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ROUNDTABLE DISCUSSION on

ORPHAN WORKS

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Tuesday, August 2, 2005

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University of California, Berkeley

The Library of Congress met at the Berkeley Center for Law and Technology, Boalt Hall School of Law, in the John J. Goldberg Board Room, University of California, Berkeley, California 94720.

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

(9:02 a.m.)

1
2
3 MS. PETERS: My name is Marybeth Peters
4 and I have the title of Register of Copyrights,
5 which nobody knows what "Register" means, but it
6 means Director of the Copyright Office. And we are
7 here today to have the last in this series of
8 roundtables, discussing various issues related to
9 orphan works, which we identify as works where you
10 cannot find copyright owner.

11 I started looking at this issue probably
12 23 years ago. Only then I called it unlocatable
13 copyright owners. "Orphan works" has more panache.
14 In any case, my interest started when I was asked by
15 the Library of Congress to work on a digital
16 project. Back then there weren't very many.

17 And a decision was made that we were not
18 going to reproduce or display anything without the
19 permission of the copyright owner, even though
20 because it was an experiment we probably could have
21 relied on fair use. And we did it because we really
22 wanted experience in what does it take to find a
23 copyright owner and then when you find them, what
24 does it take to get permission.

25 It was a very interesting exercise. I

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1 spent a long time not being able to clear any rights
2 on soundtracks of motion pictures because nobody
3 knew who owned what rights. And we resolved them by
4 getting the major studios to agree not to object to
5 what we were doing, but we had to mute the
6 soundtrack.

7 I spent two years getting an agreement
8 with a news company for the July 4th, 1976 news
9 broadcast. I spent months trying to figure out who
10 was the owner of a motion picture, and a company
11 kept telling me it wasn't it, but it had in fact
12 renewed the work only two years earlier. And after
13 many conversations they agreed that they did in fact
14 own the work.

15 So it's always intrigued me. If
16 somebody wants to use a work, what do you have to go
17 through in order to be able to use it. And when
18 Jule joined the Copyright Office staff as Assistant
19 Register for Policy and International Affairs, this
20 was an issue that he seemed to warm to quickly. And
21 so it was with great delight that I gave him the
22 project.

23 And we were very fortunate in the fact
24 that Senator Hatch and Senator Leahy in the Senate,
25 now Chair and Ranking Member on the Intellectual

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1 Property -- I'm shortening it -- Subcommittee now in
2 the Senate, and of course Senator Leahy, the Ranking
3 Member of Judiciary, expressed a great interest and
4 actually said do a study and make legislative
5 recommendations.

6 The House expressed interest, but didn't
7 quite go that far. So our mandate is to do a study
8 of the issues and to, if we believe it's
9 appropriate, make legislative recommendations.

10 We made a decision to look at the
11 problem broadly, not to look at it narrowly, to see
12 who is affected by not being able to locate
13 copyright owners and what's involved in their
14 searching for those owners and trying to get
15 permission to use them.

16 The good news about being the boss is I
17 now can turn this over to Jule, because he's the one
18 that's closest to the study and he has formulated
19 all of the questions that we're going to pose today.

20 Before I do that I just want to go
21 through who is here from the Copyright Office.
22 Obviously Jule to my immediate left is the Associate
23 Register for Policy and International Affairs. And
24 he came to us from Arnold and Porter, but he had
25 served a one-year kind of stint with us. And I was

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1 delighted he wanted to come back.

2 To my immediate right is David Carson,
3 the General Counsel of the Copyright Office. He
4 also came to us from private practice.

5 And Jule's staff, who are the key people
6 who work on this day in, day out, to David's right
7 is Oliver Metzger, who also came to us from private
8 practice.

9 And on the far left is Matt Skelton, who
10 actually came to us from law school and he is one of
11 the newer attorneys. He also works in Policy and
12 International Affairs.

13 Any of you who get involved in Section
14 1201 and exemptions for the ability to circumvent to
15 access controls should have met the person to Jule's
16 immediate left, Rob Kasunic. We in the office call
17 him "Mr. 1201." And he will be working on this
18 project.

19 And I know that Jule is probably going
20 to ask you to introduce yourself, but let me turn
21 this over to Jule. Thank you.

22 MR. SIGALL: Thanks, Marybeth.

23 Let me start by telling you a little bit
24 about the format and just one housekeeping note: A
25 scheduling change that we're going to undertake.

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1 And then we'll have everyone introduce themselves
2 and tell us who they're here on behalf of.

3 And first we'd like to start the
4 afternoon panel one hour earlier. I think the
5 schedule called for it to start at 2:00. We'd like
6 to start it at one o'clock so that we can maximize
7 the time out here since we only have one day. So it
8 will run from one o'clock to five o'clock.

9 The second topic which is the
10 Consequences of an Orphan Works Designation, we'll
11 probably do that in the one-o'clock-to-three-o'clock
12 hour. We'll spend that extra hour on that -- on
13 that topic, because that seemed to be from last
14 week's roundtable a topic that had a lot of
15 discussion and a lot of material to get through.

16 So I believe there's only -- I think
17 everyone who is on that second panel is here in the
18 room, at least on this, on the panel or in the room.
19 So just everyone be aware that we're going to have a
20 one-hour lunch break instead of a two-hour lunch
21 break.

22 The format for this roundtable will
23 follow the same that we did last week, which is we
24 will -- one of us will introduce the topic with a
25 brief statement and then start with a question, and

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1 then solicit comments from everyone in response to
2 that question. And we found that, last week anyway,
3 the follow-up questions and discussion followed
4 relatively naturally from that -- from that format
5 and seemed to give everyone a fair shot at speaking
6 their mind and getting their views across on the
7 wide range of issues that this whole project raises,
8 so we'll follow that as well.

9 Now let's go around and start here on my
10 left and everyone can introduce themselves and let
11 us know who they're here on behalf of and who
12 they're representing.

13 DR. KELLER: Hi. I'm Michael Keller.
14 I'm the University Librarian staff at Stanford
15 University and I'm representing Stanford University.

16 MR. SIGALL: Let me make one more
17 housekeeping note. Try as much as possible to speak
18 into a microphone for a couple reasons, so that the
19 audience can hear and also it's a key to our
20 transcription process. Everything here is being
21 transcribed and a transcript will be available on
22 our website.

23 And we understand that the Berkeley
24 folks are kind enough to have made -- will be making
25 a recording of this session and the audio will also

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1 be available on their website and probably ours at
2 some point as well.

3 So speaking into the microphone is a
4 little bit of an annoyance but it's key for us to
5 record everything that's going on.

6 MS. LEE: Hi. My name is Megan Lee.
7 And I'm with the Defense Language Institute, Foreign
8 Language Center. I'm with the Curriculum
9 Development Division and I do editing and
10 copyrights.

11 MR. MACGILLVRAY: Alexander MacGillvray
12 from Google.

13 MS. GREGSON: Barbara Gregson from
14 Miller-Gregson Productions. I do independent film
15 research, rights-and-clearance work for over 25
16 years, representing -- actually I'm a member of
17 FOCAL and CLEAR and a board member of the
18 International Documentary Association. I'm trying
19 to represent all of those independent film
20 researchers everybody hires to find this stuff.

21 MR. HAMMA: Ken Hamma, J. Paul Getty
22 Trust in Los Angeles.

23 MR. JOHNSON: Carl Johnson, Brigham
24 Young University. The Copyright Licensing Office
25 there at the University.

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1 MR. KAHLE: Brewster Kahle, Digital
2 Librarian of the Internet Archive.

3 MR. LISUZZO: Joe Lisuzzo. I work with
4 WalMart Stores, Inc. and also hold a seat on the
5 Photo Marketing Association Mass Merchants Council.

6 MR. MCBRIDE: Jerry McBride. I'm
7 representing the Music Library Association.

8 DR. BUTTLER: Dwayne Buttler. I'm the
9 University of Louisville University Librarian.

10 MR. DONALDSON: Michael Donaldson
11 representing the documentary association Film
12 Independent, with about 10,000 independent
13 filmmakers.

14 MR. EBER: David Eber. I'm with
15 Houghton Mifflin Company.

16 MR. FUNKHOUSER: Bruce Funkhouser. I'm
17 with Copyright Clearance Center.

18 DR. SPRIGMAN: Chris Sprigman. I teach
19 at the University of Virginia Law School. I'm here
20 on behalf of Creative Commons and Save the Music.

21 MR. STRONG: Gary Strong. University
22 Librarian at UCLA.

23 MS. SUNDT: Christine Sundt. University
24 of Oregon. I'm here representing College Art
25 Association and Visual Resources Association and

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1 also independent artists.

2 MS. WHALEN: Maureen Whalen, Associate
3 General Counsel at the J. Paul Getty Trust and I'm
4 here to speak about the art museum perspective on
5 this.

6 MR. GOTTLIEB: Steven Gottlieb,
7 Recording Industry of America.

8 MR. SCHOTTLAENDER: Brian Schottlaender,
9 University Librarian at U.C. San Diego. I'm the
10 President-Elect of the Association of Research
11 Libraries.

12 MR. SIGALL: And we've also received
13 word that Mark Meyerson and Gail Silva will be
14 attending, but they'll be somewhat late to the
15 proceedings. We'll have them introduced when they
16 -- when they arrive.

17 Let me -- our first topic is Identity of
18 Orphan Works, and we're going to spend the morning
19 on this. The idea here is that based on the
20 submissions, the written submissions which we have
21 received, there is a general among it seems among
22 most participants that the beneficiaries of a system
23 that we might put in place will have the undertake
24 some sort of search to find the copyright owner.
25 And when they fail to find the copyright owner after

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1 making that search, they get -- they get the
2 benefits of the system, whatever that may be.

3 Once you go beyond that very high level
4 -- beneath that very high level I should say,
5 there's a wide range of proposals on exactly what
6 that search should entail. They seem to run a
7 spectrum where on one side it's a very ad hoc, case-
8 by-case, flexible approach where -- with a
9 generalized standard of a reasonably diligent search
10 of some sort that's decided on a case-by-case basis
11 based on all the circumstances.

12 On the other side of the spectrum
13 there's a more formalistic, categorical approach
14 that says there is -- there should be a registry,
15 even a mandatory registry of copyright owner
16 information that is the only place that someone
17 might have to search for copyright owner
18 information. And if the owner is not locatable
19 through that formalistic or registry-based approach,
20 then the reasonably diligent search is completed and
21 the user gets the benefit of the designation of an
22 orphan work.

23 And then in between those two extremes
24 there are a lot of different hybrid measures, if you
25 will, where people are proposing voluntary

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1 registration systems that are part of a diligent
2 search but not the complete realm of a diligent
3 search to other types of mechanisms, including user-
4 based registries where users identify their proposed
5 use of a work that has to be checked by copyright
6 owners. And all of that is part of a mix that
7 determines whether the user made a reasonably
8 diligent effort to locate the copyright owner.

9 So in this topic we'll explore some of
10 the details about those and various proposals, and
11 get your views on the pros and cons of those
12 approaches and all the various facets of those
13 approaches.

14 What we're most interested in, and this
15 is a generalized theme for the questions that we ask
16 and the information we're looking for, in doing
17 these kinds of studies and analyzing these
18 proposals, we some say may take a sort of cynical
19 and negative view of it, but we'd like to find out
20 what the downsides to any proposal are.

21 In your written comments you've done a
22 very good job, I think, of explaining what the
23 positives and the benefits of any proposal might be.
24 But what we'd like to explore with you is what
25 happens if we adopted your approach, what would be

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1 the potential pitfalls or problems that might arise
2 and how you might propose to solve them or get over
3 them or balance them with the pros and the benefits
4 of your approach.

5 So with that in mind let me open, start
6 the first question with the notion that the user
7 should take a reasonably diligent search, and that
8 be a flexible standard, not categorical is one
9 that's widely held by a lot of variety of interests
10 on both the traditional owner side and traditional
11 user side. The notion that the only standard be a
12 general one of reasonably diligent under the
13 circumstances. That's the efforts that someone how
14 to make in order to identify a work as being
15 orphaned and therefore receive the benefits of the
16 system.

17 The opening question is: For those who
18 propose that kind of flexible, case-by-case
19 approach, what do you see as the downsides of that
20 approach? What would you identify as the potential
21 pitfalls that might -- we might run into if we were
22 to recommend and Congress were at some point to
23 adopt that kind of approach?

24 So for anyone who's proposed to this
25 type of flexible approach, if you could explain for

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1 us what you see as the downside, that would be
2 helpful.

3 But before you do let me just give Mark
4 Meyerson, who just joined us, a chance to introduce
5 himself and tell everyone who he's representing.

6 MR. MEYERSON: I'm Mark Meyerson. I'm
7 with Twentieth Century Fox and I'm here on behalf of
8 the Motion Picture Association.

9 MR. SIGALL: Okay. So the question is:
10 Downsides to a flexible, reasonable-efforts,
11 reasonable-diligence approach.

12 Christine and Steve.

13 MS. SUNDT: Certainly the downside is
14 that there is going to be still uncertainty and the
15 uncertainty is what a lot of people are trying to
16 avoid. So what we're looking for is a way that
17 flexibility can also address uncertainty and give us
18 assurances with what we're afraid to do.

19 MR. SIGALL: Steve is next.

20 MR. GOTTLIEB: Another problem is the
21 potential to fall into the belief that there is a
22 one-size-fits-all system. This is one of the
23 reasons why we advocate a sectoral approach to this:
24 Having industries get together, share their
25 expertise, decide what would be appropriate due

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1 diligence in appropriate situation for appropriate
2 works.

