave estimates of what it would cost them to comply with this registration. I won't read their comments but I'll read some of the figures.

One artist estimated, one photographer, estimated that it would cost him between $104,000 and $263,000 to comply with a law that required him to register work.

Another suggested $25 to $50 per image. One suggested, based on information from Corbis, $70 per image. One photographer estimated $80,000 in two years. If he hired someone at minimum wage to do nothing else for two years it would cost him $80,000. Another one estimated $50 to $750,000. I won't go on.
I've spent the last five years digitizing a lot of my old work and I will estimate that for me to comply with an orphan works law would cost me $250,000 and would take either 5 years if I could afford to hire somebody full-time at $10 an hour, 40 hours a week, or take me 10 years if I could only afford to hire them at $10 an hour for 20 hours a week. That's a quarter of a million and anywhere from 5 years to 10 years.

And that would not include metadata because there would be no way I could go back 25, 30, 40, 50 years and dig up metadata to include in this. Not to mention filling out forms. I'm 70 years old. My creative life would be over if this kind of a law were passed.

So that's the first problem that not only artists, but we have a statement in here from Jerry Colby who in 2008 was the president of the National Writers Union making the same claim about writers, that it would
simply be impossible for them to register all
the work they would need in a registry of this
sort.

The other thing, I won't go on,
but there was a comment made earlier about
digital object identifiers and author
identifiers of the sort.

We in the Illustrators Partnership
which was the parent organization to the --
this group -- that we represent now is
actually 12 organizations. It's a coalition
of everything -- medical illustrators,
cartoonists, general science illustrators,
aviation artists, and regional artists groups
in various cities.

And our parent organization, the
Illustrators Partnership, which we started in
2000, in 2003 made an approach to the
Copyright Clearance Center, specifically to
Joe Allen who at that time was CEO, asking how
artists could be represented as authors in the
work that CCC was licensing. And we were told
CCC had no way of licensing art -- that they would talk with us if we would come back to them with a proposal for how we could track the usage of the work.

So we contacted a company called Identity Commons and Cordence and, at a great deal of expense and over a period of a year, we came up with a proposal which we drafted with the help of technical experts from Identity Commons and Cordence.

And we presented it to Joe Allen who told us well, he couldn't talk about this, but he'd give us the name of his director of author relations.

We had a conference call. He said he could only spend half an hour with us, then asked us what our favorite color was, what kind of music we liked. We couldn't get down to the business of talking about persistent identity tags.

We had artists ready to embed these tags in their work that would go through
the Copyright Clearance Center, but we could not get anyone from CCC to talk with us. When Joe Allen retired, we tried to talk with the new director Tracey Armstrong. We arranged a meeting at which nothing was concluded.

We also know that the Artists Rights Society, which handles the estates of Picasso, Matisse, Jackson Pollock, Frank Lloyd Wright and 40,000 fine artists has also been trying to work with CCC to find some way that work can be tracked.

Now we've made, in 2005, a proposal to the Copyright Office that CCC be encouraged to work with illustrators and graphic artists and fine artists to find a way to embed these kind of persistent identity tags with our work and then use it to track the work so that artists could be paid. Nothing ever came of our proposal. It could be done with money that is actually being returned overseas right now.
from reprographic licensing that is not being
directed to CCC, but is going to a number of
organizations who in the case of graphic arts
have refused to account for what they have
done with the money. This money could --

MS. CLAGGETT: I hate to cut you
off but I know that we have a lot of other
people.

MR. HOLLAND: I know. Let me just
finish, then I won't say anything else.

MS. CLAGGETT: No, you can say
more but I just want to make sure -- I think
there were a number of hands that were up.

MR. HOLLAND: I will. This is a
concrete proposal that would not cost anybody
any money. It could be done with money that
is already being licensed in the commercial
usage of illustrators' work.

MR. KASUNIC: Okay, we're going
to go to Eric, Doug, and then Colin.

MR. HARBESON: So, the question
is still the private registries I think,
right?

And so I wanted to, first, if I could, clarify my statement. When I said that what we need is one registry, what we need is one place to look. If it's a federated system of registries that is functionally the same thing.

I think, as has been pointed out earlier, if you have a whole lot of private registries, you're going to increase the cost of search.

Now, as I mentioned in the earlier panel we have studies that have shown how much the cost of searching for an orphan work is, especially as you move down the line. When you have an archive that is trying to make up for 50 years of non-record keeping over the ownership of a work, it's going to cost a significant amount of money.

And if we have a public good that we're trying to meet where we're trying to make the information available according to the best practices of our profession, we need
to be able to -- if we are expected to do this, I think that there needs to be some way for us to be able to reliably find the work without spending more than 70 percent of our time on the problem.

Now, the registry question is definitely -- so, we strongly prefer a registry solution over something like an extended collective licensing solution, which I know you're going to talk about tomorrow.

But for kind of the same reason whereas a solution that doesn't involve a very easy way of searching and showing due diligence -- so, properly done, a registry solution should be: you search in this registry and that is your due diligence. You don't have to search in 20 different registries and do a long trail because that's how you get your 70 percent of your time spent on copyright work rather than on the work of the profession.

So, but we strongly prefer that.
Without something like that our time is -- we may as well not make use of the works in the first place.

With an ECL regime we're putting money into a system where, as our research shows, the vast majority of the time the money will never even be claimed.

MR. KASUNIC: Douglas?

MR. HILL: The needs for the private or public registries are about access and monetization. You either need to get access to images to be able to -- or audio files, or any other intellectual property -- be able to use it, or you're interested in being able to monetize it either as the owner or as someone who wants to use that material in a project.

So, there's never going to be a situation in which the Copyright Office will be able to be central to that access. It just is not possible for you to be the repository of everything that could possibly be used.
Therefore, there's going to have to be registries of a variety of kinds spread across the industry. The best situation is going to be for the Copyright Office to enable an API to be able to access that information directly back and forth amongst those registries and/or pass through requests to the Copyright Office, to those registries to be able to answer those questions.

That's a way in which you're facilitating the information exchange, you are enabling people to get access to the material, and you're attempting to resolve the issue of I cannot find this copyright holder.

No one's yet talked about work we do, which is we go to the estates. We go to the probate offices in the city we think -- we think -- that individual may have died in, try and get a copy of their will and determine where their estate passed the rights for their materials for.

If they're older than a certain
age and died prior to 1970, roughly, then we
know they're not going to mention anything at
all about where their rights passed to because
until Elvis died the idea of passing that
right onto a future generation was not a big
moneymaker.

But at $85 million, you know,
that's got a lot of people's attention about
how to be able to monetize it after you're
gone. It becomes a -- for some photographers
it becomes -- a legacy to pass onto their
children.

So, if the Copyright Office can
figure out how to be able to enable that
process of the sharing of information, I think
that's the single greatest contribution you
can make to the industry of intellectual
property in general.

MR. KASUNIC: Okay, Colin and
then Frederick.

MR. RUSHING: Sure. So, I hate
to sort of dial things back a few speakers
ago, but I just wanted to respond to Nancy's question which actually is a good segue to one of the points I wanted to make.

So, Nancy earlier talked about the SoundExchange database and specifically the PLAYS database as an example of some of the problems of private registries. And I can understand where that perception would come from.

The PLAYS database, though, is not actually our database. And this is why I think it's an interesting sort of object lesson. The PLAYS database really reflects the raw material that SoundExchange gets and is in the process of being matched.

It's not intended to be a sort of public-facing registry of who owns what. It's our attempt to basically give the public, hopefully record companies and recording artists an opportunity to say hey, I think this is mine.

We use that as a piece of
information. We actually have a really sort
of complicated process to take all the
information that we get and make sure we're
paying the right people.

Which I think is a useful
illustration, because the value that a private
registry has, sort of part of this network of
information out there is the people that, you
know, SoundExchange and other organizations
like us, the role we play is paying people for
works that they own.

And so the people participating
in that have a really strong incentive to
participate and make sure the information is
accurate.

And no one is perfect and we
wouldn't claim to be, but we have a process to
make changes all the time. And, in fact,
we're regularly updating accounts through our
claims department to make sure we're paying as
accurately as possible.

So I think that is one important
takeaway, which is that there really is value in having private registries, seeing them as a source of accurate information. Because the participants have an incentive, an immediate financial incentive, to get the information right.

The other thing that our PLAYS database illustrates is the sort of matching challenge. Whenever you're talking about a registry, you're talking about a record of hopefully who owns what. And in the case of most works that have commercial value, you're talking about who owns what, when and in which territory, which can be incredibly complicated.

That's just the information about who owns what, when, and where. There's a first step challenge of making sure that you're actually accurately matching to that. Because the license that we do is a statutory license that, people using it, you know, they can just sort of give us what they
believe is their sort of best effort. But it's incredibly poor. And the PLAYS database really reflects the type of information that we're getting from the users of the recordings, not the information that we're relying on. And I think it's sort of illustrative of the challenge of frankly matching incoming information to information in a database.

MR. KASUNIC: Frederick and then Alex and then I think we're out of time after that.

MR. SCHROEDER: Yes, thank you. Recognizing the time, I'll be very brief.

I just want to say that particularly with mass digitization of materials now, there's unprecedented access to information by blind people and others with print disabilities.

And as we look at legislation, regulations that deal with access to intellectual property, just to remember that
the use that is vital to blind people and
others to get to this information, that it not
be inadvertently compromised, made more
complicated, or that disincentives to making
materials available not be an unintended
casualty.

    And I just wanted to say one
other quick thing. With databases, some of
your users of databases are blind people. And
I can tell you that there are many, many
databases these days that are not readily
searchable using non-visual text-to-speech or
other assistive technology.

    And it seems to me that if people
are expected to do a search of a database,
there needs to be the enforcement of
requirements around accessibility.

MR. KASUNIC: Thanks. Alex?

MR. MCGEHEE: I'd like to
reinforce a couple of comments that have been
made today about simplifying the system. I
think it would be very helpful if people
understood a definition of what due diligence
is because there seem to be a lot of
definitions of it and it's a situation that
can wind up in court.

The second thing is our
organization is a relatively small group.
We're about 1,500 archivists, librarians,
sound collectors, sound enthusiasts. And
someone who has got to go through the process
of finding the original owner of a work is
really up a tree in terms of cost. And that
was mentioned earlier.

So I think the system has got to
be -- let me make it very hard for you --
relatively simple. It has to be low-cost,
which means it doesn't involve lawyers with my
excuse to fellow members of the panel.

And it needs to take care of a
unique problem that we have in recorded sound,
which is pre-1972 records. They, right now,
are under individual state laws and this needs
to be federalized so that pre-72 recordings
can be found in one place and under one piece
of legislation.

And we don't get into a situation
like we do with the New York law, which is the
most stringent law, and so everybody now goes
by the New York standard. There needs to be
a federal standard. Thanks.

MR. KASUNIC: Okay. Do you want
to add any questions?

MS. CLAGGETT: Yes. We have just
a few moments. I think we're running a little
bit over so just a few moments to take any
questions from the audience. As before, we'll
have a microphone if anybody has any
questions. If not, we'll end with Gene if
there are no audience questions. Anybody from
the audience? Okay, Gene.

MR. MOPSIK: Thank you. So, I'm
going to make a few -- you'll be sorry, maybe.

(Laughter)

MR. MOPSIK: They're kind of
extraneous comments. But you know, I've been
listening all morning and I've heard two
things. I've heard about public good and I've
heard about how difficult it is to identify
orphan works.

So, I'm an unabashed
representative and advocate for independent
small creators. I know my photographers wish
every day when they go out to a job that the
job would be easy. But not all the jobs are
easy. Some of the jobs are hard. Some of
them are more difficult.

Some of them are impossible, what
I used to call "subject failure." They're
faced with -- to try -- to make something good
that's impossible, a real pig in a poke. But
they have to do it. Comes with the territory.

You know, public good at whose expense? I
guess I just have a hard time understanding
how we can be expected to provide works
without any compensation in an ongoing basis
and still expect to sustain a class, a
creative class, and have people sustain their livelihoods. So I can go on forever on this, but I just felt compelled to make those comments having listened to -- you know, as far as I'm concerned, I guess it goes with the territory. If it's difficult to find a rights holder, well so be it, it's difficult. Comes with your job.

MS. CLAGGETT: Thank you. So with that uplifting note I guess --

(Laughter)

MS. CLAGGETT: -- we're going to take a short break and then we'll go onto the next panel, which will focus actually primarily on photographs and other types of works that may or may not need to be included into orphan works legislation.

(Whereupon, the foregoing matter went off the record at 2:05 p.m. and went back on the record at 2:15 p.m.)

MS. CLAGGETT: All right, we're going to get started with Session 4. Before
we do, one quick logistics thing. I know you guys are going to get sick of hearing this over and over again but we have to do it for each panel, so I'll read our little video release language.

The panel discussion is being recorded by the Library of Congress. There will be a short question and answer period at the end of the session.

If you decide to participate in the question and answer period you are giving us permission to include your question or comments in future webcasts and broadcasts.

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

As I mentioned, the issue we are going to discuss next is the type of works subject to any orphan works legislation including issues related specifically to photographs.
I think a lot of the conversation that was started in the previous panel was a good segue into some of the issues that we will want to address today.

I know that we alluded to the fact that overseas there have been proposals to address orphan works. And some of those proposals have dealt with, for example, different types of works in different ways.

In the EU Directive, for example, they exclude photographs unless they're embedded into another work. The UK model, however, would include photographs as well.

So, some of the questions we're going to have is: what types of works should be included in any particular orphan works solution? And are there areas of works or types of works that should not be incorporated into an orphan works legislative proposal?

Before we begin, I just want to, as we have in the past, go around the table and have everyone introduce just their name.
and the organization that they represent.

I'll start with Barbara.

MS. NATANSON: I'm Barbara Natanson. I'm the Head of the Prints and Photographs Reading Room at the Library of Congress.

MS. ROGERS: Kelly Rogers, Rights Manager, Johns Hopkins University Press.

MS. GOODYEAR: Anne Goodyear, President of the College Art Association.

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

MR. OSTERREICHER: Mickey Osterreicher, General Counsel with the National Press Photographers Association.

MR. MOPSIK: Eugene Mopsik, Executive Director, American Society of Media Photographers.

MR. SEDLIK: Jeff Sedlik from the PLUS Coalition.

MR. SANDERS: Charlie Sanders from the Songwriters Guild of America.
MS. MATTHEWS: Maria Matthews,

Professional Photographers of America.

MS. SHAFTEL: Lisa Shaftel,

Graphic Artists Guild.

MR. McGEHEE: Alex McGehee,

Association of Recorded Sound Collections.

MS. FERTIG: Rachel Fertig,


MR. HANSEN: Dave Hansen, UC Berkeley Law and the Orphan Works Best Practices Project.

MR. COHEN: Dan Cohen, Digital Public Library of America.

MR. LEHMAN: I'm Bruce Lehman and I'm here today for the Association of Medical Illustrators. And perhaps we could just correct the record because it says American Medical Illustrators and that, I think, probably was my mistake originally. But it should be the Association of Medical Illustrators.

MS. CLAGGETT: Thank you, Bruce.
So, I was going to just throw it out to the panel: should we follow, for example, the EU model and exclude any types of works in any orphan works legislation? And if so, what types of works and/or is there any reason to actually try to do that? And will that undermine, for example, the actual effectiveness of an orphan works solution?

So, should we exclude works in any orphan works solution, or should we try to cover all types of works and subject matter?


I think AAP has consistently advocated in our interactions with the Copyright Office processes reviewing an orphan works solution that we should cover all types of works, that it should be a broad-based solution.

And we would see the EU Directive as sort of -- if that model were implemented in the U.S. we would be leaving a lot of the
problem unaddressed. And if we're going to have spent numerous years talking through this process, then let's come up with something that actually addresses the problem.

And I think we've heard throughout the panels today that there are serious issues with trying to find rights holders for different visual and photographic works, but that's exactly why we need to come up with a good solution.