3 MR. DONALDSON: Michael Donaldson. It's
4 the lack of certainty. And I believe what you were
5 saying is what has become crystal clear, and that is
6 that the searches are so different for different
7 kinds of material that you really would need
8 guidelines put down by somebody of what a reasonable
9 search is for music, what it is for film clips, what
10 it is for other things. So you'd have some guidance
11 for people conducting the search.

12 MR. SIGALL: Brewster.

13 MR. KAHLE: From the library and
14 archives perspective, which is the only thing I
15 might bring up, there's some really tricky things
16 around digital materials that I'd like to bring up.
17 That sometimes you can find somebody that was the
18 author or the owner of the work, but there's nobody
19 home to talk to.

20 Let me bring up an example. [Displaying
21 tapes.] These are tapes made by a researcher of the
22 United States -- of the Election 2000 websites. It
23 was made at Digital Equipment Corporation before it
24 was bought by Compaq, and then it was bought by HP.
25 And I can find somebody that will at least answer

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1 the phone call the first time, but not the second
2 time to ask what I can do with it.

3 (Laughter.)

4 MR. KAHLE: If there's not a commercial
5 viability, it's hard to get somebody to do an ad hoc
6 negotiation around something that they don't really
7 care about, that they can only get in trouble for.
8 So it's an interesting case of the what happens when
9 you search, find, but they don't want to talk to
10 you.

11 And it's not just because I'm not
12 bidding high enough, it's just it doesn't make any
13 sense to them. It comes up very clearly in the
14 software area, where you can find somebody that
15 says, 'Oh, yeah, we made that software.'

16 But, 'Can you make a copy of it for your
17 archive and make it available?'

18 'Uh, I'm not really sure. I'd have to
19 look back at the contracts and I have no idea.
20 Don't ask me.'

21 So the case where you can find people,
22 but you can't get anything going, I think it's
23 somewhat close to what Marybeth brought up.

24 And let me just bring up one other
25 example which is close to my heart. My

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1 grandfather's book, which is -- I have one copy.
2 [Displaying book.] I have two sons. I'm told by
3 lawyers that one kid gets it and the other one
4 doesn't, even though it's out of print for 50 years,
5 but it's on McGraw Hill. But no one in my family
6 has the contracts to find out whether it ever
7 reverted.

8 So there's nobody at McGraw Hill who
9 could care less about this book, but we do. So
10 there's a market failure that's even beyond sort of
11 what this search thing is. So it's more complicated
12 than you think, unfortunately, for we archives and
13 libraries.

14 MR. SIGALL: Christine.

15 MS. SUNDT: Brewster brings up the issue
16 with text. This is legion in the arts, in visual
17 art because it's not only that we don't know who the
18 owner is but you also have people who deny any
19 ownership even when there is a name. Or they say,
20 'No, we have never -- we have never published it.'
21 And in fact it has been published.

22 The whole business of what is published
23 and unpublished in the arts is a huge, huge issue.
24 So tracking down ownership and rightful ownership is
25 a big obstacle for us.

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1 MR. SIGALL: David and then Dwayne.

2 MR. EBER: Just to respond to one of the
3 points that Brewster made. I think that there is
4 different scenarios that are being discussed there
5 and they should be kept separate because one of them
6 seems to me appropriate for an orphan works solution
7 and one doesn't.

8 You can go around, you can try to find
9 people. You can have various luck either getting
10 permission or even finding the person. It seems to
11 me that if you find the copyright owner and the
12 copyright owner is not cooperative or is confused or
13 just doesn't want to talk to you, that takes it
14 entirely out of the orphan works scheme and --
15 because that is not an unlocated owner.

16 And that's simply a case where you have
17 someone who for whatever reason doesn't feel like
18 licensing. And it seems to me that that kind of
19 scenario should be kept out of what we're talking
20 about here.

21 When you have a situation where you talk
22 to somebody, they don't know who owns the rights,
23 they can't figure it out who, and you actually can't
24 discover who it is, that is an orphan works
25 situation. And some of the kind of histories or

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1 anecdotes about these things sometimes mush these
2 things together, but I think they should clearly be
3 kept separate. And so that's my point.

4 MR. SIGALL: Dwayne is next.

5 DR. BUTTLER: I just wanted to say that
6 from the standpoint of the library where I'm at, one
7 of the things that we have to think about is that we
8 have a library and the resources to throw at this
9 problem. So there may be very sophisticated kinds
10 of libraries and there may be very small libraries.
11 I talk to libraries all the time where there are one
12 or two people. And I think any orphan works
13 solution needs to deal with those kinds of
14 resources.

15 And I'm not convinced the guidelines
16 approach would work, but I am convinced that if
17 there's some flexibility and reasonableness in the
18 way that it's applied that we can deal with those
19 kinds of users.

20 And then the other issue I'd like to
21 just tag onto that question, I think sometimes the
22 person doesn't respond and you haven't located the
23 right person. You might have thought that you
24 located the right person, but still they're
25 unlocated because it's not the right person and

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1 they're not going to respond in that context.

2 MR. SIGALL: I have Steve next, and then
3 Chris.

4 MR. GOTTLIEB: I just wanted to echo
5 what Dwayne said and --

6 MR. SIGALL: The microphone.

7 MR. GOTTLIEB: I'm sorry. I just wanted
8 to echo what Dwayne said and say that silence is not
9 consent. You know you might have trouble finding a
10 person or the person ultimately might just be a
11 curmudgeon and not want -- not want to help you, but
12 there are exclusive rights that we have to maintain.
13 And this really is outside the orphan works system,
14 as we're talking about it.

15 MR. SIGALL: Chris.

16 DR. SPRIGMAN: I'm not so sure it is
17 clearly outside the orphan work system. So Brewster
18 brings up an important point, and I'd like to try to
19 figure out what the categories are here.

20 One category is when you locate an owner
21 and he or she says no. And I think the copyright
22 law should give them the right to say no either
23 because they don't -- they have plans to exploit it
24 themselves or for some personal, idiosyncratic
25 reason, they just don't want you to exploit it.

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1 Another is the copyright owner that
2 can't be located. Okay, so those are the two polar
3 cases. And there I think we would all agree that
4 that is the heartland of the orphan works problem is
5 an owner who after some kind of search and, you
6 know, we're going to talk about what kind of search,
7 can't be located. That's certainly the heartland.

8 A tough intermediate case is the person
9 who you contact who perhaps doesn't know if he's the
10 owner because ownership is subject to some
11 contractual agreement that was long ago, you know,
12 thrown out. That's a tough intermediate case. What
13 do you do in that case.

14 Well, I mean the policy goal here I
15 think should be to establish some kind of proxy for
16 when a work is orphaned, when a work is abandoned,
17 when use is not being made of it and use could be
18 made without harming the ownership interest that the
19 copyright law is there to protect.

20 And that intermediate case that Brewster
21 posits is not so easily thrown out of the orphan
22 works category. That is likely to be a fairly large
23 category. I've had personal experience in that
24 category. And it's a troubling one to me because
25 ownership, even for people who might be owners is

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1 not always self-evident.

2 MR. MCBRIDE: Yes. I think one thing
3 that Marybeth referred to originally was how much
4 time and how difficult it may be to find a copyright
5 owner. And that in and itself is a problem
6 especially for organizations with very limited
7 resources.

8 So I think that one of the things that
9 rather than saying that we need maybe perhaps only
10 one registry for copyrighted works, at least we
11 should be able to come up with some sort of clear
12 and identifiable and limited criteria that people
13 searching for a copyright owner would be able to
14 apply with certainty so that they would know that
15 they could either go ahead and use the work or not
16 use the work. And I think in that case it would
17 benefit both the copyright holders as well as the
18 potential users of the copyrighted work.

19 MR. DONALDSON: The large part of my law
20 practice is in clearance of films and there's no
21 question this is a big problem, none whatsoever.
22 But I think, with all due respect, it clearly is not
23 an orphan works problem.

24 It's horribly frustrating to come to
25 somebody and either because it's economically

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1 inconsequential or they're not sure they have the
2 right, so what can they grant, but it's not an
3 orphan work. You've identified who the owner is.

4 What I usually do is try and get a
5 quitclaim, as Marybeth was talking about, or a
6 letter saying, 'We don't think we own it and we're
7 not going to bother you if you make this use of it.'
8 But it's not an orphan work.

9 And it seems to me if we try to lay that
10 problem in on the clear orphan work problem, that
11 we're sort of overloading the boat before it ever
12 leaves the harbor and there's a good chance it will
13 sink before it gets very far out at sea.

14 MS. SUNDT: As I was preparing for today
15 I began to think about what an orphan work is. And
16 I came to the conclusion that we're talking about
17 two different things. We're talking about lost
18 children and orphans, true orphans. The lost child
19 being something that has dots leading to an end, but
20 they're not clear, but the orphan doesn't even have
21 a dot.

22 So, again, the idea that we can -- we
23 can overload the boat is so true. And I think we're
24 talking too much about stuff that can be handled
25 with other aspects of the law. The law is already

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1 written to cover a lot of issues, and fair use might
2 be invoked in some cases or it may be a situation of
3 public domain in the end. But let's look at orphan
4 works for what they really are and not be overloaded
5 with everything else.

6 DR. KELLER: So if you will permit me, I
7 want to take us on a little excursion. The approach
8 that you have outlined and the approach that we have
9 been speaking about has to do with property rights,
10 and that's perfectly appropriate, I think.

11 On the other hand, I like the notion of
12 a nuanced approach that divides the problem set into
13 sectors. They are clearly sectors that have
14 longterm interests in maintaining and exploiting
15 their rights, the rights under the law.

16 For lots of work, though, that we
17 describe as orphan works where either the
18 recordkeeping has been -- the transition of
19 information about the work has been poor; the
20 contracts have been lost; the owners, their heirs,
21 assigns, legatees, agents and so forth have
22 disappeared, don't know they have the rights,
23 there's a raft of opportunities there for
24 bureaucracy, for more money being spent and so
25 forth.

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1 We have suggested in our submission, and
2 I want to bring this up because I know there were
3 about 700 submissions, and recount it for you, we
4 have suggested a much different approach which goes
5 to the use of regulation, the use of the law to
6 benefit the citizenry appropriately recognizing
7 property rights, but limiting them in an interesting
8 way.

9 Our proposal is to say that an orphan
10 work is a work that has been out, has been published
11 for 28 years, and if it's not in print, if it's not
12 currently accessible through its originator, it
13 might be determined to be a work that is lost,
14 orphaned. And then we could make use of it for not-
15 for-profit purposes, for research, for teaching, for
16 study, for analysis, and make use of it in digital
17 form or whatever form.

18 And if someone came up and said, 'By the
19 way, I'm the owner and I don't want this to be
20 available in the form that you've transmitted it,'
21 there would be a quick take-down procedure without a
22 huge penalty.

23 And I think the question of penalty is
24 important regardless of what the approach is. If
25 the penalty is overwhelming, then we won't make use

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1 of the material, the citizenry will not benefit from
2 the -- from the ideas and expressions. It would be
3 a disaster. It would be what we have now.
4 Recognizing that the records, some of them are very
5 poor, especially going back in time, no one
6 contemplated this sort of situation that we have
7 now, and the opportunities that we have now to
8 benefit education K through 12, benefit higher
9 education, benefit innovation, we should be taking
10 another look at this rather than the strictly sort
11 of embroidery on the existing situation. We should
12 approach this with the idea that the citizenry ought
13 to benefit from whatever proceeds.

14 MR. SIGALL: We'll be discussing the
15 remedies and limitations on remedies that might be
16 available in a later topic, but anyone who wants to
17 react to a different approach, which I mentioned one
18 that says after a fixed number of years the work is
19 presumptively orphaned if it's not in print, those
20 kinds of things, please feel free to react to what
21 Michael has said or have some other viewpoints.

22 I've got Brewster first and then Joe and
23 then I think Chris had his hand up.

24 MR. KAHLE: I think it's interesting to
25 distinguish noncommercial use and also in an

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1 environment where you can -- where notice can take
2 down works. So -- and those two things are kind of
3 interesting. And I don't want to get into your
4 remedies issue, but let me go back through a couple
5 areas that are particularly problematic I think for
6 the idea of lets write off the things where things
7 are confusing, at least in terms of this proceeding.
8 Because I think we can handle it without being --
9 sinking a boat. Maybe not. That's up for you to
10 decide.

11 Let's take some of the digital works.
12 We are best known for collecting webpages. We
13 collect -- we've collected webpages from about 50
14 million different websites, 50 million and we've
15 collected about 40 billion pages over the last nine
16 years. So this is a large-scale effort to go and
17 collect these materials.

18 We at one point tried to contact website
19 owners and ask them, 'Hey, what do you think.' We
20 were shut down very fast for writing spam.

21 (Laughter.)

22 MR. KAHLE: And their spam builders set
23 up and it was -- it was like no, we're not spammers.
24 But that wasn't received very well. So we tried
25 basically doing what Alta Vista and within the web

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1 community is -- sort of presumptively do it: Opt
2 out, which seems to be common within that world.
3 And it worked fairly well -- with the combination of
4 a few things.

5 It's digital works that are very new.
6 Right, so these are 28 years old, but I really like
7 the idea that in certain media types there could be
8 this sort of bring back Ben Franklin's 28 years.
9 It's noncommercial use, and notice and take-down
10 works.

11 And in those circumstances, which may
12 help make a section of the boat that doesn't sink, I
13 think we can get huge numbers of amounts of cultural
14 materials preserved and provided access to in such a
15 way that people aren't upset.

16 MR. SIGALL: Okay. I had Joe next on
17 the list.

18 MR. LISUZZO: Yeah. I know you all seem
19 to be dealing with it on a little bit different
20 level. And I wanted to kind of paint a picture of
21 what we deal with every day in the retailer
22 business.

23 In our stores, and I'm sure a lot of you
24 are WalMart shoppers, we have a machine -- machines
25 in there where you can bring in an old family photo,

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1 put it on there and copy it.

2 What we run into mainly is just that
3 scenario, where you've got a great customer who
4 brings in an old photograph of their great-great
5 grandparents taken back in the '20s, '30s, '40s, and
6 they just want a copy of it for their family album
7 or distribute to their rest of the family. And we
8 can't copy it because our policy not only supports
9 the copyright law but it goes beyond it. If it
10 looks like a duck, smells like a duck, walks like a
11 duck, it's a duck, we don't copy it regardless of
12 what the details are and, you know, whether or not
13 it qualifies under the infamous Mickey Mouse
14 copyright law.

15 We don't put any kind of timeframe on
16 it, so we run into situations where we may have
17 pictures that are back from the '20s where we will
18 upset a customer and say, 'We can't copy it. We're
19 sorry.'

20 Now to that point we've got pretty savvy
21 customers that go out on the internet. They pull
22 the laws and they say, 'Well, if it's over a certain
23 amount of age, you should copy it, et cetera.' And
24 we know we do more than that.

25 Our situation is the fact that we need

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1 immediacy in the solution or immediacy in finding
2 the owner. And a lot of times we have people where
3 we direct them to go to the -- you know, if it's in
4 a small town where WalMarts are, we have them go
5 down to the central office or the county courthouse.
6 And we find out the photographer's been dead for 50
7 years, the business has been defunct for a long
8 time, there is no family tree history to trace it
9 down to. So at that point, you know, it's purely an
10 orphan work. Nobody even knows who the owner is or
11 who the photographer might have been back then.

12 So we're in a situation where we've got
13 those kind of pieces sitting in front of us where,
14 you know, the customer's upset and rightfully so
15 because they can't get a family photograph. And
16 we're in a situation as a retailer where we'd like
17 to do nothing more than take their money, but we
18 can't because of our policy and the law.

19 So that puts us in a little situation.
20 You know it's more of a basic thing and I know you
21 all deal with a lot more high level pieces than
22 that, but that's what we deal with every day is the
23 customer standing in front of you at the counter who
24 all of you may be, standing there at a counter with
25 a photograph that I can't do a darn thing about and

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1 I can't help you. And I'd like to do nothing more
2 than to help you and do what I got to do.

3 So I mean in that since, I mean I bring
4 that up only because a lot of pieces you all been
5 talking about are more of a very intricate level.
6 You know we deal it on a daily basis more of a basic
7 level. And in a representation of the
8 Photomarketing Association, it's not just WalMart's
9 position, that we have this situation, it's all
10 retailers. And we all try to deal with it on the
11 same level where we try to support both sides of the
12 fence.

13 Like I said, we'd like nothing more than
14 to take the money, but we also understand the
15 copyright law. And we also understand there's
16 pieces in place to support it, so it's not easy at
17 all on the customer side of the fence. And I agree
18 with the gentleman at the end of the table, that
19 it's got to be -- I think the solutions have got to
20 be looked at from the end consumer standpoint and
21 not so much satisfying our standpoint, because we're
22 the ones that are just kind of the advocate of the
23 customer out there. And we need to kind of take
24 care of what they want, not what we want.

25 MR. SIGALL: Chris was next on the list.

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1 DR. SPRIGMAN: So much we have to --
2 Michael's suggestion of, I think, a 28-year period.
3 Creative Commons and Save the Music favor an
4 approach -- I mean our -- similar, our period's a
5 little different. It's 25 years, but it's close.
6 And we did that because we think that's a rational
7 approach given the depreciation rate of copyrighted
8 works, and let me explain what I mean by that.

9 If you look at Copyright Office data on
10 registration and then renewal, one thing you notice
11 is that of works registered during the period where
12 you can actually compare registration and renewal
13 data, the vast majority are not renewed 28 years
14 later.

15 So if 85 to 90 percent of works are not
16 renewed, 28 years later you can take that data and
17 you can calculate at least an approximately
18 depreciation rate for the economic value of that
19 work. And what you see is after about a quarter
20 century, you know nine out of ten or so works don't
21 have significant economic value remaining on them.
22 If they had an economic value early, it's gone away.
23 It's been exhausted.

24 So maybe a quarter century or so, 28
25 years is a good proxy for the vast majority works

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1 that had economic value in the first place not
2 having it anymore. And at that point the interest
3 in public access is just as strong in many cases,
4 but the interest in exploiting exclusive rights is
5 often attenuated substantially. And that's in our
6 proposal, the trigger for an orphan works system to
7 be put into place.

8 After, in our proposal, 25 years, if
9 your work still has economic value, if the exclusive
10 rights granted by copyright are valuable to you as a
11 means of appropriating that value, hold up your hand
12 and tell the Copyright Office that 'My work is
13 valuable and I want to retain all the rights that
14 the copyright law currently gives me.'

15 If your work is not valuable at that 25-
16 year point, if it neither had any market value as of
17 any point thus far or that market value has been
18 depreciated away, then you don't need to register.
19 It's a voluntary registry. But if you don't, your
20 work is exposed to what we call a default license,
21 which is people can use it, they pay a fee, but
22 there's a kind of a statutorily determined fee.

23 So we are very much onboard with
24 Michael's approach in terms of the waiting period.
25 We have a little bit different mechanism, but the

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1 intent is, I think, the same.

2 MR. SIGALL: Gary and then Jerry.

3 MR. STRONG: I'd like to echo on that
4 particularly in the music and in the photographic
5 arena. We've been working very diligently in
6 preparing, creating an archive of Latin music that
7 is all over 28 years old from 78s, trying to search
8 down who owns the rights to that, where they were
9 very small labels, mostly sold to unknown sources,
10 it is virtually impossible to run them down.

11 And yet as we've developed the archive
12 we have people from the Latin community who are
13 discovering music and their own heritage all over
14 again in places that they never realized it was
15 still present. And so a part of the University
16 environment is where we're trying to not only
17 preserve and capture these resources but to replace
18 them back into a new set of community users, where
19 there is not a great deal of commercial interest.

20 We would very much like to see a system
21 where if indeed there were a commercial value and
22 someone came forward to take it down, deal with it
23 in some other fashion, but not to lock up the corpus
24 of the rest of the archive so that no one can use it
25 on fear of there being some kind of problem down the

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1 way. And the certainty-uncertainty issue of your
2 question is really critical for us.

3 If you go to the other side where we
4 have massive numbers of manuscript collections where
5 there are diaries, photographs, other kinds of
6 things, and I think in particular of our growing and
7 very large archive of Japanese Relocation Camp
8 material, where it is virtually impossible to trace
9 down who took a photograph. Often the families are
10 unidentifiable in diaries that were written and not
11 otherwise identified in a number of the archives
12 that we're receiving. To have to lock that kind of
13 stuff up so that no one can learn from what went on
14 in that period of history, I think does not do the
15 public service nor does it do the University
16 service.

17 MR. MCBRIDE: I think that having some
18 sort of discernible time limit would be really very
19 helpful. In the case of sound recordings, this is
20 particularly problematic for older recordings.

21 In Section 301(c) sound recordings
22 before 1972 are exempted which means that they --
23 from the copyright laws -- which means they are
24 subject to the copyright laws of all 50 states. Yet
25 most of the sound recordings were probably marketed

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1 and sold nationally.

2 This basically locks up all this sound
3 recordings from the beginning of recorded sound to
4 1972 until 2067. If you can imagine our earliest
5 cylinders trying to research the copyrights on
6 something over a hundred years old, where there have
7 been numerous companies going out of business,
8 merging, being sold, it really creates a situation
9 where some of these very early and very sometimes
10 fragile materials are left to sort of languish and
11 they may no longer be around.

12 It's part of our cultural heritage to
13 bring these out, and that's what we hope to do with
14 libraries. But these very old works that clearly
15 have little or no commercial value at all are sort
16 of sitting there.

17 MS. PETERS: Can I ask a question that
18 you just raised? You're talking about pre1972 sound
19 recordings and you're talking what, I think, about
20 is searching the record company or the performer, I
21 guess, the recorded sound side.

22 What do you do about -- do you do
23 anything with regard to the music that may be
24 embodied in those sound recordings?

25 MR. MCBRIDE: Well, that's another area

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1 that's problematic for libraries, because in Section
2 108(i), I think, it -- the underlying musical work
3 is not available for copying by libraries for
4 various purpose because music is exempted from
5 those.

6 So, again, the copyright on the
7 underlying music may not be as long, but it's still
8 pretty long. So you'd have to research both the
9 underlying musical work and the sound recording
10 itself.

11 MR. SIGALL: I have Alex and then Carl
12 and then Joe.

13 MR. MACGILLVRAY: Yeah. I guess to
14 build on what Jerry said, it is important to keep in
15 mind that there are some tremendous opportunities we
16 have here both for the audience of these works, to
17 be able to make some of this stuff more accessible;
18 and then also for the copyright holders, to actually
19 make them more findable, to make them even easier to
20 find.

21 And the one thing that I did want to
22 pick up on is Mike Keller and Brewster Kahle's
23 comment about nonprofits. I think it's extremely
24 important to remember that if we keep in mind --
25 and, again, of course speaking for a for-profit, but

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1 if we keep in mind that the benefit we're trying to
2 have is to the end-user, to the audience, to the
3 citizenry, and to the copyright holder in terms of a
4 better way of contacting them; that when WalMart
5 makes it possible for an end-user to copy some very
6 old photos, when Houghton Mifflin maybe comes out
7 with a book that had been long since forgotten but
8 they've been able to come out with it, reintroducing
9 and help it refind its audience; or when Twentieth
10 Century Fox uses a particularly orphaned work in
11 terms of producing a movie, these are all really
12 valuable things that can be done, again, for the
13 audience and in creating this audience.

14 When the owner then sees that their --
15 that their particularly orphaned work is available
16 and is creating this value, and that owner is able
17 to come forward and make -- get into a contractual
18 relationship with the entity that is making the
19 profit on the work, that again would be great from
20 our perspective.

21 And I guess the thing that I would
22 question is whether nonprofits have a particular
23 lock on that or whether we should be thinking more
24 specifically about the best way to get the most
25 amount of work out there and useful to people.

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1 MR. SIGALL: Carl.

2 MR. JOHNSON: I want to make a comment
3 on two subjects. One to the inquiry about music
4 works. Very much so there's three elements,
5 obviously, and -- at least three elements, most
6 often three elements in musical works, as we know:
7 The musical score, the word lyrics, and the sound
8 recording.

9 In our work those are all treated
10 equally independent. That is, they all require
11 copyright analysis and the due diligence and all
12 that we're talking about. So in our environment,
13 just to answer your specific inquiry, all three
14 elements are dealt with.

15 Now another subject that I'd like to
16 return to is the underlying definition of -- initial
17 definition of an orphan work. And I'd like to
18 return to the notion of what many have commented on
19 as being unidentifiable, unlocatable, and
20 unresponsive. And I'd like to, even though it's a
21 dicey path to go down and try to define
22 "unresponsiveness" and make it fair and equitable to
23 both sides, it is a very real issue in terms of
24 trying to, at least from the University perspective
25 of looking at the public good, the community

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1 interest in a work and realizing that you may have
2 located the owner, you believe that you've located
3 the owner, but you haven't. They just will not
4 respond at all to the inquiry.

5 So you really don't know if you've
6 identified the correct owner. And so I think there
7 is reason to put in the basic definition, this
8 matter, of unresponsiveness.

9 MR. SIGALL: Joe.

10 MR. LISUZZO: Yeah. I just wanted to
11 comment on the timeframe. In a lot of pieces it
12 seems like the timeframe will work, I mean in a lot
13 of the music situations you've got archives'
14 recordings. You have pretty good date stamps on
15 that.

16 In the photographic piece of it, from
17 our side, it's really hard to keep that timeframe on
18 it. And that's why at WalMart we've always
19 supported the -- before the Mickey Mouse copyright
20 went into effect it was a 75-year piece. We did --
21 you don't like that term, do you. Sorry.

22 MS. PETERS: I've heard it many times.

23 MR. LISUZZO: That's what it's lovingly
24 known as in our area.

25 MS. PETERS: It's painful. It's all

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1 right.

2 MR. LISUZZO: But before when it was 75
3 years, we actually -- we actually didn't even use
4 the 75-year piece, too. We erred on the side of
5 being good for the photographer. If we couldn't
6 verify it was 75 years, we just said, 'No. It's
7 professional. We won't do it.'

8 Part of the issue we run into now on it
9 is whether it's 25 or 28 years. I mean that brings
10 you down to 1977 and 1980. You know, I want you all
11 to think about it if you have kids who are 18 to 20
12 years old and working at a retailer store part time
13 just for fun money, are they really going to care or
14 have the interest to know whether or not the picture
15 was taken in 1976 or 1978. And, you know, how they
16 are going to verify it. You're not going to do it
17 unless there's a stamp on it.