MS. CLAGGETT: Anne?

MS. GOODYEAR: Thank you very much. The College Art Association concurs. CAA represents a broad spectrum of artists, scholars, curators, art publishers. And like the AAP we feel that any solution that does not take into account all copyrighted works would be incomplete.

MR. HANSEN: So again, I'll repeat that, in general for the library and archive community, we've seen that there's a general feeling that fair use does enough.
But one of the things that it does, that proposed legislation could do, is treat different works differently based on similar principles to what fair use already kind of analyzes.

The second fair use factor looks at the nature of the work. And there are some nuanced factors within that that a proposed piece of legislation could examine.

One that's come up repeatedly throughout the morning and the first session this afternoon was the reason for which the work was created. If it was created for a commercial purpose versus if it was created as a letter to a friend or a photograph or a home movie or something like that.

MS. CLAGGETT: Yes, Mickey.

MR. OSTERREICHER: Mickey Osterreicher with the NPAA.

You know, we heard a lot about fair use this morning. And unfortunately our position really is that copyright seems to be
becoming the exception to fair use.

But, that said, I think some of the things that need to be looked at is whether this is a public entity or a private entity. And I also think we need to consider certainly commercial versus noncommercial use if we're going to be looking at these bills.

MS. CLAGGETT: And we will talk about that even in more detail in the next panel, which will focus on the type of uses that any orphan works solution should focus on. Yes, Bruce.

MR. LEHMAN: Well, on behalf of the Association of Medical Illustrators I'd like to say that we actually have a very clear answer to the question and that is certainly that medical illustration should be excluded.

And we would also think that illustration in general should be excluded. I can't really speak to photographs, though they share a lot in common.

But I'd just like to say a word
about why, if I can, in the case of medical illustration. And that is that the comment was just made that the purpose of the use is important. And that there's a distinction between commercial use and something not created for commercial use.

And I would think it's fair to say that in the case of medical illustration, medical illustration is always created for commercial use. The way medical illustration comes into being is that medical scientists and researchers, doctors, publish articles that are published in peer-reviewed medical publications. These are very high-end, very expensive publications.

And, naturally, if you're writing an article about something having to do with the human body you have to illustrate that, provide illustrations. So medical illustrators, for example, not only have to go to art school but they also have to have a lot of training in anatomy and various medical
subject matter. So, their work is always created for commercial purposes.

So why or how would a work of medical illustration be an orphan work? Well, the only way it would become an orphan work is that if for some reason it were separated from the journal that it was a part of.

And that might happen if the work in some kind of unauthorized way, for example, got out online in a digitized format and then the identifying material that almost always would have that would be credits in the medical journal were somehow or other stripped out.

And to treat those as to, in effect, reward that behavior by limiting in some way the right to sue for infringement and the right to enforce one's copyrights would be really completely inconsistent with what the copyright law is all about, which is to reward creators and provide an incentive for people to go to school, spend the money, get into the
business and then actually try to make a
living from it.

MS. CLAGGETT: Thank you.

MS. NATANSON: I'd like to speak
on behalf of researchers in my custodial
division and in many historical societies and
libraries around the country. Because
uncertainty about historical photographs is a
serious problem for those researchers trying
to shed light on trends and events from the
late 1800s onwards.

So, I guess one of the things I
would like to raise -- without talking about
the term of copyright -- but should the age of
the material be taken into account in
considering its orphan work status?

Just to take a couple of examples
of items I looked up this morning. Images
often come with no photographer names, no
definite title, and no easy way to determine
whether or not they were published.

One of the images I looked at
today was a picture from the La Follette family papers, a wonderful picture of Belle Case La Follette doing grassroots suffrage campaigning in 1912 in Wisconsin.

I've spent hours trying to search for the name of the photographer that was written, penciled, on the back of one of these photographs. And if I come up with the right Emily Chenoweth, she died in 1972, which means that this unpublished image would be under copyright until 2042 and I have more hours of research to try to do genealogical research to figure out where are her heirs.

The lack of certain information is a dilemma our researchers face every day and they're looking for reassurance from us to use their school project on YouTube, or to make a documentary, or to use an image in a textbook and we cannot give them that reassurance.

So because they fear legal consequences, they walk away from the opportunity to understand the images and to
share that understanding with other people.

Copyright considerations are having a
seriously chilling effect on poorly documented
historical photographs.

So the same safe images are
getting used over and over. We're getting a
skewed view of history and truncating our view
of history.

Custodians of historical
photographs, like my division, are also losing
the opportunity to benefit from the public's
knowledge and research energies.

We've found that our best chance
of identifying poorly documented photographs
is to share them on the web. We've shared
images that because of their date or source
have no known copyright restrictions and
viewers have helped us to learn who and what
the pictures show. They've helped identify
the photographers. They've helped us
understand the context in which the materials
were made.
But we cannot make available the very photographs that would benefit most from crowdsourcing because the images lack the information that we need to establish their rights status. So hundreds of thousands of photographs at this point are being lost to history.

MS. CLAGGETT: Yes, Dan, then David.

MR. COHEN: I just want to underline what Barbara said which I really appreciated. And I'll put on my historian's hat, which is what I am by training.

Historians and students in the past few decades are increasingly looking at visual material in addition to textual material in their work. And that's true across the board -- from K-12 researchers who want to find and want democratic access to the historical record all the way through to professors like myself.

And so when you exclude certain
kinds of information, I think what you do is
you return us to an age where all the
knowledge was considered to be transmitted
textually.

And I think we live in a very
visual age. I think the 20th century and the
early 21st century has a tremendous visual
record that it would be a real shame to
exclude from these kinds of new research
methods. And so I think we do need to take
what Barbara said greatly into consideration.
Thanks.

MS. ROWLAND: I wanted to ask a
follow-up question to Ms. Natanson. You
mentioned the age. And can you be a little
bit more specific about timing of that?

MS. NATANSON: Well, just to pick
a number out of my head I was looking at
photographs 70 years or older, older. So
that's 1944.

We have plenty of images in a
newspaper photograph collection. You would
think a newspaper photograph collection would
have been very consistent about crediting
images.

But going back to the nineteen
thirties no, they were not. I found a great
image of a homeless man on Brooklyn Bridge,
1931, just as the Depression was getting
underway. Absolutely no credit on the back,
no way to know what the right status is of
that image.

MR. COHEN: If I could just add
another brief example on this. On Halloween
last fall, Digital Public Library of America
provided access to hundreds of photographs of
kids wearing Halloween costumes from the past
century. And this included photographs from
every single decade going back to 1910.

And I think it's a really good
example of how you can look at trends over
time, what kids wore in different times. I
think gives everyone, from a kindergartner
really interested in what kids their age wore
in the thirties or the seventies or the nineties, a good sense of that.

These don't need to be full-scale images, but I think providing, again, that access provides a real view into history that would be lost if we didn't have that kind of democratic access.

MS. CLAGGETT: David, then Charlie.

MR. HANSEN: So, first I just wanted to clarify, I didn't mean to imply earlier that commercial versus noncommercial intent with the creation of the work should factor into whether certain works are excluded. I think all works should be covered if there is a piece of legislation. That's just one of the things that might go into a determination about the use later.

The second thing I wanted to say was that when you're talking at least about library and archive uses they're not -- libraries and archives don't make uses of
individual works ordinarily where they're separated out and categorized differently as photographs and movies and texts. They make collections available.

And that's increasingly -- the way that libraries and archives get funding to do digitization projects, they digitize collections to tell a story about whatever the subject of that collection is. And to artificially remove specific types of works really devalues the collection and the real public benefit that you get from making those available.

And a lot of that, again, is tied together with the actual use of the work. I know we have these split apart. This session is on the nature of the work. But I do want to just get out there that splitting those apart is in some ways an artificial distinction. And so we should keep that in mind for this discussion.

MS. CLAGGETT: Yes, and we made
that artificial distinction just to foster the conversation, but I think you're right in terms of some of these issues do have interconnection. Charlie and then Mickey, then Jeff, and then Jane.

MR. SANDERS: Charlie Sanders, counsel for the Songwriters Guild.

There are certain communities of creators, songwriters among them, who have done a pretty good job over the past century in creating a database in which the tracing of origin and ownership is readily available to members of the public and the business community. And that's been out of necessity, in part, and opportunity.

With that said, and taking note of the fact that the performing rights organizations in the United States and around the world have an almost universal database of musical compositions, we would as a community wonder how it would be possible if a standard of due diligence was put in place that did not
protect all of these works from being
considered orphans. So, in essence, we'd like
to reserve our rights to ask that if the
standard of due diligence is not high enough
that musical compositions might be withdrawn.

The second point I want to make is
that, even though the community of songwriters
deals in the music area, there is tremendous
concern for photographs and fellow individual
creators. And our community, I think, stands
right next to the photographs and all of the
other creators in saying exactly what we said
before, that fair use cannot dominate
copyright and copyright be the exception to
what was formerly the exception. And we're
standing with you on that.

MS. CLAGGETT: Mickey, Jeff, and
then Jane and Alec.

MR. OSTERREICHER: Mickey
Osterreicher, NPPA.

We appreciate the concerns that
you all have in terms of trying to find old
pictures, pictures where you can't find who might have taken them.

But we would also ask, on the other side of the coin, for an appreciation for us with hundreds of millions of images being uploaded every single day to the internet, and the fact that many times the metadata of those images is stripped out and we have instant orphans in terms of the picture was just created but nobody has any way of figuring out who that image belongs to.

And yet under possible orphan works legislation, those images would be again susceptible to the same type of remedy limitations that you're seeking for the older works. So we need to figure out a way to have that conversation to protect our members and be able to have them earn a living while still understanding your desires as well.

MS. CLAGGETT: Jeff.

MR. SEDLIK: I agree with Mickey.

I was about to make that instant orphans
comment.

The PLUS Coalition is neutral on the issue of what should or shouldn't be in the legislation, so I won't comment on whether photographs should or shouldn't be included. We're not an advocacy organization. We represent the libraries and the museums as well as the publishers and the creators, et cetera.

But I will say that, having spoken with photographers all over the world and also being a professional photographer myself, that as soon as you push an image out to the web it's going to be an orphan within the hour. It's going to be picked up by a search engine spider. It's going to appear on a search engine and then it's going to be virally distributed all over the world without its metadata. No matter what a photographer or illustrator might do to identify their works short of putting a big stamp right over the center to obliterate the image itself, you're
not going to be able to keep your work from being orphaned.

The second part of my comment and your question in this first question is looking at the European Commission's Directive on orphan works.

And the Directive had to do with noncommercial use for cultural heritage purposes. And we've seen the UK pick it up and add commercial use. And also we've seen the UK adopt the Canadian system, which your office determined in 2006 to be a failed system.

The Canadian system was started, I believe, in 1988 or so — became functional in 1990, and in the years between 1990 and 2008, 18 years, it collected $70,000 in total. And I don't believe that any of that went to any rights holder, any individual creator. It was distributed to collecting societies. It was used to operate the system itself, and is generally considered to be a failed system.
I wouldn't want to see that system under strong consideration here again today.

And that Canadian system is: you find an image, you go to the Copyright Board of Canada, you make a deposit. And they determine how much that deposit is going to be. And if the creator ever surfaces, the money would go to the creator. But the creators don't surface.

In the UK, what they're doing is you pay a fee in advance based on the usage type and then it's for a limited duration. And you don't have the right to sub-license.

The copyright holder can then go in and search which images have received payment or which works have received payment and then make a claim and receive that money.

I don't have a high level of confidence that that's going to function well. My organization, the PLUS Coalition, is involved with the UK Intellectual Property Office and we're also part of the UK Copyright
Hub to enable searchers to find images rights holders and rights information.

I believe that the UK is really going about it in a good way in bringing all the stakeholders together to come up with a solution. I'm not quite confident that the Canadian system as implemented there is going to fly.

MS. CLAGGETT: Thank you. Gene, and then Alec.

MR. MOPSIK: I was struck by Mr. Cohen's use of the phrase "democratic access." And I'm not quite sure what that means, but I guess, on one level, I'm not sure it's good for photographers.

But I guess I would ask any of the folks from the library or folks who have these older collections. So I'm not talking about current works. If, in fact, they were able to use the work without penalty of anything other than what might be considered a negotiated reasonable fee for the use, would
that be some part of a system that they'd find acceptable? Or do they want to be able to use these works without compensation?

MS. CLAGGETT: I think you threw that out to everybody. So, after Alec answers, then any response in response to your question to the panel.

MR. FRENCH: Do you want the response first since it follows?

MS. CLAGGETT: Sure, if you're willing. Yes. Anyone who wants to respond to what Gene just said? David and then Anne. David.

MR. HANSEN: Sure. So, no, in terms of paying license fees for those works, for a couple of reasons.

One is that it's difficult even to identify within a collection what group of works you would be talking about to obtain a license.

So, like I said earlier, when a library digitizes things and puts a collection
up online, it's not just photographs in there. There's newspaper clippings, there's record books, there's letters, there's diaries. There's all sorts of things put together there.

And so going out and trying to parse that collection and split it apart into these atomic little parts here and pursuing licenses for each of those different types in and of itself would be a huge cost on the library.

MR. MOPSIK: But if the rights holder -- I guess I should have been more specific in what I meant. And I don't know if it was understood. That if, in fact, that work were still in copyright and those rights were owned by some, either the estate or some rights holder.

MR. HANSEN: Oh, yes. And libraries do that now. When they find works that are owned by someone who they can identify they go and seek permission.
Although more often than not, in the cases that we have heard about, people are more than willing to give permission for free. When they hear that it's a nonprofit use and that it's going to be used in a library collection, very seldom are rights holders asking for fees.

And that, I think, is something that's generally worth noting is that libraries and archives have been putting up orphan works online for awhile now. The Library of Congress American Memory Collection has orphans in it.

And when rights holders come forward the responses are typically either positive -- they're happy to see that their works are being made available online -- or they have some concerns that are usually not copyright-related. It's very seldom, in the reports that we've heard, that copyright holders are actually coming forward and are concerned about copyright issues with those
works.

MS. CLAGGETT: Anne and then Dan.

MR. COHEN: I'll explain my democratic access comment. I think for a lot of students, researchers, and scholars around the world you have to physically go to these archives to see some of these images that are in this gray area.

I mean, I think if we step back a little bit, what we're talking about here is we don't want to infringe. As Dave just mentioned I think libraries do not want to infringe on the rights or on the living of illustrators or photographers or anything like that.

But what we are dealing with here is a tremendous gray area where unless, as Barbara I think so eloquently put it, we are able to provide more democratic access to more of this gray area where it is hard to find works. After all, that's the whole point.

Without someone buying a plane
ticket, coming to the Library of Congress, going to a specialized archive to find it. If we can't provide more democratic access, not fully infringing maximal access of the kind that infringes, we're not talking about that. But we are talking about spreading the availability more in this gray area in a sensible way. And I think if it's difficult to understand my example of the Halloween costumes then I don't think we're getting what that democratic spirit means.

MS. CLAGGETT: Anne and then Alec.

MS. GOODYEAR: I would, on behalf of the College Art Association, echo Dan Cohen's point that members of CAA I think are extremely -- are not interested in infringing upon the rights of rights holders.

I think what we're interested in promoting, with respect to proposed legislation on orphan works, is simply access to visual works that might not otherwise be
subject to scholarly scrutiny, to extended
creative use on the part of artists.

And, of course, if there were
legislation proposed that would enable the
creators of works to identify themselves to
possible -- or to identify uses of those
images that may have been inappropriate, if
fair use is not found to be an adequate
defense, we understand that it might be
reasonable to look at some licensing scheme
that would enable a rights holder to come
forward and claim that. But of course we are
interested in limited liability of course so
that risk can be averted and these works are
not bottled up.

MS. CLAGGETT: Alec.

MR. FRENCH: Thanks. So, again
on behalf of the Directors Guild, I'm not here
to advocate that motion pictures be excluded
from orphan works legislation.