18 And then when you get into that other
19 situation like I'm talking about where it may indeed
20 be orphaned from a characteristic of the
21 photographer's dead or gone or moved away or nobody
22 can be found, you know, then what do you do in that
23 case.

24 And, again, I'll go back to the customer
25 at the counter with a picture that's only, you know,

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1 25, 26 years old of maybe them in high school or
2 their mother, father, whatever. And you get into
3 that situation where, again, you're standing there
4 wanting to make something for a personal use,
5 private use, and it's hard to figure out from the
6 timeframe perspective what to do. And, you know,
7 what do you tell the customer at that point.

8 So, again, I kind of go back to really a
9 practical situation of making it easy for those
10 folks.

11 MR. SIGALL: Let me just ask a question
12 related to the notion of using some sort of
13 timeframe or an in-print status of a work as a
14 determinant.

15 And the question I think is in many of
16 these types of scenarios I think those proposals --
17 and maybe wrong and correct me if I am -- those
18 proposals make those sort of threshold requirements,
19 whether a work has been in print, whether it's been
20 in print for a certain number of years.

21 And one of the things we hear a lot is
22 that under the current system the determination of
23 whether something's published versus unpublished is
24 very difficult to make.

25 Would it be the case if you had sort of

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1 fixed requirements of these sorts, would that just
2 add to the uncertainty in a sense because you would
3 be potentially squabbling with someone over whether
4 something has been in print or not, or whether it's
5 been in print for 28 years or 30 years or 26 years,
6 or something like that; and if these are threshold
7 requirements they could really from a user's
8 perspective -- you know, if they lose on that
9 argument, if they an argument whether it's in print
10 or not what the timeframe might be, they wouldn't
11 get the benefit at all of any system.

12 I think one of the proposals that people
13 -- one of the arguments people make in favor of a
14 flexible system is you could very well have an
15 orphan work that's only ten years old, and you don't
16 have to get into questions. And I think we'll
17 discuss this a little bit more when we talk about
18 published versus unpublished. That you can avoid
19 unclear and uncertainty over threshold requirements,
20 like in print, published versus unpublished,
21 timeframes.

22 Am I on the right path there? Is that
23 something people are thinking of or how do people
24 react to that?

25 Let's start with David and then

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1 Christine and then Chris and then Michael.

2 MR. EBER: I agree with what I take to
3 be sort of the presumption of that question which is
4 that if you have a bunch of other threshold issues
5 that have to be met before a particular use will be
6 permitted under this you're going to just add to the
7 level of investigation -- you'll have threshold
8 investigations before you do your later
9 investigation. And you've actually made the problem
10 -- well, you've made it worse, but you certainly
11 haven't made it any better.

12 So I think that, and when we get to
13 unpublished-published, I don't believe those
14 distinctions should be -- there should be these
15 threshold determinations based on the age of the
16 work, based on the published status of the work,
17 based on the out-of-print-or-not status of the work
18 for those reasons.

19 Let me just say something that sort of
20 relates to that and relates to a lot of things that
21 have been said. I represent Houghton Mifflin. And
22 we are, like some people at this table but not
23 everybody, we are both a copyright owner of many
24 things but we're also a heavy copyright user of
25 other people's works. And so we come to this with

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1 -- you know, balance in this thing is just very
2 important for us and for our authors as well, since
3 they themselves often get permission for their stuff
4 that we publish by them.

5 And it strikes me that some of the
6 proposals that would essentially -- well, for one
7 thing that would make the privilege, or whatever we
8 call it, rest on the nonprofit-profit -- for-profit
9 distinction is not really going to be feasible in a
10 market economy, as we have now. But also these
11 ideas that there are these proxies, years, out-of-
12 print status, that proxies for can you locate
13 someone are going to essentially divest certain
14 people of their copyright rights. And I don't see a
15 reason to actually have a proxy for the underlying
16 question which is can you locate them, can you
17 identify them and locate them.

18 And what these proxies will end up doing
19 is taking -- taking something that I view as being
20 focusing on a use -- we talk about orphan works, but
21 I think technically we should be thinking about uses
22 of orphan uses, or something like that.

23 What we'd be doing is taking something
24 that should be focused on a particular use and what
25 you do to get limitation of liability, or whatever

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1 it's going to be, and it turns -- and these proxies
2 turn it into essentially a work losing its
3 protection for all time, for all uses. And that is
4 a big problem.

5 I view that what would be helpful to do
6 from our perspective, which again is an owner and a
7 user, is to make changes that essentially take what
8 we do all the time, which is we look and we try to
9 find someone, we go down this avenue, go down that
10 avenue, and essentially take what our practices are.
11 And instead of at the end of the day saying, 'No,
12 you can't use it,' say, 'Well, you've done enough
13 and now you can use it,' but after having made that
14 search.

15 MR. SIGALL: Christine and then Chris
16 and then Maureen.

17 MS. SUNDT: If we have to incorporate
18 the criteria of time of when something was created
19 and also whether something is in print published or
20 not, then I think that the large part of visual art
21 would be excluded from orphan works, because these
22 are the two slippery slopes that we deal with. And
23 we feel -- and it's not just the visual art, it's
24 also the photograph. It's the derivative work
25 beyond the visual art. I mean that gets even more

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1 complicated. And then all the repetition of the
2 publication or the distribution of that visual art.
3 It wouldn't work at all.

4 Now I also want to bring up another
5 point and that is the commercial aspect, commercial-
6 noncommercial. As a librarian I very well
7 understand our willingness to say let's deal with
8 the noncommercial because we're doing this for the
9 common good, for the public good, but let's be
10 realistic. In today's university situation we're
11 doing a lot of stuff that is commercial as well, and
12 that starts to get us into areas that we cannot make
13 blanket distinctions that everything that is being
14 done within an educational institution is going to
15 be for nonprofit, but we are in business. We are
16 trying to make a living out of some of the stuff
17 that we are holding and protecting.

18 And also within the arts everything that
19 an artist does probably has some commercial value.
20 So that's another area that we can't really make a
21 distinction between for-profit and not-for-profit.

22 MR. SIGALL: Chris and then Michael and
23 then Maureen.

24 DR. SPRIGMAN: So the 25- or 28-year
25 waiting period makes sense, I think, as part of a

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1 categorical system of the kind that Jule discussed
2 in his introduction where, you know, at the end of
3 that period something has to happen. And if you
4 comply as the author or the rightsholder with that
5 requirement, your work is -- all the rights are
6 preserved. If you don't, some of the rights go
7 away. Okay, there's some limitation on liability,
8 at least with respect to some uses for some period
9 of time.

10 All right. If we're going to have a
11 reasonable-efforts system I don't think personally
12 that a waiting period makes sense. If we're going
13 to have a reasonable-effort system, then we just
14 make the reasonable effort to locate the owner of
15 the work.

16 The Creative Commons and Save the Music
17 approach, our espousal of a waiting period is really
18 tied to the categorical system that we've
19 recommended. Okay, that's the first point.

20 The second point that was -- I think
21 there was a comment by David about the use of
22 proxies and what good is the use of proxies. I mean
23 in our view, and you know people in Washington heard
24 this, but there are some people here who weren't
25 there, the most important benefit of proxies is that

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1 they make decisions cheaper. And it's important to
2 make the orphan works identification system as cheap
3 as possible because many of these works have little
4 economic value. That's why they're orphan, that's
5 why they've been abandoned by their owners. Many of
6 the uses that are foreseen of these works may have
7 tremendous social value, economic value, cultural
8 value, but again relatively little economic value.
9 And, as a result, in order to have these uses made,
10 in order to have, you know, the orphan work system
11 work well the system has to be cheap to use. So
12 that's why we think proxies in a categorical system
13 make sense.

14 One specific response to David's
15 statement that, you know, what we're talking about
16 here is a loss potentially of all rights for all
17 uses for all time. I don't remember of the people
18 at this table anybody making a suggestion like that.
19 Creative Commons and Save the Music certainly have
20 not.

21 We are talking about works having
22 limited liability if they fall into the orphans
23 category. We'll talk later about reclamation
24 provisions. We wouldn't be opposed categorically to
25 an approach that said, you know, a rightsholder

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1 could later come forward and reclaim at least
2 against uses prospectively, although we're not in
3 favor of reclamation against uses that have already
4 been made, but I just wanted to clarify what's at
5 stake here.

6 What's at stake here is not a complete
7 removal of property rights. It's a balancing of
8 rights of users and of owners.

9 MR. SIGALL: Michael.

10 DR. KELLER: Our perspective on this is
11 that the recordkeeping by the government, for
12 whatever reasons; by the publishers; by those who
13 issue protected works is so poor that the process of
14 discovering, of locating, identifying and locating
15 first the work itself, then the owners, the owners
16 may have been the original issuer or those who
17 received it in some kind of transfer of ownership is
18 so fraught that rather than observing a 28-year or
19 25-year period of waiting and the condition of
20 whether an object is in print, is accessible and
21 distributed actively is the difference between some
22 use by the citizens of the country, some benefit
23 directly or indirectly to the country or not at all.

24 Observing the rule that one has to
25 locate and then persuade the presumptive owner to be

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1 responsive puts us in a very, very bad place. The
2 remedy in part is to have a quick take-down
3 procedure based on the owners themselves identifying
4 themselves, saying to those who would reissue,
5 redistribute, transform the work that they're the
6 owners and they have some interest in it and they're
7 asserting that interest and they want that new use,
8 that new distribution to be ceased without serious
9 penalty.

10 To the question of commercial-
11 noncommercial, I really do understand that very
12 well. And there may or may not be a way of
13 explaining it. From our perspective, the
14 perspective of folks who are librarians -- and we're
15 publishers and owners of IP as well -- at a certain
16 point the economic value of an object may have
17 reduced itself to next to nothing. And the
18 noncommercial use really refers to nonexploitative
19 use of an object. I would regard, for instance, and
20 I do regard the Google digitizing of works for
21 distribution -- for indexing and indicators online
22 of where these words and phrases occur in works is
23 noncommercial use. That's a noncommercial use of
24 expression.

25 MR. SIGALL: Maureen.

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1 MS. WHALEN: I'd like to make a couple
2 of comments in response to things that have been
3 said. Sort of working backwards, I would like to
4 also state it is difficult even given the systems
5 that we have in place to find out who people are.
6 Even using the Copyright Office website, which we've
7 all done and we appreciate, you know it would be
8 nice if we could go back beyond 1978. We recognize
9 that.

10 In the museum world I would say there
11 are probably -- if there are 50 museums in the
12 United States that have lawyers or people on the
13 registrar staff who actually really spend most of
14 their day on rights, clearances, and rights
15 identity, that's probably a lot. There are maybe
16 ten lawyers that I know in museums nationwide who do
17 this work on intellectual property issues.

18 Most of the museums in the United
19 States, whether they're art museums or history
20 museums, are very small and are really run by
21 volunteer staff. These are the people who are
22 sitting on enormous amounts of material and would
23 like to make it available.

24 Now it would be nice to have a checklist
25 and say if you do these three things you can assume,

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1 you can presume this is an orphan work. And I think
2 for the purposes of noncommercial, nonprofit,
3 scholarly uses, whether print or electronic, whether
4 it's going on the web, you kind of sit back and
5 say, well, where really is the harm, gets even more
6 minute when you're dealing with unpublished works
7 because then there really is -- you don't even know
8 where to go on that. You have no reason to believe
9 there ever really was any -- you don't have the
10 issue of statutory damages because you don't believe
11 it was ever registered by anybody. So under current
12 law you're already doing a risk analysis that sort
13 of takes you to zero.

14 On the unresponsive potential maybe-
15 copyright owner and whether you can draw a
16 presumption for that, whether it's ambiguous, it
17 would be nice to have some basic guidelines,
18 thresholds. I don't think they can substitute for
19 the due diligence that you would do. I think at a
20 certain point you kind of know when you've run to
21 the end of the path and you can't go any further
22 based on your potential use and what you're doing.

23 And so as much as I like the checklist
24 and the guidelines, I think that that can get
25 problematic for -- you know, we're owners, we're

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1 users, and I think that that can get to be a
2 problem. But for scholarly works I think the
3 unresponsive copyright owner, potential copyright
4 owner, just the fact that they're unresponsive or
5 their answer is ambiguous does not mean that that
6 should be -- that is not an orphan work. I know
7 there's too many negatives in that sentence; I
8 apologize.

9 (Laughter.)

10 MR. SIGALL: I'd like to explore a
11 little bit the concept of guidelines in this sense.
12 I'd like to explore a little bit the criteria -- I
13 mean *criteria*'s probably not the right word -- the
14 factors that people believe should be considered
15 when you're trying to determine whether a search is
16 reasonable or not. We've heard mentioned a few of
17 them. The question of the nature of the use,
18 whether it's commercial versus noncommercial use,
19 but let's think some more about all of the things
20 that people think are relevant to determination of
21 whether a reasonable -- a search for finding the
22 owner was reasonable or not.

23 I can think of some. There's
24 commercial-noncommercial as a distinction, but we
25 can explore the nuances of that if people would

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1 like. But I think published versus unpublished
2 might figure into that. But other factors that
3 people think would be relevant if we are
4 constructing, if we are going down the path of
5 determining guidelines and what kinds of things we
6 should look at it or if we are thinking about the
7 circumstances and factors that courts should, or
8 whomever is deciding these issues, should look at
9 when deciding whether -- what a particular user did
10 in a particular circumstance, whether that was
11 reasonable or not.

12 Dwayne had his hand up. Brewster.

13 DR. BUTTLER: One of the points that I
14 wanted to make was the idea that there are ways to
15 protect your rights now under copyright law. There
16 is an existing registration system, and we haven't
17 talked about that at all.

18 And my hunch is that of all the works
19 that are created on any given day not all of them
20 are registered. And I go out and do this talk all
21 the time to folks and say: If it's important to
22 you, spend the 30 bucks and register it. So I don't
23 want to leave this impression that there aren't ways
24 for owners for copyright folks to protect their
25 rights now, because I think that there are.

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1 And in fact there are incentives in the
2 law that are very powerful to encourage them to do
3 that, and that still doesn't happen. In the same
4 sense I think you could say that about renewal
5 rights. People were aware of the law and renewal
6 opportunities and they didn't do that.

7 So to look at least newer-than-1978
8 works, where we have electronic records,
9 registration might be an important factor in that
10 kind of context as to whether there's an owner for
11 it or not.

12 MR. SIGALL: Brewster.

13 MR. KAHLE: We unfortunately get to deal
14 with this issue every day. And it really comes down
15 to when we're talking with somebody that feels like
16 we shouldn't have their webpages or some such,
17 they're trying to figure out: Are they being taken
18 advantage of. And that's fundamentally underneath
19 everything. And then all this law stuff, as best I
20 can tell being a nonlawyer, is all about what
21 happens when you're pissed off.

22 (Laughter.)

23 MR. KAHLE: And so the key thing is to
24 try to keep people from being pissed off. And so
25 here are some of the factors in terms of what seems

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1 to in the day-to-day life when do people draw the
2 line.

3 Probably one of the biggest is whether
4 it was sold in the first place. If it was never a
5 commercial work, then they tend to say, 'Well, I
6 gave it away before,' so that seems to be an aspect
7 that seems to be useful.

8 It seems to really depend by media type.
9 That maybe it's by industry, or some way of thinking
10 of these. There's different cultures in music than
11 there is in webpages than as opposed to what the
12 software guys call "abandonware," which I think is a
13 great term, abandonware. So media type I find very
14 important.

15 Another is did somebody do some level of
16 work to assert something, whether it's a registry of
17 formal and informal, whether it's with the Copyright
18 Office or with some sort of DNS kind of things. Is
19 there something that somebody actually did to assert
20 that they care.

21 In our case in the webpage world it's
22 whether they put a robot exclusion up. It's this
23 simple file that is part of the culture web where
24 you can go and assert something: You care. That
25 seems to work. The other is years. If years go by,

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1 kind of who cares. It's old stuff.

2 So that's are the aspects that we've
3 found to be important towards understanding whether
4 a work is going to cause people to be upset, then
5 the issues of what do you do with it. There's
6 noncommercial -- let me just hit them briefly even
7 though it wasn't your question. There's
8 noncommercial use. There's where notice and take
9 down works. And is it for a navigation and is it
10 for preservation. Because people will often be very
11 inclined to have their things in archives just for
12 that mortality thing, which is very real.

13 So those sorts of aspects of the use
14 tend to become very important. And to us, to finish
15 my --

16 MR. SIGALL: Let me just clarify. By
17 "navigation," you mean finding it on the web,
18 finding something?

19 MR. KAHLE: Finding aids. Exactly when
20 does it -- when does it stop to be a finding aid
21 versus -- if it's two lines of text about a webpage,
22 that seems to be okay. Then there was a debate
23 around whether it's a thumbnail of an image. Okay,
24 is it a clip out of a movie. You know, there are of
25 course debates, but if it's fundamentally navigation

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1 as opposed to substituting for the work, that tends
2 to make people feel much more comfortable with their
3 works being used in that circumstance.

4 And the last is actually from our
5 perspective, is some form of limited liability. I
6 mean I talk to these lawyers and the copyright law
7 is pretty darn frightening as it currently stands.
8 Thank you.

9 MR. SIGALL: Barbara then Megan then
10 Joe.

11 MS. GREGSON: Well, the producers and
12 directors and film makers and studios and networks
13 that I work for are not interested in ripping off
14 people. They don't want to, you know, just use
15 things arbitrarily. And we spend a great deal of
16 time really trying to track down material and who
17 the owner is.

18 I mean oftentimes I start at the
19 Copyright Office and I start with the Bib book and
20 looking to see who the current distributors are of
21 documentaries and other films. And oftentimes
22 that's very incomplete information. And then we
23 spend the rest of the time literally calling and
24 tracking down every known name, entity, production
25 company. Does it still exist, who bought it, when

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1 did they buy it. Was this film collection
2 transferred at some point, to whom. Was it
3 mortgaged at some point. Who now holds it. And
4 it's an exhaustive process that literally goes
5 around the world.

6 And the filmmakers, they don't have --
7 especially documentary filmmakers and even the
8 studios, they don't have unlimited funds that they
9 want to spend doing this kind of research. And what
10 they really want is to know what can I do to try to
11 -- you know, some guidelines to say, 'Okay, this is
12 enough.' When we try to do certain things with
13 talent and try to clear talent, there are certain
14 things that most people have a set what we can do to
15 try to locate even talent that sort of falls within
16 the realm of SAG and AFTRA that, 'Okay, that's
17 great. We've done this. We've contacted the guild
18 and they don't have a contact. We sent out a
19 letter.'

20 If we had at least some minimum
21 standards from which to follow then if the person
22 does step forward we don't want the liability of
23 them being able to charge anything that they can
24 desire or have to go to a lawsuit and have to defend
25 that. So the filmmakers, -- trust me, they really

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1 want to find these people and they want to pay them
2 some money. They don't necessarily want to pay them
3 a million dollars, but they want to pay them a
4 reasonable fee. 'Well, gee, we're paying everybody
5 else this certain amount of money for this
6 particular documentary' or we're using this motion
7 picture and the average price that we're paying
8 everybody is maybe a higher amount because it's a
9 big film, but they want some kind of guidelines
10 because they don't want to get into trouble. But at
11 the same token you have a director who really wants
12 to include this little piece of footage and it's an
13 everyday task. It's very frustrating sometimes when
14 you really can't find it.

15 And I have had -- actually had the
16 instance where I've had two studios absolutely deny
17 that they own rights to a particular film. 'Oh, no,
18 this company owns it'; 'No, no, no, we don't own it.
19 Our rights expired. They own it.' And nobody
20 would, like, step forward to it.

21 And then meantime, well, gee, you know,
22 we're shooting that scene in the next couple of days
23 and we really want to use it. So it's happened, so
24 finally we just kind of ask both of them and say,
25 'Well, can we just pay you both a little money' and,

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1 you know, sort of settle it. But it can be very
2 frustrating.

3 So it would be really great to have some
4 minimal guidelines that we can follow because there
5 are researchers all around the world who do this
6 every day, so that we can feel safe in telling our
7 producers and the studios that this is what we've
8 done and we have made reasonable efforts. And then
9 along with the, you know, people they can decide
10 that, yes, we can use this. This is okay. And if
11 somebody steps forward we can either payment them
12 some reasonable set amount or that they can't then
13 sue you for suing it.

14 MR. SIGALL: Megan was next and then
15 Joe.

16 MS. LEE: Coming from the nonprofit,
17 educational point of view, we produce foreign
18 language materials for the government. And we use
19 portions and amounts of texts or one or two of a
20 number of photographs in our works.

21 I think that one guideline that might be
22 helpful could be possibly in some cases portions or
23 amounts; and also a number of requests. We've done
24 this thing where we've written once and waited three
25 weeks and written again and waited three weeks and

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1 written again. And yet because of the uncertainties
2 and lack of having a clear guideline, we usually end
3 up not using the work and trying to rewrite the
4 material or find a substitute.

5 I would also like to see something
6 specific about nonprofit educational uses as a
7 guideline or a criteria. Everything that we do
8 immediately falls into the public domain, being
9 produced by government employees during their
10 working hours. So this is also another factor, the
11 possible consequences of us using an orphaned work
12 and it going into the public domain. A take-down is
13 not necessarily that simple once the work has been
14 distributed in this way.

15 MR. SIGALL: Joe was next and then
16 Christine.

17 MR. LISUZZO: We talk about published
18 versus unpublished. Can we go back to a
19 professional photograph for a second and maybe can
20 you tell me what the interpretation of published
21 versus unpublished, what's protected, what's not
22 protected from a copyright stance?

23 MR. SIGALL: Well, from current
24 copyright stance for works since 1978 everything is
25 protected, whether unpublished or not published.

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1 The questions of published versus unpublished become
2 tricky when you go to works from the old 1909 Act,
3 and that's where it becomes difficult.

4 We heard last week the question of
5 unpublished versus published work is very important
6 to photographs, for example, --

7 MR. LISUZZO: Right.

8 MR. SIGALL: -- because that's a
9 critical distinction, especially photographs who
10 produce a thousand images of which only a handful
11 will ever, in their view, be worthy of publication,
12 and then the question is how do you deal with the
13 other 990 or so that they believe are unpublished
14 and they would not like to see be made public in any
15 way. That's one of their important copyright
16 rights, is that they profess to really take an
17 important view of and want to have control over it.
18 So that's --

19 MR. LISUZZO: Make sure I understand the
20 -- the interpretation of published means that it's
21 been released to somebody for sale?

22 MR. SIGALL: It depends. I mean it's
23 not an easy question to answer -- I will admit that
24 -- based on --

25 MR. LISUZZO: Well, you wrote the law.

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1 (Laughter.)

2 MR. LISUZZO: You ought to be able to
3 figure it out.

4 MR. SIGALL: If I did I don't think I
5 would claim a right of attribution on that right
6 now. No.

7 MR. LISUZZO: Well, really, you know,
8 and the reason I ask that, all joking aside, is that
9 in the position we're in it's one of those things
10 where I think somebody brought up, there are a lot
11 of available avenues for somebody to put a stamp or
12 a copyright mark or to register it to a position.

13 The issue we get into a lot of times is
14 that the photographs from the Professional
15 Photographs of America, their stance is they kind of
16 hide behind that whole 'Well, we don't have to do
17 that because we're protected under this piece of
18 it.' So we get into a little bit of play on words
19 there and a little bit of, you know, hiding behind
20 what is there. But then there are available avenues
21 to put a stamp on it or to put some kind of
22 identification, to make it actually easier.

23 And the reason I bring it up is because
24 it's easier for somebody to go find the photograph
25 if there is a stamp on it. So I mean this goes into

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1 a different aspect of what we're -- than what we're
2 talking about from orphan works, but --

3 MR. SIGALL: No, actually --

4 MR. LISUZZO: -- if there was an
5 identification rule --

6 MR. SIGALL: I think it's relevant. I
7 think what -- it may be similar to what Brewster was
8 referring to as sort of assertions by the owner --

9 MR. LISUZZO: Yeah.

10 MR. SIGALL: -- of contact information
11 or just identifiable and, you know, their
12 identification information that they make, whether
13 it be a stamp on an --

14 MR. LISUZZO: Right.

15 MR. SIGALL: -- image or something, that
16 could be one of the factors that you consider about
17 whether -- what a reasonable search is.

18 You know, I have told this story that
19 I've had clients who wanted to use a photograph.
20 And I asked them, 'Did you see a notice anywhere on
21 it of who the owner might be.' And they've -- they
22 say no.

23 And then I asked them, 'Did you turn the
24 photograph over,' and they say -- and they say, 'Oh,
25 there's a notice here.'

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1 (Laughter.)

2 MR. SIGALL: And so -- so I think that
3 could be one of the factors.

4 MR. LISUZZO: See, I think -- I think
5 what you get into, though, is, you know, 999 times
6 out of a thousand they're not putting anything on
7 the photograph and they're hiding behind the
8 copyright law that says I don't have to,
9 everything's protected. And it makes it extremely
10 difficult for the average consumer to figure out
11 where to go if they -- you know, if they go back and
12 try to find that photographer in their hometown
13 phone book and it's not there, what do I do next.
14 And I think that's really kind of where I keep going
15 back to the ease of how does this average consumer
16 who can't find it in the phone book, what's their
17 next step.

18 And I kind of like that idea of the
19 checklist of saying, you know, if I can't find it, I
20 need to go here next. And then if I can't do that,
21 go here next. And then, you know, to that point
22 once the average consumer exhausts that list or even
23 the retailer, for that part, on our sense, exhausts
24 that list of things to do, you know, I think at that
25 point we got to say, 'All right, we can't find the

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1 person.' And I think it's free will at that point,
2 where we've got to go ahead and satisfy the consumer
3 for what they want.

4 The other thing I want to make a comment
5 on, I guess from a criteria standpoint, is where
6 does this fall into international copyright and how
7 that plays out. And I'll just give you a real
8 simple example that's very basic that we run into
9 sometimes. And I know it's very simplistic, but
10 people who go on cruise ships get their pictures
11 taken. They come back, they want a copy of that
12 picture from the cruise ship. Of course the cruise
13 ships are of international registry. You can't get
14 ahold of the photograph. Forget that noise. And
15 the cruiseline won't even entertain the thought of
16 answering the question.

17 So you're now into a situation where
18 you're -- we know clearly it's a professional
19 picture. We're not supposed to copy it, but you try
20 to do due diligence and, you know, forget it,
21 there's no way you're getting anywhere on it.

22 So I think from that standpoint you may
23 get into those kind of situations too where there
24 are exceptions to the rule. And, again, I know I'm
25 playing on a different level than a lot of you folks

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1 are, but I've got to look at it from the average
2 consumer standpoint.