But I think, again going back to
the conversation this morning, you have to
figure out ways to treat different types of works differently because they present different challenges.

And when you're trying to figure out what the balance is, I was kind of struck by the democratic access comment of Dan's and the public benefit comment that David made because that was reflected this morning.

And I think, again, you've got to take a step back. I mean, we're hearing a lot about the public access, democratic access, benefit of different user communities being able to use works that might be orphaned or might be hard to find the copyright holder for.

But we're not hearing a whole lot, again, about the creator's rights here. And that's what I think we need to balance that against.

I mean, again, we're talking about, when it comes to directors, we have not just economic rights, not just internationally
recognized moral rights, we have
internationally recognized human rights.

The 1996 International Convention
on Economic, Social and Cultural Rights
recognized the human right of all people to
the protection of the moral and material
interest derived from any scientific,
literary, or artistic production of which he
is the author.

Universal Declaration of Human
Rights, the same. Et cetera, et cetera.

Every internationally recognized human rights
document says we have human rights in the
moral and material interest.

So when you're figuring out, gee,
it's a little bit hard to find the author,
it's a little bit hard to track this down,
yes, maybe. This goes to Eugene's comment
earlier.

But maybe it should be when
you're talking about implicating, affecting,
degrading someone's human right. So, let's
have the discussion on both sides, understand
t heir interest on both sides that are
implicated here.

MS. CLAGGETT: And I'll go to
Charlie in one moment but that is a good segue
into my next question, which is assuming, for
example, that we do cover all works and don't
have an exclusion of any particular types of
works -- should there be specific provisions
in the legislation that address different
works differently?

I know in previous bills there
were specific provisions that did attempt to
address photographs, for example, having --
waiting until a database had been established
and that type of thing. So, if we do include
all works, are there specific provisions that
we should take into account depending on the
type of work implicated? But I'll go with
Charlie first before we start on that
question.

MR. SANDERS: You know, I was
going to comment on Alec. So maybe if you
want an answer to that you could come back to
me to follow up on Alec.

    MS. CLAGGETT: Okay, great. So,
does anybody have any response to that general
question? If we do include all works, should
there be specific provisions in terms of how
we handle the variety of works that would be
covered under a legislative solution. Lisa?

    MS. SHAFTEL: Lisa Shaftel,
Graphic Artist Guild.

    I know that we all realized years
ago when we were discussing this, there is no
one size fits all solution. There's no one
size fits all solution for visual works, or
any other classes of works, or any type of
user, or any type of search.

    It seems to me, in all that we've
discussed over the years, there's three
different categories that we're discussing
here that we're all calling orphan works.

    And it seems to me that there's
really only one true category of orphan works under the law, which are works when the copyright owner was a corporation or some sort of legal entity that wasn't an individual. And that legal entity doesn't exist anymore. They went bankrupt. They shut the doors, walked away. Whether it was a publisher, an ad agency, a production company, a small studio. Maybe they filed for bankruptcy. Maybe they just gave up one day and shut the door and stopped paying rent and walked away. And those works, quite literally the copyrights are owned by a legal entity that doesn't exist anymore. Those are true legal orphans.

And then we're in the area of what Jay Rosenthal brought up, which is termination rights, or reversion of rights. And maybe that needs to be revisited because the creator or the authors still exist but that legal entity doesn't. That seems to me to be a pretty easy solution.
Then we're off into unlocatable copyright owners. We have a name. We can't find them for any number of reasons.

Then we have the unidentifiable. And that's what we're talking about in visual works is that more often than not there just is no name. And then how do you search? And the age of the work is entirely irrelevant. Because something could be created last week and not have the creator's name on it.

For example, the average American supermarket, and we've all been there, has 47,000 products for sale on the shelves. And every one of those products has product packaging that has an illustration or a photograph on it. Because the vast majority of Americans buy products by looking at the pictures on the package.

It's just standard industry practice that none of those images have the creator's name on it. And you could call up Kraft and say, I want to find the illustration...
of that rotini. Good luck. And that could have been created, you know, a month ago and that product has been for sale, you know -- commercial use in the marketplace -- for I don't know how long. So, just to say that something is old.

And we've all seen the popularity of older photographs and older illustrations and graphics being used again in the marketplace, because retro is cool.

And if anyone's worked in the photographic industry and television and film production we all know how easy it is to create scenery and props and costumes that look old-timey. So just because something looks old -- Downton Abbey -- doesn't mean that the photograph or the film was actually made a long time ago.

And we are sympathetic to the users of old photographs, old films, old music. I mean, there are genuinely orphan works and there are noncommercial uses.
But in terms of any sort of distinction of the intent of the work when it was made to be used commercially or not every illustrator creates a plethora of works and maybe one or two end up being used by the client who commissions us. The others are rejected.

Those were created with the intent of them going into the marketplace but they weren't used.

And we all know that, whether it's a photograph or an illustration or fine art, there is a lot of works that were created a long time ago by someone that had no commercial value for any number of reasons at that time and at some point in the future become valuable. So none of those are cut and dry, one size fits all qualifiers.

MS. CLAGGETT: Thank you. Maria, then Bruce, then Charlie. Or Charlie after Maria I guess. Maria.

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

For us, our 27,000 members and about the same number in direct members are primarily portrait and wedding photographers. So for us, the vast majority of creative works that are produced are to hang in people's homes and offices as mementos and family documents.

These works may or may not be marked for aesthetic reasons but it is industry practice for our photographers to either watermark the images, emblazon their studio name on it, or mark it on the back. After a number of years of hanging on a wall framed or being adhesed inside of an album, that information disappears.

Recognizing that this is a reality, something that my office does on a daily basis is talk to users, or would-be users, of these images in trying to locate a photographer -- be they a current member, past member, or somebody that may have purchased a
studio. So this is something that we grapple with on a daily basis in recognizing that photographs do need unique treatment under any orphan works legislation or best practices that are developed.

MS. CLAGGETT: And just to follow up really quickly, you mentioned unique treatment. Is there a specific way that you want photographs to be treated under an orphan works system?

MS. MATTHEWS: Having a clearly defined reasonably diligent search requirement and ensuring that reasonable compensation is attainable by the photographer.

MS. CLAGGETT: I'm going to go to Charlie because I know that you had your hand up earlier. Then Bruce and then I think Jeff over here.

MR. SANDERS: Yes, two quick points to follow up on. I thought Alec's very cogent comment about creator's rights sometimes being lost in panels like this
because there are no actual creators most of
the time on these panels.

We have on the one side advocates
for fair use as part of democratic process.
And on the other side we often have attorneys,
some of whom have practiced in the arts and
some of whom have not.

If we had a combat photographer
sitting here, whether it was a 90-year-old
woman who got off a Higgins boat in 1944 on
Omaha Beach, or somebody who went into
Fallujah with a camera with the 1st Marines,
it would be a lot more difficult to make the
argument with a straight face that this is a
one-sided affair in terms of what serves the
democratic purpose and how broadly we want to
interpret what an orphan work is and what the
standard of due diligence should be. I think
it's important to make that point.

And hearing directly from creators
who put themselves on the line whether
economically, physically, or otherwise, when
they're actually sitting in the room it's a lot harder to be dismissive of that.

The one other point that I wanted to make was just a clarification of the title of this entire roundtable grouping as orphan works and mass digitization.

Because a lot of the people that I spoke to in the songwriter community were a bit confused on the one hand and dismayed on the other that somehow a linkage was being made between the discussion of orphan works and those works, as we just discussed, might truly be parentless as in corporations and the idea that a massive corporate apparatus like a Google might walk in and under some rubric related to orphan works say that they had the right to digitize every copyrighted work in the world.

I just want to be sure that there was no nexus intended or existing between those two concepts.

MS. CLAGGETT: And we did receive
a lot of comments in terms of people wanting
to have the Office consider those issues very
separately, orphan works versus mass
digitization. Although that was an issue that
kind of was touched upon a little bit in our
2006 report but not explored in detail. And
obviously, given recent case law, mass
digitization, it is very timely to consider it
as well.

I think I had Bruce, Jeff, and
then David. So Bruce?

MR. LEHMAN: First of all, I
think the remarks that were just made were
excellent and would apply to our case as well.

And I would also point out that
we actually did have a creator here, maybe the
only one for these whole two days, with vast
experience. Brad Holland. And indeed he was
cut short and was only able to make one
intervention in the last panel.

Your question, however, is if
we're not going to exempt clearly certain
categories of works, then is there something else, I gather, that we could do to provide certain special kinds of treatment for certain categories of work.

And let me start out by saying that I don't think that's very easy to do at all. I think it's virtually impossible. I think that, to the extent that that is something that's good to do, that the present system of fair use largely addresses that problem.

And I'd like to again just get back to sort of some fact-specific situations. Because I think it's very difficult to understand what we're talking about if we deal just in generalities.

And I tried to describe a little bit about what the practical problems for medical illustrators are.

But the argument that we seem to be hearing for -- the strongest argument for some kind of orphan works legislation -- is
that it is needed to -- because we have to
provide democratic access that permits users
to make maximum -- take maximum advantage of
new digital technology. And this puts us in
a completely different situation than ever
before in American history when everything was
print and libraries and so on and so forth.

Well, first of all I think we
have to question that. I think if we really
think that, then maybe we ought to go and
amend the Constitution, take out Article I,
Section 8 and perhaps we should repeal the
entire copyright law and go to an entirely new
system.

Mr. Love pointed out this morning
that he was working in the patent area on a
system of prizes. By the way, that is his
position. Now, perhaps we should abolish the
Copyright Office and set up a system of
prizes. And then we wouldn't have a problem
at all. Everybody could use anything they
wanted.
But I want to get back again to fact-specific situations. The most sympathetic case for orphan works is the case of the archive of historical records where works are involved that are very important for researchers, or just important for people to have access to, where it is extremely difficult to determine the provenance of the work -- largely because they were not really created for public distribution in the first place. They happen to be a part of personal letters. They were photographs taken of family members, or maybe even photographs taken of a historical figure by some long-dead photographer. And maybe they weren't published and therefore, because of common law copyright, they're still in the public domain -- they're not in the public domain, I mean. So I think that it is reasonable to permit access to those kinds of works in a digital archive that, for example, is a
library of a kind that we have heard.

The question is, however, is what are going to be the limitations on that access? This sort of gets into the fair use question.

It may well be fair use for a college library to basically digitize its archive of historical records simply to make it easier for researchers to have access who otherwise would just come into the library.

The problem that we have, however, with regard to a lot of works and that's particularly true in this case of medical illustration, isn't that, you know, I don't think medical illustrators have any problem with a doctor going to the library and having access to a medical journal that contains their work. And indeed it is the case that many of those institutions do provide, at the current time, digital access and that's not a problem.

The difficulty is that if the
institution that has created the archive does not properly provide protection for the subsequent use of the work, you have a very serious problem.

And in the case of medical illustration, what that would mean is that someone would come in, they would have access to the digital library, and then they would basically download that image and then reuse it for some other purpose.

For example, they might even reuse it to use in another medical journal. They might think well, rather than hire a medical illustrator, we're just going to basically rip off this article. We will strip off the credits or the copyright information and then we'll use it in this new article that we're writing where this particular illustration would fit the subject matter of the article.

That is happening already, by the way, because a lot of these images get out
online and it has an absolutely devastating
impact on the livelihood of medical
illustrators and other illustrators.

And I want to point out, finally,
that we've heard a lot about how these
archives and universities and so on and so
forth don't have any money. Now, by the way,
Harvard University, who was represented here
this morning, is one of the wealthiest
institutions on the face of this planet. So
let's not talk about poverty.

Who are the people who don't have
any money? Well, they're professional
illustrators, by and large. And visual
artists in general. There is not a single
visual artist that I know of, including the
most successful fine artists, who basically
isn't a sole proprietor. They're just one
person working in a studio.

And in the case of medical
illustration, sometimes you have a small
studio with three, six people working
together. But they are virtually sole
proprietors.

They're having a hard enough time
making a living right now. And then the
burden is supposed to be put on them basically
to go out and enforce their rights. And in
previous legislation, actually basically we
would have had a compulsory license for
anything that found itself as an orphan,
whether it was through no fault of the artist.

And their remedies would be
restricted to actually getting sort of a
proper royalty fee.

Well, one of the big problems we
have in copyright in general is that it's a
federally preempted right requiring you to go
into U.S. federal district court. I've been
a lawyer for 40 years. I've been in a lot of
big law firms. I know what law firms cost and
what federal litigation costs.

You can't even get a lawyer
basically to draw up the complaint, even
remotely get it, probably get him to sit down in his office and have a discussion with you -- a lawyer competent to go into U.S. federal district court -- who wouldn't cost you more than the royalty that you would get under the previous legislation. So I think we have to keep those things in mind.

We talk about democracy. We have to be looking at the people who actually create stuff in this country.

MS. CLAGGETT: I appreciate it.

And I will say that previous legislation talked about having a small claims study to address some of those issues. And we'll get into that perhaps tomorrow when we talk about remedies. But we do have an outstanding report and recommendation to address small claims.

I last, I think, had Jeff, then Rachel, then Mickey, and then David.

MR. SEDLIK: Okay, Jeff Sedlik from the PLUS Coalition.
Bruce, just one correction. You said that Brad was the only creator to have appeared on the panel. I've been a photographer for 32 years. Gene's been a photographer for 32 years. Mickey. We've got Graphic Artists Guild illustrators over here and photographers over there. If anything, we have a rather disproportionate number of people in these proceedings. And thank you very much for giving us these seats.

The question on the table is, if all the different kinds of works were to be added, should there be any distinction between them in the legislation?

And I would only say that because of the particular concerns that Mr. Holland brought up earlier, which have to do with just the quantities of works created by artists. I have close to 850,000 images that I would have to determine how to get into a registry, even though I'm leading the charge to build the registry.
Photographers, photojournalists, might create 2,000 images a day, 10,000 images a week. How do they keep up with getting those into registries? And so, whatever is passed, there needs to be some kind of provision that allows sufficient time, if registries are part of the diligent search process, for the rights holders to get their works up and into the registries.

The previous round of legislation did have that. I think it needs to be a bit longer.

And secondly, I think that there needs to be a notion of repeat diligent search but in such a way that it does not generate undue cost for the people searching.

One example, and the way that we're approaching it within PLUS, is when you do a search of the PLUS registry network you can save that search and you can ask the registry to repeat that search automatically and notify you should the rights holder emerge...
and eventually register that work. So it gives the rights holder a fair shot.

Lastly, one particular concern about visual works and particular photographs is that photographs often picture individuals. Individuals have rights, they have the right of publicity, right of privacy.

And just because a work might be cleared for use through some kind of orphan works scheme doesn't mean you can actually use that work. And then we get down into state law. But I do think that it does need to be part of the conversation.

MS. CLAGGETT: I think Rachel, then Mickey.


In our most recent comments we reiterated our support for the framework of the 2008 Act and we still think that's an appropriate way to balance wanting to have a high-level set of principles that guide the
diligent search for all types of works.

But then there could be more flexible standards and best practices that are developed under the guidance of the Copyright Office in order to keep pace with the technological changes that we've heard a lot about this morning and that are surely to keep coming.

So I think that strikes the middle ground in order to be able to provide as simple a solution as possible that applies to all of the works but then addresses the significant concerns that there are with the various types of works.

MS. CLAGGETT: Anne, and then Gene.

MS. GOODYEAR: College Art Association likewise supports a great deal of the 2008 Shawn Bentley Act.

However, Karyn, you had raised specifically the question of whether a registry should be a requirement of orphan
works legislation and that would not be something that CAA would see as a necessity.

MS. CLAGGETT: And I'm sorry, Gene, actually I had called Mickey and forgot to ask for him. So Mickey and then Gene.

MR. OSTERREICHER: Just real quick, just a point of clarification. One of the most difficult things I think an attorney has to do is to understand what his clients do. And, having been a photojournalist for almost 40 years, fortunately at least my clients don't have to explain to me the problems that they see being squeezed from all sides. So, I mean that's probably why I'm as passionate as I am about the advocacy here.

We really appreciate the fact that the Copyright Office issued their report in favor of a small claims board and I guess we're going to have that panel tomorrow so I won't go into that. But certainly we see a linkage there as if there's going to be any type of orphan works legislation, there needs
to be some buy-in of the people that want to
participate in that to also agree to
adjudicate any claims in the small claims
board.

MS. CLAGGETT: Gene?

MR. MOPSIK: I guess I want to
support what Mr. Lehman said earlier, without
going into any detail.

But I think ultimately the real
question that we're looking at here is whether
or not creators can profit in some ongoing
manner from their creations, and whether they
have the ability to sustain a living today.

And whether or not, with the
continued expansion of fair use, whether or
not there is ultimately any value to
copyright. I know that for many of my members
-- between their inability to bring action in
courts, as Bruce pointed out, with the cost of
federal litigation and the erosion or the
appropriation of their works under a fair use
mantle -- they feel pretty disenfranchised.
MS. CLAGGETT: David.

MR. HANSEN: Yes, I just wanted to make a comment about the framing of the question. So we've heard a couple of things about human rights and kind of the integrity of authors. And I think it's important to keep the focus of the purpose of proposed orphan works legislation.

So in the Copyright Office's 2006 report there was a nice statement in there about how really this whole thing is intended to alleviate situations where productive uses of copyrighted works are foregone because owners cannot be located.

And I think that falls well in line with the constitutional purpose of copyright. Copyright in the United States exists to promote the creation and dissemination of created works. The owner is a secondary consideration and the public is the primary beneficiary.

And I think that's important to
keep in mind when talking about how legislation is potentially designed to alleviate those concerns.

And we just heard a comment about participation and those who are interested in this legislation. I think it's important also to keep in mind -- on the library side, because they are some of the largest holders of orphan works -- that if they're not willing or able to make use of proposed legislation, it's really not achieving its intended function.

And so, for example, diligent search and item-by-item level that has a high standard similar to what the European Union has put in place with the Directive wouldn't be of much use to U.S. libraries and archives.

MS. CLAGGETT: Charlie?

MR. SANDERS: Yes, forgive me for being blunt but that was a series of conclusions unsupported by fact or Constitution.
The United States Supreme Court said, in the Nation case, that copyright protection is the very engine of free expression. That is the law of the land and regardless of however you want to couch it, your interpretation of Article I, Section 8 is not supported by fact.

I also want to go back to say that the music community, songwriter community anyway, supports the small claims issue and is very pleased that that's been raised in the context of this conversation.

MS. CLAGGETT: I think I'm going to go to Barbara. You're going to get a response from the secondary comment. But if you want to respond and then we can go to Barbara on that.

MR. HANSEN: Sure. So, I actually have Sony v. Universal Studios up in front of me and I was reading from that.

MS. CLAGGETT: We're going to have a legal debate here.
MR. HANSEN: "Copyright law, like the patent statutes, makes reward to the owner a secondary consideration. . . . The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public. . . ."

MS. CLAGGETT: And we could get into a long debate about whether artists and authors and creators are part of the public and should be considered in there as well.

MR. KASUNIC: We can take administrative notice they've said both things.

MS. CLAGGETT: Right. Barbara?

MS. NATANSON: And I will frankly confess I don't know what the solution is. But again, just addressing the age of the materials, I just wonder whether there could be some sliding scale or some different best practices depending upon the age of the materials. Because different kinds of sources, and different relevance of certain
kinds of tools, is going to be affected by the age of the materials. It's certainly possible to make materials look old.

And I would think one of the criteria is how do you prove that the material is old. Because in many archives and libraries we know when we got the materials, so we know it's got to be older than when we received it.

And oftentimes, whereas you don't have much other information, you do know the date of the material because of what it depicts or because of internal content.

But I would say that some of the registries, while they may really help our researchers who are trying to use more recently made materials that could be very useful, it's hard to envision some of this historic material -- 70-75 year old material -- getting entered into a commercial registry that would be of any use to the researchers and the kinds of images our researchers are
MS. CLAGGETT: Dan?

MR. COHEN: Sure, yes. We're kind of getting here toward the end. I'll try to bring us together a little bit.

MS. CLAGGETT: Yes, please do.

MR. COHEN: Rather than the spirit of division.

And I'll start by saying I'm also a creator. I've written a few books. Actually, one of them was published by Johns Hopkins University Press. And so I think for a lot of people they're actually on both sides of this equation here.

I think most creators are also consumers or readers. I think illustrators, for instance, take inspiration from older illustrators. And so really what we're talking here about is how can we both be. And I really do want the illustrators and the photographers to make money. I mean, I would love to make money off
of my non-best selling book from Johns Hopkins University Press.

(Laughter)

MS. CLAGGETT: If anybody wants to go out and buy it now.

MR. COHEN: It's on the history of mathematics in the 19th century.

(Laughter)

MS. CLAGGETT: Very, very scintillating topic.

MR. COHEN: You can gauge the -- but after all, right, most things are not those famous photographs or perpetually commercial works from 70-75 years ago.

And so, I think, what we're really trying to get at here I think, really, is in the middle -- someplace where people like me, we might want to be authors, we might want to write, we might want to be photographers, but we also want an expanded realm of access to things.

Again, as best as we can do, I
think as we come together on this point of how we can expand some reasonable amount of access.

I was actually very heartened by Bruce's comments about -- and I should have emphasized early on about those Halloween photographs -- they indeed do come from archives and they are of sort of unknown provenance.

And so there are realms like that that I think we can work together -- where we're saying we don't want to be like, and in fact Digital Public Library of America hates, the Twitter accounts that steal the photographs from these commercial publishers and publish them. We are only publishing stuff where we have had a sense of who wrote this stuff -- is it okay to re-publish? All those things brought into the metadata, all that stuff.

And so I think we need to work together to think about what is the maximal
realm that we can put into that which, after all, all of us as creators also need to draw from as a common storehouse, right?

That is, I think, in some ways part of the copyright law. I am not a lawyer, but it is to draw from something to also produce something, to learn about the history of photography, to learn about the history of illustration.

Even things that are commercial -- I can tell you as a historian of science -- fade into a point where they're also in some sense a work to be drawn from. Vesalius's diagrams of the human body were at some point a commercial book, actually sold quite well. But then at some point they became the stuff for historians and other illustrators to work from. And so we need to figure out where that midpoint is as things recede into the past how can we provide maximal access to that record, wherever it may be, so that others can draw from it. And indeed be creators and make
money from it as well.

MS. CLAGGETT: I think we're actually getting close to the end. I'll go with Kelly and other final panelists, Mickey, who want to speak. And then we're going to open it up to the audience for a few minutes. So, Kelly.

MS. ROGERS: I'd just like to say that I think, at the Press, I come from both angles of this. Because I not only license permissions but we also obtain them and acquire them.

So I've spent -- the Press is 100 years old -- we spent hours researching historical images to see if we can trace heirs, estates, family members. I think it is important to do that background work and not just to say it has a certain date, it's free for someone to put in a commercial product and make 10,000 copies of it without any due diligence at all.

On the other hand, I do get a
little concerned about mass digitization,
especially since I have seen certain books of
ours that are assumed to be public domain and
aren't. But vendors are picking them up and
then binding them and then selling them. So,
a lot of my time is now chasing those
companies that are popping up all over.

I think that if you use the same
criteria that you do for fair use in
considering those special exemptions --
images, letters, whether they're pieces of
poetry -- when we're trying to decide
legislative concerns I think that would be
helpful.

MS. CLAGGETT: A flexible
approach.

MS. ROGERS: Right.

MS. CLAGGETT: Mickey.

MR. OSTERREICHER: I think our
fear is that, while we understand what it is
that your needs are, that should orphan works
be enacted that the language be so broad that
it would allow -- and we all recognize that there are many people out there that are very predatory, that infringe with impunity, and they would use this as another tool to limit any type of recovery by people who truly -- those works are not orphan, they just have not been able to be identified even though in good faith they put that metadata in there, they did everything within their power to do it.

So we've got that on one hand.

As Bruce said, you know, trying to bring a copyright infringement claim when you're a press photographer and only want $100 or $200 for your work and somebody says that's fine, but it'll be a $10,000 retainer to bring that into federal court, it makes absolutely no sense. Because, even if you pay that, there's no guarantee that you'll get your $200 back if you were silly enough to enter into that type of an agreement. So we really do have to try and work together.

And I really commend the
Copyright Office for having this roundtable
discussion so that we can better express our
concerns to one another and maybe find a
middle ground here.

MS. CLAGGETT: Thank you. David?

MR. HANSEN: So, when the
Copyright Office issued its 2006 report on
orphan works it had a really nice list of
factors that would have gone into the
consideration of whether a given search was
reasonable.

And I won't read them out here
but I just wanted to note that they were a
very thoughtful set of considerations that
really were pretty flexible but gave some
leeway within them for organizations to kind
of figure out and feel for themselves what
would be acceptable.

And one observation that I've
seen several people make is that the nice
thing about those factors is they track pretty
well to the fair use factors that we all know
and know how to deal with in a pretty
consistent way.

MS. CLAGGETT: Thank you. Any
final comments from the panel? Because I'll
open it up for the last nine minutes to the
audience in case they have any.

So I will open it up to the
audience with any specific comments that would
you like to make about the type of works that
should be or should not be included in any
orphan works solution.

MR. COURTNEY: Kyle Courtney.
I'm from Harvard University. And so I just --

(Laughter)

MS. CLAGGETT: He does have a lot
of money.

MR. COURTNEY: I mean, we have
money. The library does not have an endowment
that is as large as this. We're a nonprofit.
We employ medical librarians. We employ
research, teaching, photograph fellows who
make medical illustrations for research, for
teaching, for classroom study. So you know, medical illustrations do exist for educational research purposes. And we hire and pay these people to do this. But we are a nonprofit academic library.

If we find a rights holder, we get permission. I mean, we do. The majority of that exists there, if the use necessitates it.

I just want to -- we are information professionals. We are not crimson pirates. And I just want to make that very clear.

(Laughter)

MS. CLAGGETT: Thank you, thank you.

MS. PENROSE: Hi, I'm actually from the Museum of Fine Arts, Boston, and I think we have a special interest in photography because we want our photographers to be successful. We need artists that are represented in our collection to be successful at what they're doing so that they continue to
create and, hopefully, we can continue to
session their work.

At the same time, we're also
interested in making sure that the public has
access and, for that reason, I hope that we
share similar interests in creating a nice
balance with copyright offices.

My concern, I guess, was some of
the more extreme positions -- of categorically
excluding works from orphan works legislation
-- is not wanting to throw the baby out with
the bath water.

And I'm sure both sides will
argue about what the baby is, whether it's the
copyright holders' rights or public access.

So I guess I would just encourage
the Copyright Office -- in whatever
legislation, if legislation is ended up
crafted -- to make sure that however you do it
that you're really looking at -- bad actors
are always going to be bad actors. If someone
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
14 MS. CLAGGETT: Thank you.
15
16 MR. SADOWSKI: Hi, I'm John
17 Sadowski from Wikimedia District of Columbia.
18 I want to talk a little bit about how the
19 Wikimedia projects use photographs, especially
20 since it's a somewhat unique setup.
21
22 So the Wikimedia Foundation has as
23 its mission to make educational material, such
24 as Wikipedia, available to the world for free.
by individual users from around the internet contributing photographs.

Sometimes these are public domain works. Sometimes these are works that are user-generated that have been freely licensed.

Since there have been some comments about medical illustrations, that's a good example. We have a lot of articles that are illustrated by pictures from the 1918 edition of Grey's Anatomy. Well, in 1918, everything after -- almost everything after 1922 is under copyright.

And then we have images that are fairly recent. For example, if somebody has a medical condition, they might take a photograph of themselves and use it to illustrate that article.

Our interest in orphan works is that there is a huge gap in between -- of works that are simply not at all available to us. And, obviously, we care very much about copyright. We routinely check the images that
people upload to make sure that they conform
to copyright.

And we don't want to have people
take an image off of Tumblr, for example, that
somebody else had taken out of a medical
journal and stripped out the metadata. That's
not what we want.

What we want is to be able to use
these images where, truly, the author is not
known. Because they're maybe not 1918 old, but
somewhere in that gap to be able to use it,
not only for medical illustrations but for
historical images especially is very important
to us. Thank you.


MS. CONSTANTINE: Hi, my name is
Jan Constantine. I'm with the Authors Guild.

I'd like to talk about the
HathiTrust -- not the lawsuit, but what led us
to the lawsuit. And one of the reasons why we
sued was because the HathiTrust, in the
infinite wisdom of many of its members, which
were higher education institutions, decided
that they were going to take the orphan works
issue in their own hands after the Google case
settlement was not approved.

And what they did was they
decided that they were going to identify
several books, 167 to be precise, that were
orphan under their eight-point, eight-step due
diligence. And if nobody came forward in the
90 days that they had put them on their
website -- that I'm sure was not looked at by
90 percent of the world -- they were going to
issue them as full display use to their
community which, we believe, is over 250,000.

Within one week of filing that
lawsuit we found six living authors, two
candidates that were actually in print,
literary rights that were left to charitable
or educational institutions. The James Gould
Cozzens estate was left to Harvard, so maybe
that will make you better off than you are
now.
(Laughter)

MS. CONSTANTINE: One was a literary agent. And some of them actually had e-book contracts that were in place, waiting to be published.

We had these books -- and we only, we found 50 of the 167 in one week. And then HathiTrust decided also, in its infinite wisdom, that they were going to suspend the program because of the lack of efficient due diligence.

So, this is the danger of having institutions like libraries and even ones that are so distinguished as the University of Michigan's library to take things in their own hands in terms of orphan works, because that would have been devastating.

And that was just the beginning of the program. They were going to research what was in the public domain, or what was an orphan, and then they were going to let them go for the world to see. So this has to be
stopped.

And that's why it's important, what you're talking about, to get some kind of consensus as to what a due diligent search is and not let amateurs do this and potentially destroy creators' work and marketplace. So thank you very much.

MS. CLAGGETT: Thank you. With that, I think we're actually going to close. Oh wait, do we have one more? Yes, of course, HathiTrust. Thank you very much.

(Laughter)

MS. MICHALAK: I'm Sarah Michalak. I'm the chair of the board of governors with the HathiTrust Digital Library.

And I have to say that we did the project that was -- we put out the project that was described. But it was determined that that project was not working right, we pulled it back.

So in a sense we learned a lot
and I think we taught the community a lot. It is a benefit to all of those rights holders that they were readily uncovered. Again, this is -- readily discovered -- a benefit of the technology that we utilized. Crowdsourcing is one of the best ways to get to the truth that there possibly is.

So, I recognize what the speaker says from her perspective, but I think that HathiTrust and the University of Michigan did the right thing.

MS. CLAGGETT: Thank you very much. With that, I want to thank all of the panelists and participants for this session. We'll have a quick 15-minute break and go with the last panel. Thank you.

(Whereupon, the foregoing matter went off the record at 3:31 p.m. and went back on the record at 3:44 p.m.)

MS. ROWLAND: Okay, thanks for coming back. We're going to have a really exciting panel this time, I think, because
we're going to be talking about the types of uses.

And yet again, before I start I have to read the thing about the video so please bear with me. I will try not to do a dramatic reading although I think it would be nice at this point.

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

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

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

And with that, I think we'll go around and say our names and the organization we're with very briefly. I don't think you
need to hear who we are anymore at the Copyright Office. We'll start with you.

         MR. CARROLL: Okay, great. I'm Michael Carroll. My day job is a Professor of Law and Director of the Program on Information Justice and Intellectual Property at American University.

I'm also on the board of Creative Commons, Inc., which is a nonprofit headquartered in California and the Public Lead of Creative Commons USA, which is the U.S.-specific country project of Creative Commons.

And I'm here in my dual capacities as a scholar of copyright law who's studied the ways in which we tailor the law through statutory licenses or otherwise, and sort of -- I've published some guidelines about how and when that does and doesn't work and want to contribute that.