3 MR. SIGALL: I'm surprised you haven't
4 used that as an excuse to go on some cruises, to try
5 to find these photographers.

6 MR. LISUZZO: Tried. Tried. It won't
7 happen.

8 MR. SIGALL: Okay. I think I had a
9 couple of hands over here. Yeah, let's go with
10 Christine, then Brian who hasn't spoken yet, David,
11 Steve, and Megan.

12 MS. SUNDT: I'm going to put on my
13 double-pointed hat, College Art and Visual Resources
14 Association, and speak about our experience with
15 CONFU and the effort to try to create guidelines,
16 which was a two-and-a-half-year process of
17 nothingness.

18 I would -- I would try to dissuade us
19 from thinking that we can come up with general
20 guidelines. We know that's not an easy thing to do
21 and it's probably not going to end up with anything
22 that's workable.

23 But I do think that professional groups,
24 professional organizations have the wherewithal and
25 the means to do incredibly good work in putting

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1 together ethical guidelines for practical purposes.
2 And it's through these groups that I think we can
3 make the best headway. And we're going to find a
4 lot of overlap, a lot of mapping, let's say, in the
5 library world. Mapping from one group to another.

6 And we're going to see that we're going
7 to come up basically with the same stuff, but it's
8 going to be in a language that we understand and a
9 sense of workability and priorities that fit the
10 picture the best. Again, from the standpoint of
11 visual art, a lot of things, portions and amounts,
12 you can't even talk about portions and amounts with
13 visual art. It's it or not.

14 So let's forget that -- again this idea
15 of generalizing to the point of specificity is going
16 to work; it's not. We know that. Been there, done
17 that.

18 MR. SIGALL: Brian was next.

19 MR. SCHOTTLAENDER: So the counter point
20 to that, I don't know, the notion of sectarian or,
21 as you say, professional society driven best
22 practices, I think actually has considerable appeal.
23 I think Joe's example drives home my conviction that
24 any set of guidelines, however determined, is
25 unlikely to be sort of linearly applied.

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1 So Brewster has raised the notion of
2 use. Why are you -- why are you about to do what
3 you're about to do. And so your example of
4 somebody's been on a cruise and wants a copy of the
5 photograph to send to Aunt Mabel is vastly different
6 from wanting a copy of it to publish in the next
7 blockbuster book. And so the notion of guidelines
8 that are going to have to be applied in a kind of a
9 matrix fashion rather than if this, then that, I
10 think is going to have to be thought through very
11 carefully.

12 I think one of the points that came
13 through in Carl's comments this morning about
14 unresponsive rightsholders is this notion of
15 reasonableness being in the eye of the beholder.
16 And I think -- I think the prospect of sectarian
17 best practices does nothing but underscore that.
18 Because what's reasonable in your community may be
19 very different in my community.

20 MR. SIGALL: David next.

21 MR. EBER: Yeah. I actually agree with
22 a lot of what Christine said about the difficulty of
23 having guidelines that are going to be terribly
24 useful generally or very detailed. I mean I suppose
25 in certain industries, and I think of publishing,

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1 there are certain things that, you know, it strikes
2 me if you want -- you want to use some text
3 somewhere, pretty much everybody who does
4 permissions, in my view responsibly, will start in
5 the same kind of places. And if you don't do those
6 basic things, then I have to say per se it's not a
7 reasonable search, but once you get beyond that it's
8 going to be difficult.

9 I'll just say one thing about this issue
10 of, you know, what factors would be considered in
11 determining a reasonable search. I agree that there
12 are going to be a number of them. Age, for example,
13 would seem to me a relative factor in one sense but
14 not in another sense. In the sense that a newer
15 work is by its nature going to be easier to discover
16 who created it, not in all cases but just in
17 general, clearly that's going to be a relevant
18 factor.

19 What I disagree with is the idea that
20 somehow say an older work or a work without a
21 notice, or something like that, is going to be
22 considered to require a lesser search because we are
23 assuming that the author of that work doesn't care
24 if you use the work or not. That I -- I disagree
25 with that. I disagree with the idea that there are

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1 -- that we are trying to -- that we are using these
2 things to figure out what the author, what the owner
3 of this work wants us to do is it for that thing,
4 because again you are going to -- you are going to
5 just sort of be generally pulled to a situation
6 where you have certain types of work, certain age
7 work, certain classifications of work where -- which
8 lead to a situation where you just make these
9 blanket presumptions with respect to those works and
10 you move towards a situation where you have very
11 little protection for those works.

12 So I think, again, it's not trying to
13 figure out what's in the mind of somebody and then
14 make -- make their use. It's really to reasonably
15 try to actually locate this person and seek to get
16 permission.

17 MR. SIGALL: Steven was next.

18 MR. GOTTLIEB: Yeah. I just want to
19 reiterate -- I just want to reiterate what I said
20 before and what's been said by a few others. And
21 that the best -- the best way to go about this is to
22 convene sectoral roundtables to decide what is
23 appropriate for those groups.

24 Now also as far as requiring A, B, and
25 C, and at that point it's considered an orphan work,

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1 there's a danger in -- well, what's going to happen
2 is you're going to get the lowest common
3 denominator. Everybody's going to do just that and
4 no more. And really it thwarts the primary purpose
5 or at least the first step in this system which is
6 to match up an owner and a user.

7 And if everybody's doing just what the
8 rules say they have to do and not consider at that
9 moment for their purpose or the use for what work
10 they're using, what they need to do, what's the best
11 practice, then you're never going to -- well, not
12 never, but it's going to be that much more difficult
13 for the user and owner to come together.

14 If I could just side step for one
15 second. Also I want to comment on some comments on
16 mandatory registries and those kind of things. What
17 you're asking -- what you're asking an owner to do
18 is prognosticate at the creation, at the time of
19 creation or a certain period after that the value of
20 a work for a lifetime. And it's unrealistic and
21 impractical. And we would look at it from the other
22 side.

23 We would say, if anything, there should
24 be a mandatory registration by users rather than --
25 rather than deal with millions or billions of works

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1 that a creator thinks may or may not have value at
2 some time in the future, you're dealing with a user
3 who knows exactly which work or a groups of works
4 that he wants to use and knows what that work is
5 worth to him at that moment. And it seems to us --
6 and, again, like many people here, where we are
7 arriving at this as both owners and users of
8 copyrights, it seems to us that's the best balance
9 and the best system.

10 MR. SIGALL: I had Megan next to my list
11 and let's do another round here. Barbara.

12 MS. LEE: For international works. I
13 think the international works is also very important
14 especially for our work since we use mostly
15 authentic texts and images from countries such as
16 Iran, Afghanistan, Arabic countries, China. And
17 guidelines would be very helpful to us, but I don't
18 know how they would play out or apply if they were
19 made-in-America guidelines, because we also deal
20 with the international copyright law which further
21 complicates matters.

22 We have two main problems. One is
23 nonresponse, as you can imagine. And the second is
24 a very broad response, 'Sure, go ahead and use
25 anything you want from our website.' We're not sure

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1 we've really located the proper owner. And these
2 countries -- we can't just assume these countries
3 just disregard copyright law, although that is
4 probably the case, we can't assume that.

5 And so I'm just wondering if we do have
6 guidelines, which I would very much appreciate, the
7 minimum guidelines to fulfill, would they really
8 apply internationally.

9 MS. PETERS: Can I ask you a question?
10 Do you put your material up on the web? In other
11 words, do you make your material available outside
12 the United States?

13 MS. LEE: Some of it. A lot of our
14 material is just used for resident courses by
15 enrolled students, you would say. And we're also
16 doing a free web language-learning product called
17 GLOS. This is in the public domain. It is on the
18 web and available to anyone in any country.

19 And this is a project that I personally
20 work on and I'm very concerned about rights of --
21 the authentic texts that we're using from countries
22 all over the world.

23 MS. PETERS: That was actually my
24 question. The material that you create is in the
25 public domain?

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1 MS. LEE: Yes.

2 MS. PETERS: The material that you may
3 be using is not?

4 MS. LEE: Yes.

5 MS. PETERS: Even though it's
6 incorporated in your material?

7 MS. LEE: Yes.

8 MS. PETERS: Okay.

9 MS. LEE: And right now our policy is
10 very conservative. We try to get permission. But,
11 as I said, some of our permissions are very broad
12 and I'm not really sure if we found the copyright
13 owner when someone says, 'Sure, go ahead and use
14 anything you want.'

15 MS. PETERS: I'd have doubts, too.

16 MR. SIGALL: Let me go with -- I have
17 Barbara and then I have Bruce and then I have Gary.
18 I think Gary raised his hand -- no? Okay, then
19 Chris. And after that we'll cut it off and take a
20 short break and then come back to this discussion,
21 so Barbara.

22 MS. GREGSON: In response to what Mr.
23 Gottlieb said and then what Mr. Buttler had said
24 earlier is it seems like we are all spinning our
25 wheels to some degree. We do have a system in

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1 place. We have a copyright registration. Now why
2 is it that the copyrightholders and the people who
3 then have those rights transferred to them, why
4 isn't encumbered upon them to make sure that those
5 records are kept up to date, that they have the
6 current information as to where they are located?

7 Because, you know, why -- literally why
8 do we have to spin our wheels to try to figure out
9 who the heck owns something? And certainly, yes,
10 unpublished works is a whole different ball of wax,
11 but at least with published works if those people
12 really did keep all of those records up to date,
13 then we wouldn't be sitting here. We would make it
14 much easier.

15 The system is in place. The problem is
16 the people just don't use it. So why should we have
17 to really go to such great depths to try to locate
18 people? And I -- that I just don't understand. I
19 mean it's there. The system's there. We should
20 just use it.

21 MR. SIGALL: Bruce was next.

22 MR. FUNKHOUSER: Yeah. I'd like to kind
23 of go back to the question I think that Jule asked
24 at the very beginning which is what is wrong, what
25 are the pitfalls of the systems that we have kind of

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1 been talking about here.

2 To me the pitfalls of guidelines are
3 that you end up not dealing with all the potential
4 possibilities. I mean we talked here about cross
5 media. We've talked here about cross border. We've
6 talked here about cross uses. How can you come up
7 with a set of guidelines and -- thank you, I'm sorry
8 for bringing up CONTU [sic]. I remember it as a lot
9 more than two years. I thought it was about 20.

10 (Laughter.)

11 MS. SUNDT: CONFU.

12 MR. FUNKHOUSER: CONFU, right. That it
13 just went on and on and on, and we never in fact
14 came up with the kind of guidelines that we can use.

15 To me the effort that we're engaged in
16 here is about the reason why we have copyright,
17 which is not particularly to create an opportunity
18 for everyone to get at intellectual property. It's
19 to encourage the creation of intellectual property
20 by creating uses for them, getting proper
21 compensation back to those people who have created.
22 To encourage them to in fact create more uses.

23 And if through a creative look at the
24 copyright law you start to adjust it in such a way
25 that after 25 years or 28 years or a certain amount

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1 of time, you suddenly kind of abrogate that
2 particular rights that Congress felt were due to
3 both published and unpublished works, both
4 registered and unregistered works, then I think you
5 kind of abrogate the whole point of copyright. It's
6 there to encourage people to create more works, not
7 to encourage uses of them regardless of whether they
8 were registered or not.

9 So I find it kind of difficult to jump
10 into this guidelines realm with any enthusiasm,
11 because I think we're just going to end up spinning
12 our wheels in meeting after meeting after meeting
13 after meeting after meeting after meeting.

14 MR. SIGALL: Chris and then -- and then
15 the break.

16 DR. SPRIGMAN: Okay. So the copyright
17 law is there I think to encourage creation, to
18 incentivize creation, but also to encourage use. I
19 mean the copyright law is really about expanding
20 knowledge in our society and around the world.

21 I just want to agree with something very
22 strong that Barbara said and address Steven's point
23 that somehow we can't require authors to do any
24 thinking about the value of their works.

25 Let's be clear. We require them to do

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1 that kind of thinking now. If you do not register
2 your work you cannot bring an infringement suit
3 until you register it. But probably more
4 importantly, you cannot collect statutory damages
5 for any infringement that commences prior to your
6 registration, which means that any normally kind of,
7 you know, intelligent and informed person who may
8 own a valuable property has to think to themselves,
9 'Is this kind of property that I want to be able to
10 defend adequately in a lawsuit.' And the
11 availability of statutory damages and, importantly,
12 attorney's fees is absolutely necessary to defend a
13 property in many cases in a lawsuit.

14 So we actually oblige them to do that
15 kind of thinking now. And this is the kind of
16 thinking we all do. We buy car insurance and we try
17 to figure out what kind of deductible we want. We
18 try to figure out what our risk is. We buy health
19 insurance and we do a risk analysis there.

20 We can do the same risk analysis with
21 respect to potentially valuable or potentially not
22 valuable pieces of property. And if -- you know, if
23 we do this better, if we make the registry have some
24 implications for orphan works we will get authors to
25 reveal information about what they want.

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1 The alternative is what we have now
2 which is we don't know what they want in most cases
3 and all of us have to do a ton of expensive work to
4 find out. And that is an inefficient way to do
5 this.

6 MR. SIGALL: Okay. Let's take a short
7 break, come back at quarter to 11:00, a ten-minute
8 break, and continue with the discussion on this
9 topic.

10 (Recess taken from 10:36 a.m. to 10:55
11 a.m.)

12 MR. SIGALL: Before we get started back
13 up I want to give Gail Silva a chance to introduce
14 herself and tell us who she's here representing.