And then Creative Commons USA has a particular interest in knowing when you need
a license and when you don't because a lot of people get confused about that.

MS. PRESCOTT: I'm Leah Prescott, the Associate Law Librarian for Digital Initiatives and Special Collections at Georgetown Law Library.

MS. GOODYEAR: I'm Anne Collins Goodyear, President of the College Art Association.

MS. GRIFFIN: Jodie Griffin from Public Knowledge.

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

MS. KOPANS: Nancy Kopans, General Counsel, ITHAKA which houses JSTOR, Portico and ITHAKA S+R.

MS. RESS: Manon Ress, Knowledge Ecology International.

MR. COLLIER: Dan Collier, Chief Legal Engineer for the Durationator at Tulane University.

MS. SHAFTEL: Lisa Shaftel,
MR. SLOCUM: Chuck Slocum, Writers Guild of America, West.


MR. COURTNEY: Kyle Courtney, Copyright Advisor, Harvard University Libraries.

MR. COHEN: Dan Cohen, Executive Director of the Digital Public Library of America.

MS. ROWLAND: Thank you. I will say we do have an extra microphone. I don't know if anyone wants to move. If you don't, that's fine. But we have an extra one if anyone ever gets crowded.

So right now, we're going to talk about the commercial versus noncommercial uses. As everyone knows, in the prior legislation it covered both commercial and noncommercial.
In the time that's passed there have been other countries that have done other things. The EU has only limited their Orphan Works Directive towards noncommercial uses, but the UK has expanded it.

So I wanted to start off in, I guess, a very broad question before we get into the nitty-gritty of what is a noncommercial use is. What do people think about having any orphan works solution be applicable to both commercial and noncommercial uses? Ms. Cox?

MS. COX: So, from our perspective, it's very important to have any orphan works solution apply to both commercial and noncommercial. Because the distinction, from our perspective, doesn't really make sense. It can become fuzzy really easily.

And there's also arguments that not-for-profit uses are still commercial and vice versa. So I think actually defining noncommercial and commercial gets very, very
tricky. So, we think that any legislation should apply equally, that any narrow carve-outs for certain types of commercial uses or noncommercial uses could reduce the value of that type of legislation.

One of the solutions that we think might be better than making a distinction between commercial and noncommercial is kind of taking a lesson from the fair use factors, in particular the fourth factor which looks at the effect on the potential market. And that might be a more appropriate way to look at it rather than trying to say that commercial uses are not applicable.

MS. ROWLAND: Okay, Mr. Courtney?

MR. COURTNEY: Sure. I'd agree with a lot of what my colleague says. Library digitization projects -- which we talked about, you know, mass or collections or otherwise -- are not initiated, generally, to be developed or sold as commercial products --
generally -- but to stimulate new scholarship, new findings, getting the very part of what we talked about earlier, promoting the progress of science and the arts. That's why we do that.

Digitization, mass or collection-specific is a form of leveraging technology that can resuscitate old materials, derive valuable new information. And this clearly sits in the field of noncommercial.

However, we understand that commercialization may happen later as the market dictates.

And I would just echo that the first panelists mentioned there was the possibility of nonprofit libraries, et cetera, kind of serving as a commercial front maybe to get stuff digitized and then introduce it to the market. And, you know, we don't take that approach. We take a similar approach to fair use where we already have in the tests a balancing and the first factor actually,
commercial versus noncommercial.

So I'd agree that while the initiation of these mass digitizations that are occurring at our libraries are noncommercial in nature, I don't think there would be an objection to having commercial uses which may satisfy everyone at the table as well. Thank you.

MS. ROWLAND: Ms. Shaftel, and then we'll go around the table that way.

MS. SHAFTEL: Lisa Shaftel, Graphic Artists Guild.

I think that any professional illustrator, photographer, or graphic artist would have absolutely no problem explaining to you what commercial use is. This is how we earn our living. We create visual works and we license them to different users to use in different uses in different media. And the value of the work is determined by its use, what media it's being used in, and for what purpose. And what has little use today may
have a lot of use in the future.

And our value in licensing is also determined on exclusive rights and licensing exclusive use to certain clients or certain users.

No author or creator can compete with free work. And once copyrighted works, copyrighted images, are allowed to be used in the marketplace as alleged orphans, it's going to result in a very quick accumulation of a large collection of images that are still protected by copyright that most likely have very living, working, and breathing illustrators, photographers, and graphic artists who aren't getting paid for the use of that work. And we can't compete with free work.

Free erodes copyright protection and it erodes the value of the works. Someone is taking something of value without paying for it.

We're not asking for more, we're
asking for enough. We're asking for enough to
make a living. Not to survive, but to make a
living selling our work -- creating and
selling our work.

MS. ROWLAND: Okay, I think Ms. Ress was the first to raise her hand over
there.

MS. RESS: We work for consumers
and we are a consumer organization.
Nevertheless, we believe the distinction
between commercial and noncommercial uses
could be okay as long as the noncommercial
uses have more liberal procedures and greater
access, of course.

We also believe that commercial
uses need a path to access. In a way
consumers, consumer groups too, believe that
there needs to be a path, a path to access for
more stuff that's over there, but legal
access.

So we rely on commercial,
commercial publishing, whether it's for
textbooks or for all sort of activities and uses. I'm thinking, for example, of YouTube, which is a commercial publisher, for example, that consumers love. So, consumers are always well served -- not always, but very often well served -- by private interests.

And we think it's important to find a path that would reconcile both commercial and noncommercial uses.

MS. ROWLAND: Ms. Kopans?

MS. KOPANS: Well, I think a lot of it is contingent on the use involved, too. And I find myself really on both sides of this divide. I think maybe for preservation, there's value in a commercial entity undertaking preservation services.

Access might be different. And there are different types of access. There's large-scale access. There's access that's monetized. Sometimes it's monetized for the sustainability of a project that could be for a nonprofit. That could be a public good.
Sometimes it's monetized for individual enrichment.

So I think these are some of the things we'd want to be considering taking into account -- the very real interest of the rights holders in wanting to make a livelihood.

MS. ROWLAND: Ms. Goodyear, Mr. Carroll, then I'll go to Mr. Adler and Mr. Slocum.

MS. GOODYEAR: The College Art Association believes that orphan works legislation should apply equally to the commercial and noncommercial sectors.

And this has to do, really, with the uses that our members may wish to make of orphan works. Many of our members, which include practicing artists, art historians, curators, art publishers operate in noncommercial sectors.

But often their activities shade into commercial sectors as well. For example,
practicing artists may seek to sell their work in galleries, and scholars or curators may wish to publish with commercial presses. And for this reason, we think that it becomes extremely difficult to try to bifurcate these categories of practice. So we advocate equal coverage for commercial and noncommercial uses of orphan works. Thank you.

MR. CARROLL: Yes, I want to agree and suggest that that framing of commercial versus noncommercial is unlikely to be productive for some of the reasons you're hearing.

If you're going to have a license, a license should pick up where fair use leaves off. And we can have disagreements about where that line is. But we should be talking about licensing uses beyond fair use and then ask the question -- is there a problem that the market's not solving with respect to those uses?

Because, certainly, just the act
of digitization is reformatting -- it's save-as. It's no different from taking a WordStar file and turning it into a .doc and taking an analog file and turning it into a .doc. You're just reformatting the document. That doesn't need a license. That's a fair use.

Text mining and doing computational research on that data doesn't -- that's a fair use -- doesn't exercise the exclusive rights because it's not even reproducing the work in copies.

But it's when you make it public that we have the fair use conversation. If you're now making it publicly accessible -- for what purpose, to what audience, under what terms? And there's going to be a fair use zone with respect to, certainly, to the librarian archives.

And then we've heard that the commercial sector feels like they're likely not to qualify for a fair use. And so there might be a targeted zone in that space for
some kind of legislative solution where the author or rights owner cannot be identified, where the use is clearly commercial, and therefore we can't get a negotiated solution.

That would be the place of market failure. That would be the place for legislation to find a fix.

MS. ROWLAND: Thank you. Mr. Adler, and I'd like to add something on that perhaps you guys can also respond to.

It is how do commercial enterprises use these orphan works? How often does it come up for the commercial enterprises and how has that worked within the business models that you guys are involved in?

MR. ADLER: Well, just to answer the first question before I answer your other one. I think we have to be very careful to avoid adopting these kind of caricature-ish notions about the public interest and what commercialism is about, and that the two are
somehow mutually exclusive.

What we're talking about here, in
its basic terms, is the idea that there are
many copyrighted works that society does not
get the benefit from because of these issues
involved with whether or not permission needs
to be obtained, and whether or not there's
somebody available who actually can provide
the permission that is necessary.

But the fact of the matter is
that there are a wide spectrum of interests
along what is considered the public interest,
and that includes commercial use of these kind
of works.

To answer your question, Catie,
for example, in the publishing industry --
where three-quarters of the players are
actually considered small businesses --
they're not the Simon & Schusters and
HarperCollins' of the world.

In that business, the way in
which these works would be used is as largely
embedded and incorporated works in the works
that publishers produce for the market.

They may range from photographs
and other images to small works like poems.
They may involve letters that people have
written. Some of that material may have been
published. Some of it may not have been
published.

But the point is that when you
publish a book on a subject there are many
times that there is the need to publish within
that work other works in order to be able to
fully cover the subject and to be able to
expose what those works' significance is to
the subject that is addressed.

And, for that reason, I think
that our interest as the Association of
American Publishers extends from the many
nonprofit publishers who are members of the
organization right through the work of the
commercial publishers. Because we are used to
having to license the use of other people's
The issue of orphan works is really just a question of whether or not, ultimately, someone is going to have to obtain a license, or whether or not they don't have to use a license because they have followed a scheme that is meant to address the situation where there is no one who can grant the license, at least no one who could be found.

MS. ROWLAND: Mr. Slocum?

MR. SLOCUM: I agree that the distinction between commercial uses and noncommercial uses is going to be problematic. It's a very blurry line between those two.

And I would say the same thing about the references earlier to whether something was made with commercial intent or not. Something that was made that may not have initially seemed like it had value could have great value.

But another terminology point that comes up when I'm thinking about the
variety of uses is the terminology "orphan works." It seems to me we're really talking about orphan rights with regard to certain works.

Because you can have works where certain rights have been orphaned but other rights not. It's very common in our environment in film and television in Hollywood that the writer retains certain rights, particularly to an original work where most of the rights are conveyed to the producing company but they retain the right to, for instance, the stage adaptation or to write a novelization or whatever.

And so if the producer is defunct, the writer may well still retain other rights that the producer may, to the public, seem to own but they don't. So the split rights problem, I think, will come up a lot.

One instance that I would point out is where the right may not extend to just
anyone in the public, but a writer often will
sell a script to a producer. And if the
producer goes out of business, the writer has
a right to retain, to reacquire the right to
a script if it wasn't produced.

And so if the producer doesn't
exist they can't reacquire the right. And so
it may be actually not the right to take a
clip from the movie or whatever, but an
unpublished, unproduced work -- there may be
a rights holder who can't be made whole
because the work is orphaned. And so they may
have their rights that could be solved by such
a policy as an orphan work policy.

MS. ROWLAND: And are there
thoughts on how -- and I know Mr. Adler talked
about this and I think you did too, Mr.
Courtney, about how there's kind of an
intertwined nature of having a commercial and
noncommercial. And the difficulty in kind of
trying to parse those out.

So I'd like to hear a little bit
more about people in enterprises that you
might think are really noncommercial but,
depending on whatever the definition of
commercial might be, might also have some sort
of commercial aspect that, once you start down
this road, it might make it a little more
difficult to disentangle everything. Ms. Cox?

MS. COX: So, I mean I definitely
think that the commercial and noncommercial is
often -- can be intertwined.

For example, Google, as a
commercial entity, can make noncommercial uses
for the benefit, for example, of persons who
are blind to make accessible format copy of
works and are able to do so at a much faster
rate than some nonprofit institutions can.

And the reverse is true too. And
I think that some lessons can be taken from
the patent perspective.

And in the Madey v. Duke case one
of the concerns is that the plaintiff in that
case argued that Duke, even though it is a
nonprofit institution, was in the business of education.

And that hasn't happened, to my knowledge, in the copyright sector. But of course sometimes those distinctions do get very, very fuzzy, and I think that's part of the difficulty.

And just aside from that, I think we have to recognize that, as I mentioned earlier, the Association of Research Librarians doesn't really see a need for orphan works legislation because from the perspective of libraries, we're quite happy with the recent fair use jurisprudence and we feel like fair use is working quite well for libraries.

So, in order to make -- if you do have orphan works legislation -- in order to make it effective, I think you really have to think about the commercial users. If you're thinking about libraries as nonprofit institutions that can already avail itself,
and has successfully availed itself, of fair
use, you have to think about how to make this
legislation effective and not just redundant.
And I think you do that by applying it also to
commercial users.

MS. ROWLAND: Mr. Courtney and
then Mr. Adler.

MR. COURTNEY: So, to quote a lot
of -- we're quoting a lot of copyright's
greatest hits today. Even Harper & Row has
said copyright is intended to increase and not
impede the harvest of knowledge.

So we're talking about, you know,
let's say we go through a library digitization
project and we find some orphan works. We
digitize them, we put them online.

A scholar comes along, visits our
collection or finds it online and then
suddenly wants to write an article about that.
They write an article. Now, where does the
article end up? In the hands of a publisher
who's a commercial entity. So here we have
maybe not entangled, but we have a kind of
transformation from a noncommercial activity
that turns and uses that work and may have to
go into a publisher's hands.

And then a lot of times, as we
know, publishers will be like, well, where are
the rights that you need to use these images,
these works, these photographs so we can
publish this into a book and/or a journal?

So I view it as not so much as
tangled as a transformative kind of moment
where nonprofit activities turn into
commercialization activities.

MS. ROWLAND: Mr. Adler.

MR. ADLER: Well, one might have
hoped that some of these issues that we had
spent a lot of time discussing when the 2008
legislation was pending might have advanced a
little bit but I see this is one that really
has not.

(Laughter)

MR. ADLER: We had discussed at
that time, for example, the quandary of trying
to deal with this idea of nonprofit
institutions like museums and art galleries
that nevertheless have shops that sell what
are essentially commercial, very high-quality
commercial books of their exhibits. And they
do so, of course, in competition with other
publishers of similar types of works.

And so there's a question of how
you would consider that situation when you're
dealing with an entity that has a nonprofit
tax status but is engaging in commercial
activity.

We also spent a lot of time
discussing questions of whether or not uses of
orphan works should be treated differently in
terms of whether or not, for example, on one
end of the spectrum it was somebody who takes
an orphan work and uses it to create a new
work of original expression as opposed to
whether or not a publisher would take an
orphan work, something that has sort of sunk
into obscurity over the years, and reintroduce it to the reading public merely by republishing that work without any alteration in its content.

Both of those things have great merit if you consider what the basic premise, as I said before, is of orphan works. The idea that these are works that are not benefitting society right now because people are concerned about whether or not they have the right and ability, without running into the potential for facing infringement liability, to go ahead and make those works available.

So I would hope that, if we're going to consider the merits of orphan works legislation, we would consider them in terms of the broadest array of possible activities that make works available to the public that previously were not available to the public because of the inherent problem of orphan works.
Because that's really the benefit that I think is maybe the one area we all agree could come from orphan works treatment, that works previously not available to the public now can be made available to the public in a variety of different ways.

MS. CLAGGETT: And I would just interject there. Then maybe there might be some people who would want to respond to this directly. But I know that this was an issue that was discussed and in the 2008 bill they did have a provision in terms of kind of addressing whether reasonable compensation would be needed if it was a noncommercial activity and actually preventing even the reasonable compensation in those particular cases.

MR. ADLER: And, if you remember, we used the phrase that nobody likes, which is "without any purpose of direct or indirect commercial advantage." And the reason nobody likes it is because nobody can agree on what
it actually means in practice.

MS. CLAGGETT: But, not to bring
up something that no one likes, the question
would be: would a provision like that that was
in the 2008 legislation address the various
concerns that we've heard in terms of not
actually creating a distinction between -- an
official distinction -- between commercial and
noncommercial as to whether it's covered at
all by the provision but having a unique
treatment under the provision for certain
types of uses? So, whether that proposal is
one that we should continue to think of as a
good proposal to think about in the future.

MS. KOPANS: So I think there is
potential for confusion between the activities
of a tax exempt and non-exempt organization,
and between conduct that's undertaken for
money or not. And sometimes exempt
organizations charge money for certain things.
There's just a private inurement issue there.
So whatever gets decided or proposed needs to
address these kinds of things.

And I can speak to an
organization, for example, that digitizes
content, some of it might be orphaned, and
charges a subscription fee for access. And
that organization is a tax-exempt
organization. There is no private inurement.
The funds are for the sustainability of the
project. But there is a fee-for-service
business model.

And I would worry that if
commercial activity were excluded, that kind
of activity could be, or at the very least the
definition of what is commercial activity
should be, carefully tailored to allow for
projects that insure the sustainability of
these kinds of activities.

I also do want to add on that I
think that part of the discussion here is --
a question I have is whether this is kind of
an embellishment of fair use and adding kind
of definition to fair use, or steps beyond
fair use. And that's sort of part of the story and that's something Michael had raised at the other end of the table.

Because there are instances where fair use might more clearly cover some of the activities.

MS. ROWLAND: Mr. Carroll?

MR. CARROLL: So, I mean the language I would recommend is rather than use this as an effort to try to do anything to the scope of fair use, just agree that there's a disagreement about the edge. But the language could be very easy. Any use that exercises one of the rights enumerated in Section 106 that does not fall within the limitation of Section 107, dot dot dot.

Now we might disagree about exactly what that use is, but you've said it exercises an exclusive right and it's not fair use. And now we can talk about diligent search. We can talk about whether it's compensated or not. But you can leave that
threshold showing to be litigated if necessary. But just say there are clearly going to be these uses that we will all agree are not fair uses involve sort of commercial entities making, selling a work.

And, as Allan says, but there's this perfect piece to the puzzle of this new work that's an orphan, that you cannot find that copyright owner no matter how hard you look. And should the public be denied access to that piece of the puzzle? If that's the problem to be solved, setting up the threshold the way I just suggested leaves you the space to solve that problem without trying to muddy the waters around fair use.

MS. ROWLAND: And I think it will be Ms. Griffin and then Mr. Slocum. But that also brings me back to something that we talked about in an earlier panel about the savings clause.

And I don't know if anyone else had anything else to say about that. It was
a little bit not exactly 100 percent supported
in our other panel because some people were
concerned about how it would interrelate. But
if people have thoughts about that as well,
that would be great. So I'll talk to Ms.
Griffin and then Mr. Adler. Or Mr. Adler, and
then Mr. Slocum.

MS. GRIFFIN: Well, what I was
going to say is actually kind of similar to
what Michael Carroll said, but I'll say it
anyway and I'll try to build on it.

The number -- the types of uses,
obviously, that you can make of an orphaned
work are just as varied as the type of uses
that you can make of any copyrighted work. So
we think that it's important to have an orphan
works structure that allows for several non-
exclusive approaches that run parallel to each
other and don't impinge on each other.

So you could, for example, have
a limitation on damages after a reasonably
diligent search that doesn't supersede fair
use and the robust economy of creation that's built on the fair use doctrine.

So, I think it's important to consider the uses or the approaches that we could have in orphan works legislation that build on making more works available for subsequent uses, more creation that doesn't take away from what the public already has in the fair use doctrine.

MS. ROWLAND: And Mr. Adler.

MR. ADLER: As I said this morning, I think that we shouldn't think that there is this dichotomy between -- it's an either/or choice between fair use and having legislation that spells out the treatment of orphan works.

Because fair use is always there to deal with the situation where a use you would like to make of a work requires permission. And if you're not going to obtain that permission -- if you're not going to even bother to try to obtain that permission --
that's what fair use is there for you to
assert.

What we're talking about with
orphan works, though, is a different
situation. We're talking about a situation
where inherently you're dealing with a use
that would require permission, but for one
reason or another, you're thinking that you
don't want to assert fair use because if
you're wrong about that that leaves you fully
exposed to all the remedies of the copyright
owner if the copyright owner should emerge.

So we're still talking about a
situation that isn't addressed at all by fair
use and needs to be addressed if there is
going to be the ability to bring orphan works
to the public generally.

And that is the situation where
somebody wants to make sure because they can't
risk being subject to liability. They have
the ability to use a procedure that largely
avoids that liability.
Now, when we talked about the savings clause on fair use there's some controversy about that too. What I understood the savings clause to be important for was the idea that if, in fact, a copyright owner emerged, that shouldn't preclude the would-be user of that work from being able to assert fair use.

A different question came up.

What about the situation where somebody performed or claimed to perform a reasonably diligent good faith search but in fact didn't? Should they then -- when that is discovered, when a court, in reviewing the way they have conducted that search, decides that that isn't a reasonably diligent search -- should they then have recourse to a fair use defense?

Some people would say yes, other people would say no. That's a policy decision that would have to be made. But that's also part of the notion of a savings clause.

MS. ROWLAND: Almost like an
unclean hands situation.

MR. ADLER: Yes.

MS. ROWLAND: Mr. Slocum and then Ms. Goodyear.

MR. SLOCUM: Let me just agree with the distinction that in thinking about these uses, commercial and noncommercial -- to me, it's not relevant whether the entity is a not-for-profit entity. It's about the use, and what use it takes away from the rightful rights holders.

And my members, quite frankly, are on both sides of this. They're creators who have works that could be misused by -- misappropriated by -- someone trying to assert an orphan right that may not be justified.

On the other hand, they're also filmmakers who want to use clips or photographs or audio in a film they might be making, or might want to make a film of a book, for instance, for whom they cannot find an owner or rights holder. And so they might
want to make use of orphan work permission as well as make sure their works are not unfairly treated under it.

So anyway, it's -- I don't know how the policy is ever going to be decided with all these different uses and all these different cases. It's definitely a ridiculously complicated landscape.

(Laughter)

MS. ROWLAND: I guess unless we say everything.

MS. CLAGGETT: Flexibility, it sounds like, was one of the themes that came across, at least so far, in terms of being able to address the complexity.

MS. ROWLAND: I think it was Ms. Goodyear and then Ms. Cox.


There's no question that this is an extraordinarily complex question. And, actually, I find myself on behalf of CAA
agreeing with a lot of what has already been asserted around the table.

And I think one of the points that Nancy made, which is very important, is that many not-for-profit organizations avail themselves of commercial activities precisely in the interest of sustaining the not-for-profit mission. It's very often a vital income stream.

And I think that's part of the reason that it becomes very tricky to try to parse apart commercial concerns versus noncommercial concerns in this context.

And I think what a number of us are arguing around this table, and certainly CAA would want to add its voice to the chorus, is that our goal is to ensure that works that are perceived to be orphans are not cut off from public discourse simply because their rights status cannot be adequately ascertained.

And it's for that reason that CAA
does not see orphan works legislation as being incompatible with our very strong interest in fair use. And, in fact, we wouldn't want the two to be seen as being incompatible.

However, if a fair use defense is not appropriate under a given circumstance, or if it fails, we do feel that it's important for orphan works legislation to provide some sort of safe harbor. And indeed, we would argue that not-for-profit organizations deserve really a complete safe harbor from liability for the use of orphan works.

And this is not a desire to shirk our responsibility, or to shirk responsible licensing. It's simply to try to reduce the perceived risk. And to put things into the arena of creative interpretation, creative uses that we feel do serve the greater public good. Thank you.

MS. ROWLAND: Ms. Cox, Mr. Cohen, and then Mr. Slocum.

MS. COX: I just wanted to
respond to your question about the savings clause. Certainly, I think that savings clauses can be important and agree, in a perfect world, that it should not be an either/or choice between fair use and orphan works legislation.

But from our perspective, one of our concerns is that Section 108 does very clearly have a savings clause. And some people have argued that the savings clause doesn't mean what the plain language says it means. As Jonathan pointed out this morning, they argue that 108 specifically enumerates certain practice limitations and exceptions. And by -- when libraries rely on fair use, they're swallowing up the exception, they're making this exception irrelevant.

And so our concern is that even though we think a savings clause is very important, that you're going to run up against the same argument. So that's our concern with why we think the savings clause might not be
completely adequate.

MS. ROWLAND: Okay. We have some
more people. That comment has generated some
responses.

I would say I think that that is
an interesting point, especially if you are,
depending how risk-averse your library is.
So, for example, if you're a library who may
not have the funds or the sovereign immunity
to litigate an entire case, you might find
some solace in having some more specified
exceptions like 108.

I think it was Ms. Cox and Mr.
Cohen, Mr. Slocum, then Mr. Adler. I'm sorry,
Mr. Cohen.

MR. COHEN: Thanks. I wanted to
just agree with Ms. Goodyear and expand a
little bit more, I think, about what's going
on in her comments, which I think are really
important from my perspective as well --
running a large digital library that's for the
public and that's open access.
I think that there's some things going on upstream that, before we get to the question of whether something is going to be commercialized, it gets to questions of intent, particularly around scholarly use and student-based use.

There's often -- and especially it does often revolve around orphan works where we're trying to make wider access of these -- a lot of question marks. Libraries, archives, museums don't quite know what they can do with the mass of materials that they have.

But they do have some kind of if you want to call it pure intent at the start, which may down the road lead to questions of sustainability and where it's going to be published and these sorts of things.

But they do go into an act which often is one of mass digitization, which might catch in a very large net a lot of orphan works where they are trying to enable certain
kinds of uses that, I think, would normally fall under fair use or would be part of some kind of broader scholarly use that we would want to extend the realm to include under some kind of legislation.

So I think that's really critical, I think, to think upstream. And I noticed that even just the title of this panel is about users too and uses.

Before it gets to this question of how actually something ends up in a gift shop or just in a scholarly monograph or just in a student paper -- before it gets to that point, there's a lot that happens just from a pure intent use standpoint that often involves these works.

And that's where I think some more focus could happen before we get into what is, admittedly I think, a very thorny question about what commercial or noncommercial use is.

MS. ROWLAND: Thank you. Mr. Slocum?
MR. SLOCUM: Yes. I think I want to go back to the comment about nonprofit entities. I think any kind of blanket exemption or protection for nonprofit entities is far overbroad. It surely must be related to certain types of uses being made by the nonprofit entities.

I mean, you can't just have a library, because it's a library, be able to release a DVD of a Hollywood movie just because you can't find who the producer was. So it's with respect to certain uses perhaps. But I think it's really related to, as is the name of this panel, the uses, not who's using it for that purpose.

MS. CLAGGETT: And I think that was somewhat of the approach that was taken actually in the 2008 legislation. It covered libraries for certain uses -- the indirect or direct commercial advantage that no one liked apparently.

But if the panel has any specific
suggestions in terms of trying to address that
type of activity and define it in a way that
people would be comfortable with, that would
be good information to have as well.

MS. ROWLAND: Mr. Adler and then
Ms. Goodyear and then Ms. Griffin.

MR. ADLER: Yes, I think one of
the things that I would say, based on Mr.
Slocum's comment and some of the other
comments I've heard here today this morning
and this afternoon, is that we think of the
larger context in which the Copyright Office
is tackling this issue. We're now undergoing
this larger comprehensive review of copyright.

You know, it is the case that --
with respect to the way libraries, educational
institutions, archives are treated under
copyright law -- that to the extent we're
talking about whether or not their privileges
should be expanded or in other ways adjusted
for the digital age in order to accomplish
aims like the premise of orphan works
treatment, we may have to redefine what those
institutions are.

In this environment today, it's
very difficult to say what kind of a library
should receive certain types of privileges
under the law. We've been dealing with
libraries traditionally -- the notion of a
brick and mortar library which is a social
center in a community and a place where people
go to.

But we also now know that there
are libraries that have no physical presence.
They're completely virtual. And it's not
terribly difficult, apparently, to set
yourself up as a library on a website.

We see nonprofit educational
institutions, for example, many of them, some
that are members of the association are now
sitting on multi-million dollar funds that
they have acquired through programs like the
Bayh-Dole program that allows them to benefit
from funding of research by the federal government.

And then they, even though they're nonprofit institutions, are allowed to commercialize those inventions in order to be able to fulfill their obligations under that particular program.

So I don't think we should all be certain that we know exactly what these institutions are today or what they could be. And we shouldn't make assumptions about an issue like orphan works or mass digitization or any other by simply assuming that because those labels meant something 25, 30, 40 years ago, that they mean the same thing in the digital era today.

MS. ROWLAND: Ms. Goodyear.

MS. GOODYEAR: I would just note that, of course, the Shawn Bentley Act did indeed contemplate the granting of a safe harbor to not-for-profit entities. And actually CAA thinks that perhaps the scope of
activities contemplated there may need to be expanded, for example, to include scholarly publishing. So that question of the scope of activities would certainly be of interest to the College Art Association and something that we could consider expanding on in comments following this.

MS. ROWLAND: Ms. Griffin?

MS. GRIFFIN: I just wanted to point out I think so far in this panel we've talked a lot about education and scholarly uses by institutions. But there are also personal uses. And after all, at the end of the day copyright law cares about people creating works and using works.

So, when we think about personal uses, some of them have sprung up on their own and some of them are building on the tools and technology of institutions or for-profit companies that make collections available.

So, I think that when we're looking at the structure of orphan works
answers, we want to care about the uses by institutions that help their users, but we also need to make sure that the solutions are usable by individuals who might not be as savvy as an institution like a university library.

MS. ROWLAND: That's a good point, Ms. Griffin, and I wanted to actually expand on that -- and then we can also talk to Ms. Shaftel -- which is that there are a lot of individuals who might be trying to make uses of orphan works. We talked about the family photographs in an earlier panel and that kind of thing. And what do you do if you want to make a copy for your child or something like that and the photographer is -- you don't know who did it anymore, you don't remember?

And so I wonder if we could talk a little bit about what -- if orphan works, a legislative solution was to apply to all types of uses, would it be tailored in different
ways to different types of users? And I'm not really talking about noncommercial versus commercial versus nonprofit. More like large company versus individual versus small business entity.

And I'll turn to Ms. Shaftel but also I'd really love to hear from everyone else about that as well.

MS. SHAFTEL: Thank you. I wanted to address this notion of educational use and scholarly use. And, certainly, that's already permitted in fair use, as is preservation for archives.

I'd like to point out that there are untold Americans who earn their living creating educational materials, whether they're written works, including photographs, illustrations, motion pictures, musical works. So any notion that anything for educational use should be allowed for fair use, that's ridiculous. You've just wiped out an entire industry there and all of the creators'
licensing opportunities for educational use.

And we keep going back to the discussion of mass digitization of collections of libraries or archives. And again, a lot of this is permitted under fair use. And certainly not every archive and not every library is entirely orphan works. There will be some in there, but not the vast majority.

And I'd like us to remember the importance between keeping the issue of mass digitization of library collections and the noncommercial use or preservation of genuinely orphan works as two entirely separate issues.

The cost and the time involved -- of locating and contacting rights holders who did not include licenses for digital use -- does not trump copyright law, nor does it necessitate allowing the use and digitization under an orphan works scheme. This is the cost of doing business.

And I think that what most of the
cultural nonprofits want to do, in terms of
preservation and their collections and out-of-
print works and orphan works, is already
allowed under fair use.

And, certainly, a rights holder
would not object to, for example, a historical
museum putting up a poster or a photograph on
display in an exhibit about an event. But
once you take that photograph or that poster
and you reproduce it and you're selling it in
your gift shop -- and I know you need to do
this to pay your bills -- you're not making
your money from admissions at the door.