15 MS. SILVA: Thank you and sorry. I
16 overslept -- no. So I'm very sorry to be tardy. I
17 work with the Film Arts Foundation in San Francisco.
18 And it's a service organization for independent film
19 and videomakers. We try and help them make films
20 and also certainly there are a lot of questions that
21 come up about copyright and materials.

22 A lot of the filmmakers who we
23 represent, which is somewhere over 3,000, are mostly
24 documentarians and experimental makers, some feature
25 people. So -- and we give them grants, so I know

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1 where the money goes.

2 MR. SIGALL: Let me just round off the
3 discussion of types of factors that you should --
4 should be considered in determining whether a search
5 is reasonable with this -- with one question.

6 The related -- the question of the
7 nature of the user and the question of the -- who
8 the user is. And some have suggested I think here
9 and in Washington at least suggested that the
10 resources available to the user should be considered
11 in whether the search they undertook was reasonable
12 or not. I would like to get people's reaction to
13 that question of whether the nature of the user
14 should be considered and how it should be
15 considered, if so, in determining whether the search
16 was reasonable, mostly in terms of the
17 sophistication or resources available to the user.

18 We got Joe and Brewster, Maureen, Gail.

19 MR. LISUZZO: Yeah. I guess I'll chime
20 in first going back to the typical WalMart customer
21 standing at the counter. Their resources of course
22 are going to be limited to whatever we tell them
23 they can probably go do. I mean most customers who
24 have a picture don't think about the fact that they
25 have to go out and hunt and peck and try to figure

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1 out where that photograph came from or if there's
2 rights or not rights or copyright or not copyright.

3 So I think as far as a common
4 denominator, again this may go back to defining what
5 type of work it is to the point of the guidelines on
6 it or checklist you have to go through, but when
7 you're looking at it from that standpoint, you know,
8 in my world it's real simple. It has to be
9 extremely inexpensive and extremely simple and very
10 basic for a customer to do because they don't really
11 have a lot of resources to go to. We've got to
12 provide them those resources.

13 MR. SIGALL: Okay. Brewster was next.

14 MR. KAHLE: In the case of -- in the
15 case of libraries and archives and in some cases
16 like the web search organizations, there are a
17 couple of factors that really play into the
18 resources. If these things are ephemeral works
19 particularly, so ephemeral works are things that
20 sort of evaporate over some amount of time or they
21 weren't meant for the ages or in some sense, often
22 these things come in such large quantity that they
23 you can't do anything on a particular work-by-work
24 basis.

25 So a guideline of going and chasing down

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1 every owner of a webpage is impossible, even if you
2 were to say you could do it at a website level, if
3 you take a site like AOL or Geocities which hosts
4 other people's materials, it becomes too big a
5 problem.

6 So in the case of libraries and
7 archives, or which have limited staff, or in the
8 case where you're dealing with millions of works to
9 make a piece, I would consider automated techniques
10 or categorical methods of dealing with it. Does
11 that help?

12 MR. SIGALL: I had Maureen and then Gail
13 and then Christine.

14 MS. WHALEN: On the user side, certainly
15 the number of resources and the level of
16 sophistication and the understanding of it are
17 important. I think the relevant factors that we
18 talked about a little earlier can help people sort
19 of understand where they're supposed to look.

20 But I usually fall not so much on the
21 nature of the user as the nature of the use because
22 most of our uses tend to be scholarly purposes,
23 limited publication. I suspect, though, if you look
24 at what some may call the broadest distribution, the
25 little historical society or a little historical

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1 museum some place that has a wonderful archive
2 relating to something and they want to put it all on
3 the web, then here you have probably a volunteer
4 organization with a nice little set of stuff that
5 they want to put out there for which they may or may
6 not get a government grant, and then they put it on
7 the web. So you look at the distribution being
8 potentially worldwide and you look at the user as
9 being conscientious, but not -- doesn't know a whole
10 lot about it.

11 So I guess you have to look at both of
12 those things together. Just because it's an
13 unsophisticated or resource-limited user shouldn't
14 forgive a use that is inappropriate or allows you to
15 take away certain due diligence. I don't think
16 anybody in the museum community would advocate for
17 that.

18 On the other hand, if it is a scholarly
19 use, its interest, the number of hits, the number of
20 people, whatever, is somewhat narrow. I think in
21 that case certain -- certain rights and maybe less
22 -- less damages, or whatever, it turns out to be is
23 appropriate.

24 MR. SIGALL: Gail.

25 MS. SILVA: I just -- I just wanted to

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1 characterize for this discussion that -- the nature
2 of filmmakers and -- the filmmakers in our community
3 and in independent communities all over the country
4 just a little bit, to put a context, to say that
5 filmmakers care very deeply about the whole issue of
6 copyright from one perspective because they're often
7 trying to use material. On the other side, they're
8 making work that they also want to protect.

9 So I can say from experience, and I've
10 been doing this for 25 years and I was in publishing
11 for almost ten, so I sort of understand this to a
12 certain perspective, people, filmmakers, because it
13 affects them if somebody wants to use their work are
14 some of the most -- or independent filmmakers are
15 some of the most diligent folks in searching, doing
16 that kind of search. And I have to say that in most
17 cases they're doing -- they're following all the
18 appropriate steps in order to ascertain the nature
19 of the ownership on material.

20 On the other hand, the paying for rights
21 on some of this work has gotten very difficult. So
22 you may select something that you want to use, some
23 footage from newsreel from the 1940s. And so what
24 happens is you have -- the filmmaker is faced with
25 the dilemma of only being able to purchase certain

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1 rights one after the other. Very few filmmakers are
2 -- independent filmmakers are funded well enough to
3 be able to purchase all rights, so they may purchase
4 rights for festivals. They may purchase rights for
5 educational. If goes beyond that, the costs start
6 escalating.

7 I don't think -- the nature of funding
8 at the moment for educational material is quite
9 tight. And I would say given the limited resources
10 that most of them have, the -- an opportunity to be
11 able to see and understand in a registry of some
12 sort might be the best solution. I think it gives
13 them -- because they are diligent and because it
14 gives them some places to do the search. So.

15 MR. SIGALL: Christine and then Gary and
16 then Barbara.

17 MS. SUNDT: Within the university
18 community it's incredibly rare to have somebody in a
19 legal capacity advising on copyright. It's almost
20 unheard of. I can only think of less than a handful
21 of big schools that can afford that. So what that
22 means is that the user has to have guidance that is
23 clear and simple and understandable and applicable.

24 We also have to understand that what
25 we're already doing is at the highest ethical level.

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1 I mean if anybody would look around at how we do our
2 business, there's no fault. I mean we haven't been
3 sued in how many years. So it's been -- I think
4 that we have a good track record of being good
5 citizens, good administrators, and respectful of
6 other people's rights.

7 However, because of the fact that we
8 don't have the benefit of good legal counsel and
9 copyright guidance on the campus, we are advised by
10 our general counsel to be -- not to take risk. And
11 that's the part that is the hardest, because we know
12 we have some rights that we should be exercising,
13 but we're -- our hands are tied because we are
14 representing the university, in some cases the
15 state, and we can't do it. How do we get around the
16 situation? How do we work it out so the nature of
17 the user at the university is somebody who's ethical
18 and afraid of risk and has no legal background.

19 MR. SIGALL: Gary and then Barbara and
20 Michael.

21 MR. STRONG: I think this question is
22 particularly interesting when you begin to look at
23 types of users, because even within the university
24 community we have increasingly an effort to engage
25 undergraduates in research on the campus and in the

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1 use of primary-source materials within a context of
2 a ten-week term.

3 And at the other end of the spectrum we
4 have our tenured faculty who are engaged in longterm
5 research with considerable amounts of more time even
6 though they all wait till the last minute to clear
7 anything, the time factors are quite different.

8 And as we change higher education and
9 the way students pursue new knowledge and create new
10 ideas of their own, which we want them to understand
11 how they are protected around, I think the user
12 question is extremely important. And if we link
13 that then to use, whether it is for the completion
14 of a term paper or a research project versus
15 something that is scholarly that may go into the
16 published domain, I don't know whether there are
17 differences. I think that that's an area that we
18 need an awful lot more discussion in, particularly
19 when you get into film and music in addition to the
20 printed material.

21 MR. SIGALL: Barbara.

22 MS. GREGSON: Since we have the
23 Copyright Office already available to us, since the
24 Copyright Office actually has a presence online,
25 what I would really like to see because it is a

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1 greatly democratic process is that -- and it's a
2 wonderful tool -- is that the Copyright Office, if
3 they could really make a concerted effort to put the
4 full records of the copyright application online,
5 because that is where you'll find all the actual
6 contact information whereas now you have to actually
7 send somebody physically into the Copyright Office
8 to pull that information.

9 And if you could really work, and I'm
10 sure it's obviously -- it's only money, but if you
11 could really -- if you could really try to start
12 putting, and I'm sure you are, the pre1978 copyright
13 information online, that is a great tool. Because,
14 like I said, otherwise it is -- it does cost more
15 money to send somebody into the Copyright Office.

16 Right now I get whatever I can online
17 from the Copyright Office and from other sources
18 that I have available to me but, again, the tool is
19 there, we need to utilize it more.

20 MS. PETERS: Can I just -- we are. We
21 actually have done an analysis of what it would take
22 to put our pre1978 records online. And, again, you
23 were right, it's money.

24 MS. GREGSON: It's only money.

25 MS. PETERS: The estimate to basically

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1 digitize them and index them and integrate them into
2 the existing records was about \$35 million. So
3 we're looking at a way in which to have a plan to do
4 it in segments and hopefully that will take place.
5 Actually we have a line item in our budget for next
6 year to start it.

7 MS. GREGSON: Great.

8 MR. SIGALL: I have Michael on the list,
9 then Jerry.

10 DR. KELLER: A couple of comments.
11 First, it seems to me that the standards for
12 whatever emanates from this process should be a
13 series of questions or processes that the average
14 citizen can understand; that would not require the
15 assistance of an IP expert; that would allow a
16 citizen some far place, distant place from a
17 publisher or a publishing regime or a moviemaker, or
18 whatever, to understand what to do and how to do it.
19 It should not be so difficult and so costly,
20 whatever the method is, to take the process out of
21 the hands of the public.

22 Second, I want to reinforce something
23 that Brewster said. This -- whatever changes
24 emanate should also consider, take into account the
25 fact that a lot of what is now published appears

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1 only on the web and increasingly will appear only on
2 the web if only briefly. And we need to have some
3 protections for our society and especially for those
4 of us who are involved in what might be called
5 cultural custodianship for our society so that we
6 can capture and copy that material into our
7 archives, including the Internet Archive and our
8 institutional archives so that we have a record of
9 what happened even if that record was only published
10 briefly.

11 A lot of conundrums there, a lot of
12 difficulties there. It will be to the benefit of
13 our country, indeed to the world, if we are
14 empowered or at least not prevented from doing that.

15 Give you a quick example. Website
16 available 1993. Will it be usable, assuming that
17 it's been copied into the Internet Archives or one
18 of our archives, in 2018 or will we wait until, my
19 calculation, 2133?

20 MR. SIGALL: Jerry was next.

21 MR. MCBRIDE: Yes. I think these are
22 questions of an interesting model. And in most
23 parts of the copyright law there is given special
24 consideration to research and study. And I of
25 course think that those should continue.

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1 But I think we also need to think about
2 people who may want to use these materials simply
3 for their own personal use in terms of things that
4 have gone out of print or are no longer available.
5 So I know that happens very frequently in the
6 library I work at, that someone may want simply a
7 piece of music or a sound recording or a text that's
8 written. And really -- or they may not be close by,
9 and we have to make a copy for them if they are to
10 actually see it.

11 So I'm hoping that this -- the language
12 would not be so restrictive that it could only be in
13 cases of, you know, people doing serious work, but
14 also people who simply, you know, want access to
15 materials that are no longer available, as long as
16 it's simply for their own individual, noncommercial
17 use.

18 MR. EBER: Similar to some of those
19 things. I'm more inclined to agree with the person
20 who said -- and I can't remember who -- that
21 reasonableness, if -- if that standard is going to
22 be a bit flexible depending on the user side as
23 opposed to the other things, that it be focused on
24 the use and less on the person, because -- and those
25 things may overlap a lot, but they won't always.

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1 I mean when we talk about these kinds of
2 uses, there's so many different people around the
3 table wanting to make so many very different uses,
4 some that are not heavily commercial or commercial
5 at all, some that could be, you know, quite large
6 and valuable exploitations. And I think that
7 whatever we do should cover everything, but it
8 strikes me that some of them are going to have much
9 more economic effect than others.

10 And so I would really focus it -- if
11 there is going to be some sort of give or play in
12 how you do reasonableness, the use itself should
13 really be the focus as opposed to the particular
14 user. You wouldn't want to have someone who's doing
15 something, you know, very exploitative with the work
16 be able to say, 'Well, I'm, you know, just a country
17 bumpkin,' or something, 'and so I couldn't have
18 done' -- so really the emphasis should be placed
19 there.

20 MR. SIGALL: Okay. I'd like now to turn
21 to the question of the use of registries. There
22 were a fair number of commenters in the written
23 comments who suggested that while registration of
24 works shouldn't be mandatory, it should be the case
25 that voluntary registration of the type, anyway,

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1 that we currently operate at the Copyright Office
2 could be implemented as part of a reasonable-search
3 approach in the sense that you encourage copyright
4 owners to put their identifying information and
5 ownership information into a registry either run
6 privately or either run by the Copyright Office or
7 sort of a mixture of public-private approach as a
8 place to start, a place where -- a necessary part of
9 a search, but not a sufficient part of a search in
10 the sense that if you don't find a copyright owner's
11 information in that, in any of these registries
12 doesn't mean you're finished. You have to continue
13 to look in reasonable other places that would be
14 reasonable to try to find the copyright owner.