But that is clearly a commercial
use. And it's absolutely competing with the
market interest of the rights holder and it
may actually be violating exclusive licensing
contracts that that creator has with a client
either in the past or present. And the user
may have no way of knowing that.

So just simply saying that you're
a nonprofit -- that's a tax status and a
business model -- that has absolutely nothing
to do with how you want to use the work.

MS. ROWLAND: Thank you. I think

Ms. Kopans was next.

MS. KOPANS: So much will depend
on the remedies. That's a different topic.

But these things work in conjunction.

MS. ROWLAND: And I think you can
be -- I'm moderating the one tomorrow on --

MS. KOPANS: Yes, so I see

remedies is tomorrow.

MS. ROWLAND: So I think that we
can talk about that issue right now.

MS. KOPANS: Right.

MS. ROWLAND: Different types of
remedies for different types of users.

MS. KOPANS: As a placeholder
that there may be a different way to address
different types of uses in that context.

MS. ROWLAND: Did you want to say
something quickly about that?

MS. KOPANS: It just may mean
that things that are, you know, exempt-type
activities, and I'm not talking about gift
shops. I'm talking about collections of
content made available to other nonprofits for
scholarship. That might be one type of remedy
versus some type of activity that is seemingly
more commercial -- benefitting individuals,
not for a nonprofit purpose, and that's not
enrichment for individuals would have another
remedy.

MS. ROWLAND: Mr. Slocum.

MR. SLOCUM: I'll also have more
comments tomorrow on remedies, because I think
that's a very relevant aspect of certain of
these uses, that they should, if they're
permitted, be permitted with regard to certain
remedies being attached.

Like for instance, my members
convey the copyright of their scripts to
producers and are going to be paid residuals,
royalties, for the exploitation of that work.
And if someone's going to take up a work
that's orphaned later, a movie that's orphaned
let's say, and distribute it, they should have
to make those beneficiaries of the copyright
whole. Because, in fact, that aspect of the
copyright is not orphaned, it's owed to
somebody who's identifiable -- even if the
middleman is not found. So anyway, but that's
a little bit more for tomorrow.

I think on the question of
different users or different sort of, I don't
know, types of origination like home movies or
whatever, I mean I think that home video
"Charlie Bit my Finger" has probably paid for
the college of Charlie and his brother. And
surely that family has the right to that.

Well, that YouTube posting was a
home movie that was just posted for a family.
So it's very much like taking a photograph of
your kids in the backyard and wanting to put
it in a place where your family, who's far
away, can see it. And yet, it turns into a
commercially valuable thing. So I think it
has to be very carefully considered if there
are going to be carve-outs for sort of
personal uses. They could have commercial
value to those creators.

And it's a very blurry line where
you end up with things that are created with
a little bit more of an intention to -- for
commercial exploitation. Or by professional
creators who make their living from that, but
they do sort of a pet project or a personal
project that they put up on the internet
perhaps but it turns out to have value because
of their talent or whatever. So I think that
needs to be protected. It shouldn't be just
sort of released casually.

MS. ROWLAND: So there are two
different types of -- I guess we'll call them
personal for these purposes, personal creation
and then personal use. So I guess the
creation is the "Charlie Bit my Finger"
situation and then the use would be I get to
make my own copies of my family photos or
whatnot.

MR. SLOCUM: But the other blurry aspect is what is publication? Because putting it on YouTube is publication, but it's often just for personal, you know, to share with personal friends. But then it turns into a commercial use.

MS. ROWLAND: Mr. Collier.

MR. COLLIER: Yes, I wanted to just build a little bit on what Jodie Griffin said a few minutes ago about how the voices of private users are kind of getting lost in the shuffle here.

One of the things that Tulane University did in preparation for our reply comment was to analyze the differences in the initial comments from the first round of initial comments between the reply comments and the initial comments that were submitted to this most recent request.

And we found actually that, first of all, the initial comments for the first
round, there were over 700 of them, an
incredible number. And for this most recent
round we only had 91. So that's an incredible
drop-off in the number of people who are
participating in this discussion.

And, in particular, we found that
from the original 700-plus comments, only
around 10 percent of them were actually
submitted by formally identified
representatives of large interest groups. And
the rest were largely submitted by private
individuals who were speaking on behalf of
their personal concerns.

But with the most recent set of
91 almost none of those was actually a private
individual speaking on behalf -- and, in fact,
those few people who did seem to speak as
private individuals seemed to be saying
actually just in support of another group, you
know, I'm a private graphic artist and I
support the position of the Graphic Artists of
America.
So a lot of the private individuals who don't feel affiliated with any of the larger groups are simply no longer participating in this discussion.

And we think, at Tulane University, we thought that it was vital that we not lose sight of these people.

And, in particular, we were concerned about the idea of tailoring any legislation towards particular users or uses, even if they're nonprofit groups, even if they're libraries, because that would have the effect of separating the institutions who serve people from the people themselves that they're supposed to be serving.

MS. ROWLAND: Does anyone else have anything to say about that? I think that's a valid point, that it's hard to get people who are individuals who are out there using orphan works or wanting to use orphan works to make comments to the Copyright Office or try to participate.
Because a lot of times I think people don't even know what is an orphan work. They might have come across it in their day-to-day life and they didn't know it's an orphan work and they just kind of stopped using it or didn't mess with it because they didn't know what to do.

Does anyone have anything else to say about that? Ms. Cox.

MS. COX: I guess I would just add to that that the Shawn Bentley Orphan Works Act, I think, when it finally came out, or you know, when it came out of the Senate was extremely long, extremely detailed. It was like 20 pages long.

And I don't know that that makes it -- that level of detail and that length is a positive aspect for individual users, as Jodie said, who sometimes aren't as savvy or don't have the resources to understand what all that means.

MS. ROWLAND: Ms. Prescott and
then Mr. Cohen.

MS. PRESCOTT: Speaking from a practitioner perspective, I can verify that this -- the nature of the conversation today seems to bear out exactly what you found in your study.

And I think that you can easily include with the individuals very small institutions. And that they're going to have exactly the same fears and exactly the same difficulty in really even understanding -- and that's not meant to be insulting -- but to have the resources to really understand the nature of the conversation, never mind the risk aversion, to actually take action. And I think that that really is becoming more and more of a problem rather than less of one.

MS. ROWLAND: Mr. Cohen?

MR. COHEN: Yes. You know, our site serves a lot of just individual users who are just out there on the web. I think Michael Carroll and Creative Commons, as well,
I think is another place that people go and look for that sort of stamp of approval. I think individuals are already super confused by fair use. I think anything we add in here, if it's confusing a lot of lawyers, it's probably going to confuse the general public.

And so I think what happens in that case is that I think most people are actually -- we've talked a lot about bad actors, but I actually think most people are good actors. And I think we should try to tailor any legislation toward them as well, people who are out there using the Creative Commons search engine, or using the DPLA to find things where their rights are very clearly specified.

And so what I think you can do here is at least provide us with the tools. We're trying to provide openly available material with clear rights assigned to it. So that there aren't infringers who are just
going to a Google search engine and finding an image and cutting and pasting it, but actually trying to find a place that has the correct metadata and correct rights assigned to it. I think it has to be done at that level to at least be able to enable clearinghouses and other places where it's clear, for the average user who doesn't have to go through a mental calculation of multiple variables, to figure out exactly what they're doing with this material.

MS. ROWLAND: And that raises a question. I'll call on Mr. Carroll in one second and maybe you can address this as well. Which is that it brings up the treatment of different users not just in whether they should be covered but, for example, the threshold of the reasonably diligent search. Would it be good to have different types of reasonably diligent searches for different classes of users, or is that just going to cause more confusion for people. How is that
going to work. And I'll turn to Mr. Carroll.

MR. CARROLL: Well, so I wanted to follow up on Mr. Cohen's point which is I do think that trying to solve the problem after it's occurred is going to be very difficult, which is why the registry discussion that was taking place earlier may be a better way to address the needs of smaller users in making it incredibly easy to register your work and be found and be identified. And so putting some more energy and effort into that, and then maybe having some consequences to the rights owner who doesn't even, after we've used digital technology to make it incredibly easy to push a button and license -- or I'm sorry, identify your work and register your work, the choice not to do that might have consequences.

So other -- we borrowed from patent law before others -- other countries' patent systems have what's called a working
requirement. If you have an invention and you
have a patent right but you don't actually
commercialize the invention, then the rights
to do so can be given to someone else.

So I might limit the proposal only
to published works because I think the orphans
we're talking about are published works whose
owners can no longer be found.

But where you've done that, where
there's an easy opportunity to register and
identify yourself and hold your hand up and
you haven't done any of those things, then
privileging the use in those circumstances
would be appropriate.

MS. ROWLAND: Mr. Adler?

MR. ADLER: I just wanted to
comment on this view that somehow this is all
becoming way too complicated for individuals
who would like to pursue use of orphan works.

It probably is, like many other
things in society, and that's another reason
why you need to have the involvement of
commercial interests in this.

Because you can't depend upon

individuals who want to pursue the ability to
use a particular work necessarily if they're
not going to have the time, the resources, or
the knowledge or sophistication to do it under
a scheme that would be fairly sophisticated
and complicated.

But, of course, that's what

happens in society all the time where
commercial interests grow around the need to
provide certain services that the public
wants.

In many instances, those services
here can range from whether or not there will
be commercial search services to commercial
databases to just simply the fact of people
being able to say that they have heard about
a work and ask a commercial service to be able
not only to track it down, but to be able to
clear whether or not it can be used as an
orphan work.
I think the mistake that we should avoid making here is that we're talking necessarily about whether people, especially individuals, think that they're going to be using an orphan works scheme to allow them to necessarily use a work for free, without charge.

In society today, in many areas, people are willing to pay for value. If that value means that they get to use something that they otherwise would not be able to get to use and they can do so for a reasonable price through commercial interests providing that service to them, that's part and parcel of this picture.

MS. ROWLAND: Ms. Griffin?

MS. GRIFFIN: I think -- I agree that there are benefits from commercial entities coming up that can provide services to users. But I think that when we're talking about new legislation, we don't want to create legislation that unnecessarily creates the
need for those intermediaries. And to the extent that we can make the law as easy to use and as understandable as possible for individuals, that's the ideal solution.

MS. ROWLAND: And I wonder if there are any types of uses that we haven't already talked about today that are ones that are most of concern to people around the table.

If there are certain things -- obviously we've talked about library uses and individual uses. We talked a little bit about the commercial uses as well. But if there are works or types of uses that people want to discuss that maybe have not been talked about so much. And, also, from the writers community and the authors community to see if there are ones they're particularly concerned about. Ms. Goodyear.

MS. GOODYEAR: Well, an obvious use for certain members of the College Art Association might be the use of an orphan work
as an appropriated image in a work of art, in a work of fine art.

This then, of course, would shade into the question of whether it's a fair use. And we acknowledge, as we mentioned earlier, that we do not necessarily see an interest in orphan works legislation as being incompatible with the fair use.

But obviously fine artists, like scholars, do seek to make use of visual imagery of all stripes. And much of what can be located may not have a rights owner readily associated with it. And as I say, may actually be an orphan, or may be perceived to be an orphan.

And we recognize that, if something is perhaps mistakenly believed to be orphaned and a rights owner comes forward after the individual using that work has performed due diligence, that there may be a limited scope of remedies available to the infringed rights holder.
MS. ROWLAND: Anyone else have any specific uses they wanted to talk about? I think we can take a little bit of time if anyone wanted to talk about the remedy situation.

We will be talking about it tomorrow; but, I think we're going to be talking about so many different topics with the remedies if anyone has something they specifically want to talk about, commercial versus noncommercial, now this would be a good time. Okay, Mr. Adler and Mr. Slocum.

MR. ADLER: Well, I would just mention that one of the issues that had come up -- that was addressed in the Senate bill -- was the problem that you have. This is one of the difficulties of distinguishing commercial versus nonprofit -- was the fact that many nonprofit institutions, of the kind that some people think should be sort of the focus of this scheme, ultimately are state entities.

And due to a decision by the
Supreme Court, and some lower appellate courts now, state entities have what I think most people who work in copyright-based production of works would consider to be a very unfair advantage of not being sued for damages unless they consent to be used for damages even when they engage in the most blatant kind of infringement.

And one of the things that is a concern here is that if, in fact, we are still talking about a trade-off between a reasonably diligent search and limitation of remedies, the limitation of remedies for such entities is skewed then because they're not subject to being sued for damages anyway. So, it's not as if they get any particular benefit or they need to follow the scheme in order to be able to avoid statutory damages should a copyright owner subsequently emerge.

So, for them, the issue was the question of how do you deal with injunctive relief in an instance where somebody isn't
subject to being sued for damages. And that
had to be addressed in this issue in the
legislation. And I think that will be an
issue that would have to be revisited again as
well.

There was also a provision in the
legislation that addressed the question about
the use of orphan works to create
compilations, essentially. Again, this was
what I was saying about the spectrum of uses
range from whether you take an orphan work and
use it to create a new work of original
expression, one that is in itself
copyrightable, or whether you simply use the
work in the condition in which you found it
and you benefit society by making it available
to society again so that they can have
whatever benefit that work provides.

But there's also the question of
whether or not, if you were to produce a
compilation of those kinds of works, that
would be entitled to copyright protection in
its own right under a scheme like this.

So, there are many of these kinds
of technical questions, which is why,
unfortunately, it's really difficult to think
of any way of addressing orphan works that
isn't going to be highly complicated and
legally technical.

MS. ROWLAND: I guess the same
thing could be said for derivative works.

MR. ADLER: Yes.

MS. ROWLAND: So it happens with
those as well. Mr. Slocum?

MR. SLOCUM: And I think that the
-- what's becoming clear is that the type of
use that is involved is going to be tied up
with what type of remedy is associated with
that.

Because it's one thing to say
that someone should be able to take a clip of
a film and put it into another film. And
maybe they can't find the owner of the
original to get it actually cleared.
It's another thing to say that they can actually distribute that movie, that other movie, from which the clip came and actually publish it.

And, as I alluded to, often the right to remuneration, which is not established in law but is established as a practice in our industry by contract and is something that should be fulfilled. Just because the publisher or studio is not locatable, it doesn't mean that the actual creators with an interest in that work are not locatable.

And that also gets to the third party registries or the nature of the diligent search, because there are entities like our guild which have a lot of information about who these entities are. We know who hired the original writer to buy the script from them. We know who their legal agent for service is. We know if there's a successor to them that's filed a document with us to take over the
rights and the obligations. We know who the heirs are to the actual human author so that we can convey the royalties to the family.

So, there are entities out there that are specialized, that will have a lot of information about the obligations that are attached to a work and who the various rights holders or beneficiaries of copyright are.

But it's going to be, I think, very highly related to what uses you're talking about.

MS. ROWLAND: Ms. Kopans and then Ms. Cox.

MS. KOPANS: At the risk of conflating parts of the Copyright Act, I also wonder if there are any lessons that can be drawn from the termination provisions. Because both instances involve activity taking place -- assuming one is using an orphan work and a rights holder appearing on the scene saying wait, I want to change the framework here.
And there are some interesting lessons about remedies and how content is handled when it is in the midst of being used and a rights holder appears on the scene.

MS. ROWLAND: Ms. Cox and then Mr. Carroll.

MS. COX: Just on the point on remedies. I think this was brought up this morning by Kyle and also by Jonathan Band in the first panel.

Something that we think could actually be a very simple solution to the orphan works problem rather than having this 20-page Shawn Bentley Orphan Works Act is to just make a small amendment to Section 504 and to just say that courts -- give courts the discretion to remit or reduce statutory damages provided that the infringer shows that he made a reasonably diligent search and was unable -- in good faith -- and was unable to find the rights holder.

We think that that solves some of
the problems of not needing to define with
specificity what a reasonably diligent search
is, because you're not ordering the court to
remit damages, you're just giving them the
discretion to do so.

And they can take into account
factors of what the best practices are, what
standards are being used in the community to
address reasonably diligent searches.

And that gives courts the
flexibility to adapt changing standards,
evolving standards in light of new
technologies or new ways of performing these
searches.

MS. ROWLAND: Mr. Carroll.

MR. CARROLL: Following up on
that a little. I think focusing on the
problem that needs solving. And this goes to
the earlier conversations about orphan works
versus digitization efforts and the extent to
which those two belong in the same
corner.
So, with respect to remedies in the case of the orphan that currently needs reformatting from analog to digital, someone has to invest in that reformatting. And what I would hate to see is a remedies provision that undermines the incentive to create -- the value of the digitization in the first place.

So, I think it ought to be -- if there's going to be some acknowledgment about that sunk capital, basically which can then be captured by a rights owner who emerges after the fact, after somebody has digitized and then used. And so accounting for the value that was invested in the digitization ought to be part of the scheme if there's going to be a finely tailored remedies provision.

Otherwise, the amendment to Section 504 seems like a more elegant way to deal with this.

MS. ROWLAND: Okay. If no one else -- oh, Mr. Adler.

MR. ADLER: Well, just since we're
sort of repeating this discussion. But if you're going to take that approach, you still need to inform the court to some degree -- with objectivity and for purposes of uniform and consistent interpretation -- what is meant by a reasonably diligent search.

And if you're not going to do it through legislation, you would have to do it through regulation. You would have to do it some way.

Simply to say to a federal court -- your Honor, you go out and find all of these best practice statements and you decide which of them makes sense in each of these areas -- that's no way in which to provide for an evenhanded way in which orphan works policy can be administered.

MS. ROWLAND: Mr. Courtney?

MR. COURTNEY: I sort of agree, but best practices are used in a lot of other areas of law. They can be used in -- all right, I'll agree with that, for good or bad.
But they are adopted.

So, malpractice -- what would a lawyer do in your situation? That was faced in the same case. Medical malpractice -- how would a doctor, and a country doctor versus a city doctor? And they kind of use best practices.

Additionally, I think the UCC is just a best practice document that has been codified and it's gone through that cycle of being codified. And I think that's important too.

I think best practices can lead to coherent rules, if you will— aspirational goals. The Society of American Archives has had a best practices for orphan works since 2009. There's been no litigation regarding that, and they seem to be following it.

So I think it can inform the decision. It's not the end-all be-all, I agree. One judge and one jury member can mess that all up, absolutely, I agree. But I think
it can be a start.

MS. ROWLAND: Well, thank you.

And I think at this point we have time for a few questions from the audience if you wanted to do that. So, we're going to bring up the microphones and see if anyone has additional questions. It might be getting so late in the day people are just falling asleep. But here we have somebody.

MR. KATZ: My name is Ariel Katz from the University of Toronto.

I just want to add a few words for the distinction between fair use and orphan works solution. I can see a possibility that there also may be a timber line in the sense that, okay, things, activities that you have done before the owner emerges and then you couldn't contact, there is a clear market failure. You couldn't get permission because there was no one to get permission for. There ought to be greater leniency there.

But once the owner shows up and
says thank you very much for reusing my work and telling me what great potential it has, but now I want to get paid for it. Now there is an owner with whom you can negotiate. And then there may be a difference between how the work or your use is being treated from that point onward.

Now, there may be a difference between type of uses. So if the work is being incorporated in a book, right, it's an image in a book or incorporated in a movie, it's already there. You can't take it out. Then the remedy should take that into account.

But if what you do is like Amazon -- just print on demand the entire book and the owner shows up and says look, I'm the owner, stop doing that unless you pay me, and you can stop. There's nothing -- you can easily stop. Then you should, I think, have the full range of remedies from that moment onward.

MS. ROWLAND: Thank you. We have
another audience member.

MS. HOFFMAN: Ann Hoffman from the National Writers Union.

I just want to take a minute on these best practices. You say there have been best practices for archivists since 2009. I don't think that's a big deal. I think that's pretty contemporary and hasn't borne the test of time. I think to compare that to standards for malpractice, which have been around for centuries, for better or worse, is absolutely nonsensical.

And in this room today we've heard about probably 8 or 10 different codes of best practices that have been developed by somebody. I don't know if any author knows about the best practices in the industries affecting them.

And so I think we're putting the cart ahead of the horse. I think the creator of a work ought to have the rights that copyright bestows on him or her. And the
person who wants to use that work without
permission oughtn't to be able to hide behind
anything at this point.

MS. ROWLAND: Do you want to
respond, Mr. Courtney?

MR. COURTNEY: So they don't hide
behind fair use, they have that as an actual
right. And that's -- they can use a portion
of a copyrighted work without permission. And
it's in the law, absolutely. As far as best
practices, they have been around for hundreds
of years, I agree. But we have to start
somewhere. So just because 2009 isn't 1950
doesn't mean that we should discount them. We
should allow them to develop in these fields.

And additionally, if these artists
or copyright holders should be paid for this,
absolutely, I agree, they should be paid for
their work when uses are outside the scope of
fair use or some other transformative fair
use.

The problem is they're not
registered. We can't find them. Because we're talking about orphan works. I would never try and encourage someone to take someone else's work without permission if they clearly are registered, findable -- either through any of the stuff that we've talked about here, whether it's databases that are private or public, or the copyright records. I think there is a diverse array of ability for us to search for this. I think libraries have that special role because Congress thinks we're special. We have 108. We have 504(c)(2). We have lots of things that make us information professionals and we want to help with this.

But there are some areas we just can't help in, and orphan works is one of those, because we have no idea where to find these folks.

MS. HOFFMAN: Except that we've heard today of various organizations that identified orphan works which were not
orphaned at all. And a very simple search turned up that fact. So I think we're sort of trying to deal with a problem that is more in the heads of the users than in truth.

MS. ROWLAND: I think, with that, it's the end of our session. And so thank you very much for all of our participants and our audience members. We're going to reconvene tomorrow morning at 9 a.m. here in the Montpelier Room.

We're going to be mostly in the Montpelier Room tomorrow, but in the afternoon sessions we're actually going to head on down to our Hearing Room. So, please join us here and we'll talk to you later about all of this. Thank you.

(Whereupon, the foregoing matter went off the record at 5:00 p.m.)
increasingly 74:19
95:9,12 203:14
260:15 264:5
incredible 385:2,3
incredibly 39:8
240:14 241:2
391:10,15
Independence 1:9
independent 2:3,17
3:9 14:14 26:21
93:19 185:5 245:6
indicate 22:21
indicated 203:12
indication 189:15
indicators 53:12
indirect 178:9,18
354:20 371:19
individual 25:7
30:5 50:16 67:15
179:22 198:10
200:21 218:21
236:18 243:21
264:1 266:9
269:19 282:4
322:1 339:1 377:4
385:16 387:18
388:20 395:12
396:19
individualized 181:7
individually 41:14
75:6 127:7 301:5
306:17 367:6,11
381:7,9 385:12,18
386:2,19 388:8
389:3 392:18
393:3 394:4 395:4
inducement 56:16
industries 174:11
174:14 410:17
industry 2:6 3:14
14:18 100:12
140:13,14 156:7
158:7 161:4,8,8
161:13 176:6
180:15,15 186:4
100:12 353:12
398:8
infringer 47:19,19
48:1,7,22 403:18
infringers 47:2,7
389:22
infringement 48:21
54:17 256:17
316:12 353:12
398:8
infringement 225:21
276:4,17
infringing 345:19
195:3
inferred 53:21
inherently 361:6
inherit 193:2
initial 189:1 384:17
384:18,19,22
initially 345:19
initiated 333:21
initiation 335:3
initiative 7:8
Initiatives 330:5
injunctions 57:13
220:1
injunctive 17:14,18
398:21
innovation 56:16
inquired 32:18
inquiry 65:3,6
inside 286:15
insisted 47:1
inspiration 310:17
instance 69:22
199:8 310:17
346:13,21 363:21
381:18 398:22
instances 357:4
393:14 402:18
instant 267:9,22
Institute 201:5
institution 2:20
295:1 349:1 376:5
institutions 18:11
115:22 137:1
182:12 294:19
296:10 324:1,19
325:13 348:16
349:22 352:3
372:18 373:3,18
374:4,10 375:12
375:19 376:2
386:13 388:9
397:19
instructional 161:12
instructions 104:15
119:13
instructive 86:14
108:9 143:5
instructors 127:11
insulting 388:12
insurance 139:9,18
142:14,19 145:10
145:17 154:20
174:22
insure 356:16
integrate 192:1
integrated 187:14
Integration 209:16
integrity 71:5
72:19 305:5
intellectual 2:13,15
3:8 235:13 237:17
241:22 270:21
329:6
intend 172:16
219:4
intended 61:19
189:5 222:3
238:16 289:20
305:11 306:11
350:11
intent 132:8,16,18
132:20,22 171:21
189:3 206:15,16
208:12 218:16
263:13 285:2,9
345:17 369:5,15
370:15
Neal R. Gross and Co., Inc.
202-234-4433
Laughter

Neal R. Gross and Co., Inc.
202-234-4433
Page 456
95:11,22 96:12
97:4,10 98:2,18
100:8,12 101:20
102:9,10,11 105:7
107:14 108:13
109:20 115:19
119:19 121:7,7
122:12,14,18
123:1,5 124:13
125:5,18 127:14
128:3 129:8 130:5
130:10,13 131:4
135:3 138:4
139:22 144:12
146:16 148:8,20
149:19 152:1
153:2,9,18,20
154:6 155:6,9
157:10 163:6,11
165:21 167:7,10
173:10 177:16
178:15 179:6
180:1 181:5,6,8
181:17 190:8
195:14,16 203:17
211:2 212:5,5,6
218:20 219:11,16
223:11,15 233:10
234:15,17 242:15
258:5 268:15,16
270:15 281:17
283:7 287:12
300:7,14,19,20,21
302:1 306:14
317:10 321:11
326:4 357:21
359:22 362:12,15
362:16 389:15
390:1,18 393:16
398:12 401:16
403:19 404:2
406:6 412:10
413:1
searchability 190:9
218:1
searchable 164:20

190:13,19 198:8
242:12
searcher 102:2
105:4
searchers 104:18
271:1
searches 53:17
102:2,8 103:14
123:22 129:19
137:5 178:11
179:9 390:20
404:9,14
searching 53:22
96:7,14 104:14
105:18 120:6
122:19 130:17
133:15 152:6
233:13 234:13
300:16
seated 211:11
seats 299:10
second 12:5 34:21
35:16 36:3 51:16
70:17 73:19 76:19
87:15 89:7 133:13
134:15 145:10
187:12 212:9
215:11 220:17
225:15 243:5
253:6 263:19
266:6 269:3
390:14
secondary 305:20
307:15 308:3
secondly 300:13
section 39:12,12,13
39:15 76:12 83:19
121:3 153:14
292:12 307:6
357:14,16 367:8
403:15 405:18
sector 32:9 78:2,2
146:15 178:19
341:20 349:4
sectors 339:14,20
339:22

Sedlik 3:15 4:10
98:9 185:13,13
210:11 220:6
249:19,19 267:21
298:21,21
see 13:14 18:3,9
25:22 26:4 36:9
46:4 49:18 74:11
87:21 91:20 109:7
109:8 112:7
119:21 120:8
133:18 138:10
151:21 165:12
172:9 174:1
175:13 177:16
179:20 182:20
186:12 194:13
195:4,14 196:22
219:10 223:1
251:20 270:1
274:16 275:7
303:2,13,20
314:15 325:22
349:11 351:19
366:1 373:17
380:10 382:21
395:17 396:6
405:5 408:6,14
seeing 205:9 240:2
seek 19:8 38:14
108:11 273:22
340:1 396:10
seeking 37:12
141:1 267:15
310:1
seemingly 381:6
seen 8:8 17:4 72:8
72:13 252:21
269:9,10 284:7
315:2 317:20
366:4
segue 238:2 248:3
280:5
seldom 274:6,19
sell 340:1 347:2
352:4

selling 311:1 315:5
337:3,4 358:5
379:10
semi-anonymous
208:7
Senate 31:16
387:13 397:15
send 10:13 223:17
Senior 14:5 15:12
93:11
sense 20:14 21:1
42:15,19 67:1
73:21 104:20
108:12 145:6
146:22 151:18
263:2 312:17
313:13 316:17
326:22 332:18
406:14 408:15
sensible 276:8
sent 208:4,14
separate 58:20
124:9 155:13
158:11 200:15
378:14
separated 256:6
264:2
separately 290:3
separating 386:13
separation 86:15
serial 19:10
series 109:15
165:10 306:20
serious 219:2 252:7
257:9 295:4
seriously 128:4
162:2 259:3
serve 146:6 175:1
191:13 366:18
386:14
served 338:5,6
serves 288:15
388:20
service 203:18
393:19 394:14
401:20

Neal R. Gross and Co., Inc.
202-234-4433

services 203:15
204:7 338:16
393:12,14,16
394:19
serving 334:17
386:15
SESAC 214:21
session 1:15 2:8 3:2
3:17 4:12 5:2,4,5
5:7,9 10:7 12:4,14
89:22 183:20
184:13 186:21
246:22 247:9
253:11 264:16
320:2 327:14
328:11 413:6
sessions 10:17
413:13
set 66:13,14 74:4
175:18 292:19
301:22 317:14
373:15 385:14
sets 71:22 118:17
127:22
setting 128:21
138:21 358:12
settle 146:17
settlement 7:6
324:4
settlements 219:22
setup 321:18
seven 27:5 53:7
seventies 174:16
194:16 263:1
shade 339:21 396:3
Shaftel 4:11,21
165:5,7 250:3,3
281:10,10 330:22
330:22 335:9,11
335:11 376:10
377:6,9
shame 261:8
Shannon 2:6 15:8,8
25:13,13 49:9,13
49:20 79:9 101:4
shape 12:20


slightly 194:17
Slocum 4:21 331:3
331:3 339:10
345:10,11 358:17
359:7 363:3,5
366:21 368:14
370:22 371:1
381:11,12 384:2
397:12 400:12,13
Slocum’s 372:9
slow 112:13
slowest 123:7
slowly 98:6
small 20:11,12 30:5
32:13,20 33:6
54:9 82:16 143:8
143:10,16 177:14
243:6 245:7 282:8
296:21 298:13,17
303:18 304:3
307:10 343:18
344:4 377:4 388:8
403:15
smaller 18:6 391:9
Smiths 208:4
Smithsonian 2:20
snapshots 132:6
social 279:4 373:9
socially 39:1
127:15
societal 40:1,4,9
societies 20:13
257:6 269:20
society 2:1,6,11 3:5
3:6,11 4:5 15:7,9
41:14,17,18 85:7
92:12 95:8 111:3
128:2 185:2,11
186:10 231:8
249:17 343:4
353:9 392:21
393:10 394:8
399:16,17 407:15
software 192:16
solace 368:11
sold 313:15 333:22
sole 296:18 297:1
308:3
solution 7:19 8:1
8:19,20 13:4
18:17 43:22 44:6
55:16 62:11 71:13
75:8,9,13 76:18
100:22 111:2,17
132:14 135:21
136:2,8 146:15
147:7 176:18
179:16 207:4
211:15 234:8,9,12
234:15 248:17
251:8,10,17,19
252:10,16 254:11
271:6 281:9,14,15
282:22 302:11
308:16 318:11
332:10,15 342:1,4
376:21 395:4
403:12 408:14
solutions 6:12
23:17 44:2 59:9
74:18 99:22 100:7
333:6 376:3
solve 99:2 138:6,7
163:14 358:14
391:5
solved 31:17
347:13 358:12
solves 403:22
solving 340:20
404:18
somebody 30:10
47:14 63:20 85:21
100:14 106:11
121:2 228:6
286:22 288:11
316:14 322:14
323:5 343:8
352:18 361:19
362:10 382:6
398:22 405:12
408:9 410:16
someone’s 279:22
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Before: Library of Congress

Date: Monday, March 10, 2014

Place: Washington, DC

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

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Neal R. Gross
Court Reporter