15 The question that I have about -- about
16 factoring these registries into any sort of
17 reasonable effort system is twofold: One, how do we
18 encourage these registries to be developed,
19 particularly private-sector-based registries? And,
20 two, how do we ensure that the information in those
21 registries is accurate and updated? And related to
22 that is: How do we make them as easy to use for the
23 users as possible and make them efficient in that
24 way?

25 So I open that to anyone on the floor.

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1 Chris and then Michael and then
2 Christine.

3 DR. SPRIGMAN: All right. So first I
4 think it's very helpful to be as clear as we can be
5 about the difference between a mandatory and a
6 voluntary registry. So the way that Creative
7 Commons and Save the Music would think about it is a
8 mandatory registry is the kind of registry that we
9 had once upon a time in the copyright law where if
10 you do not register you do not get a copyright,
11 okay. Or if you do not renew, your copyright
12 lapses. So that renewal is really just another form
13 of registration. It's kind of a re-registration,
14 and that's a mandatory system where your copyright
15 either doesn't arise or it goes away if you fail to
16 register.

17 We're not in favor of that for, among
18 other reasons, it creates significant problems under
19 the Berne Convention. It is just the kind mandatory
20 formality that the Berne Convention is pushing
21 against.

22 So then we move to the category of
23 voluntary formalities. And within the category of
24 voluntary formalities is a number of different
25 approaches, so one approach is that you incent the

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1 creation of some voluntary registries and you have
2 some incentives for people to register in order to
3 let users know who owns a work so that hopefully you
4 can find that user and negotiate a license. And
5 that's roughly what the copyright law has now. It
6 has some good, some meaningful incentives for people
7 to register, but those incentives, as I think we've
8 said before, only really work for people with
9 valuable works who fear being deprived of the
10 ability to gain all the remedies that they might
11 want in a lawsuit. They don't work for other
12 people.

13 So the other form of a voluntary
14 registry that Creative Commons and Save the Music do
15 think would reasonably, inexpensively deal with the
16 orphan works problem is the kind of registry that is
17 voluntary but if you do not comply, your work is
18 categorically in a category of orphan works where
19 use can be made according to some license, according
20 to some one-size-fits-all, cheap license that you
21 don't have to separately negotiate. Okay.

22 So how do you incent the creation of
23 this? Well, you could incent the creation of it by
24 changing the rules to create this category of orphan
25 works either having the registry run centrally by

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1 the Copyright Office or we would prefer having the
2 registry run according to standards that are
3 established by the Copyright Office but where firms
4 can actually compete to solicit the information
5 about registration and feed it into a format, a
6 properly-formatted centralized database. And this
7 is a cheaper, more efficient approach. Firms will
8 compete to make registration cheap and easier.

9 How do you make sure that registration
10 is accurate. Well, I mean that's a conundrum, but
11 one advantage of this approach to orphan works is
12 that the registration is only partially a way to
13 find people. And if people want to be found,
14 they'll be -- because they think their work is
15 valuable and they want people to come license it,
16 they're going to themselves have an incentive to
17 keep that registration information current, but
18 there's a second and very important function that
19 registration serves. And that is even if the
20 signal's not up to date, even if the information's
21 not up to date, you can treat it as a signal. And
22 that signal is this work is not orphan, 'I might
23 exploit it at some later date. Hands off.'

24 So even if this information is not up to
25 date, at least you can deduce that from the fact of

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1 registration at all.

2 MR. SIGALL: I had Michael.

3 MR. DONALDSON: Just further endorsing
4 that idea of a voluntary registry -- we call it
5 Directory of Claimants in our -- in our proposal, to
6 me this is central to the whole work we're about.

7 If you had the contact information of
8 claimants easily available, it really moots much of
9 what we were talking about. So it seems to me that
10 there are probably four issues:

11 Number one is the design of the
12 Directory of Claimants so that it can be accessed
13 any one of a number of ways: By registration
14 number, by title of work, by author of work. It has
15 to be a very well designed site.

16 There has to be the possibility of group
17 registration for certain kinds -- for any kind of
18 work. The Hearst Collection for, you know, 1921 to
19 1951. So that it's not overly burdensome to have
20 your contact information up on the web. And then
21 the meaning of it, as Chris spoke, being registered
22 means it can't be an orphan work. The absence of
23 being included on a Directory of Claimants just
24 means the user has to keep looking. It doesn't
25 create rights in anybody.

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1 The false claim issue is one that I kind
2 of smile at because people are making false claims
3 now in registration of copyright work sometimes.
4 And I certainly have been held up for license fees
5 from people I didn't think really had the copyright
6 but, you know, that's what we had to do. I've paid
7 Wade Williams money over the years for his Ed Woods
8 collection. He recently lost a fair use case, and I
9 saw that his standing was established by documents
10 created long after I had paid him a lot of money.

11 (Laughter.)

12 MR. DONALDSON: So, you know, people are
13 going -- false claims don't bother me just because
14 they -- it bothers me, but it's a problem we have
15 now. And presumably there could be some nice strong
16 consequences built into line to the Copyright
17 Office. I don't know about that.

18 One of the big issues, and I suspect
19 what you would love to hear is a group of
20 organizations coming forward wanting to do this,
21 you're not going to like this, but really it's the
22 Copyright Office is in the best position, because it
23 has -- and that's money, you know. And I think one
24 thing we ought to do today is recruit everybody
25 who's come to all of these Roundtables to help lobby

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1 you for some money to create this voluntary
2 Directory of Claimants.

3 MS. PETERS: You have no idea how
4 difficult it is.

5 MR. DONALDSON: Let's all help.

6 MR. SIGALL: I've suggested premium
7 standard registrations where you get an autographed
8 picture with the registry and you pay some premium
9 of \$500, so. It hasn't gone very far, so.

10 (Laughter.)

11 MR. SIGALL: Christine.

12 MR. STRONG: Is the autograph
13 copyrighted?

14 MR. SIGALL: We'll take it on a
15 cruiseship. We'll be okay.

16 Christine.

17 MS. SUNDT: From the standpoint of
18 artists and the College Art Association, artists in
19 the past never registered their works. Very
20 infrequently registered their works. I don't think
21 it's going to change very much today if a registry
22 were required.

23 But I do think that professional
24 organizations are in a good place to begin to bring
25 this information out from within its membership. In

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1 other words, College Art, which is a data-collection
2 organization, wanting to know a lot about what its
3 members do, could be asking if there are rights
4 issues that should be declared, and to have that
5 information as then part of a membership record.

6 So, again, I think that the grassroots
7 efforts for registries could be doing a better job
8 in bringing this information together. We all know
9 that a lot of conflicts happen within a type group,
10 artist against another artist or a publisher and an
11 author. So, again, those groups could be very
12 valuable for pulling -- for helping to create this
13 registry.

14 I think that if the Copyright Office
15 were to undertake it we would all be back at the
16 point of not being able to do it, because I would
17 much rather see you spend the money and get your
18 records online. Thirty-five million is a drop in
19 the bucket for people like Phil Knight. Maybe Phil,
20 you can get him interested in this. Nike somehow.

21 Now as far as the false claims are
22 concerned, yes, that bothers all of us, but it's
23 happening everywhere. But we don't necessarily --
24 we don't do anything when we recognize a false
25 claim.

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1 There are provisions for claiming false
2 copyright, but I don't -- I have never heard of
3 anybody going after somebody and actually making a
4 case of it, at least in my field. And I know that
5 in the arts field a lot of people claim rights,
6 copyright on stuff for which there is no copyright.
7 And they actually use that as a shield. They say
8 it's copyright when it's actually a licensing issue
9 or a property rights issue, but they're making a
10 point of saying it's copyright, and it's not.
11 There's no copyright there at all.

12 So we have other provisions in the law
13 to take care of fraud. Maybe this is where it
14 should go. It's not copyright. Something else.

15 MR. SIGALL: Let me ask a question
16 related to registries, which comes from our
17 practical experience operating one. In theory they
18 sound great. One of the big problems, though,
19 especially with multimedia works and works like
20 websites, is exactly what is covered by the
21 registration. And that's an issue that I think in
22 this context both the owners and the users will --
23 could potentially squabble over as to, you know,
24 there was a registration made and it was in a
25 registry somewhere.

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1 The user may argue that it doesn't cover
2 the work that they wanted to use, so therefore it
3 was reasonable for them to conclude that the owner
4 -- that it was still an orphan work.

5 The owner would argue that it does cover
6 it and therefore that you're per se excluded from
7 the orphan works system. And particularly in the
8 case of websites and collections of works that get
9 registered, whether it be group registration of
10 photographs or other types of individual items that
11 are grouped together, the quality of the information
12 in the registry about the titles of the work is --
13 becomes a real issue for us as a registration
14 matter. But I think in this case if you implemented
15 that system with registries you would have probably
16 a lot of disputes about exactly what was registered
17 and whether something was in or out, especially
18 depending on how that determination plays out in the
19 remedies that are limited or the other benefits that
20 the owner gets or that the user might get.

21 Can people react to that question of how
22 we try to deal with that problem of -- especially
23 for something like a website or a collection of
24 information that is registered, how do we try to
25 make that registration still useful for the users

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1 and for resolving disputes down the road in terms of
2 what was registered or was not registered? Anyone
3 have any suggestions on that?

4 Michael and Chris. Michael.

5 MR. DONALDSON: I think it goes to my
6 other comment, is the consequences of registration.
7 If the consequences of absence from the registration
8 being out of the system is that you have to keep
9 looking, it's a nonproblem. And I would think in a
10 set of guidelines you would -- one thing you'd put
11 in is that if somebody owns -- has a confusing
12 registration, that's a good next place to pursue to
13 find out who the true owner is.

14 The whole key is what is the impact of
15 being registered. If the impact of not being
16 registered is just keep looking, it's a not a
17 problem at all, the fact that there is confusion is
18 possible.

19 MR. SIGALL: Chris next and then Brian.

20 DR. SPRIGMAN: So I guess there are two
21 separate questions. The first is do you understand
22 the metes and bounds of a work that's registered,
23 okay. And so someone registers a web work of some
24 kind and the owner thinks that that includes pages,
25 certain pages that a user thinks are not included.

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1 So that's a pretty technical question of
2 how you would define the work. And the law has
3 rules that are, you know, not particularly good for
4 how the scope of work is defined. It doesn't really
5 fit really well to digital works like websites. But
6 you can set up presumptions in the law for how a
7 work could be defined. And you could even set up
8 presumptions that weigh heavily in favor of the
9 owner. And that wouldn't defeat the usefulness of a
10 registry. And it would -- it would at least reduce
11 uncertainty in terms of the scope of the work. The
12 user would understand that, you know, if there were
13 any question about whether the portion that he
14 wishes to use is part of a broader registered work
15 then, you know, he has to do more work in order to
16 figure out what the metes and bounds of the
17 registered work are.

18 So that's a kind of principle of put the
19 user on notice that, you know, there may be some
20 indeterminacy in the scope of the work.

21 There's a second issue, though, which
22 pops up. It pops up with visual works. And that is
23 has do you construct a registry that's actually
24 searchable. And, again, these are -- these are
25 difficult technological questions, but the

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1 technology is moving in a way that I think makes the
2 problem progressively less intractable.

3 All right. So for visual works, you
4 know we have photo search engines on the web now
5 that allow you to search for things that give you
6 results that are much more relevant than you've ever
7 been able to get before. We have staganographic
8 techniques that people who wish to make use of this
9 registry can cheaply embed in digital and analog
10 works information that allows very instant access
11 into a registry.

12 So, again, we have technological
13 solutions that can reduce the scope of the problem.
14 Registry proposals have their own problems, but
15 again we can try to minimize them.

16 MR. SIGALL: Okay. I had Brian and then
17 Christine and then Michael.

18 MR. SCHOTTLAENDER: I'd like to ask a
19 clarifying question of Michael and Chris because I
20 thought I understood Michael to say he was speaking
21 in support of what Chris said, but I believe there's
22 actually a fundamental difference between what the
23 two of you were saying.

24 And that is, if I understood Chris
25 correctly, if you don't register then your material

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1 goes into the orphan work realm. And I believe
2 Michael to be saying if you do register, your
3 material doesn't go into the orphan work realm, but
4 not the reverse. And those are two very different
5 positions.

6 Do I understand you correctly?

7 MR. DONALDSON: Yes. The position in
8 the independent film community is that if you
9 register, it provides a place people go to look. If
10 they find you there, it can never be an orphan work
11 because they've found the correct owner.

12 If it is not there, you got to keep
13 looking. And actually I'm concerned about the
14 formalities complications that come in whenever you
15 require somebody to do -- to do something or lose
16 their right, so I think this notion is embedded in
17 the international copyright law, but whether it is
18 or not, I favor it as being a solution to a problem,
19 not the creator of more problems. It helps people
20 find the owner. It doesn't automatically punish Joe
21 Blow out there who didn't register for whatever
22 reason.

23 DR. SPRIGMAN: Creative Commons and Save
24 the Music's position is that we think a registry
25 should be categorical in the sense that the cheapest

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1 way to do this is to have noninclusion on a registry
2 to be a signal of orphan status.

3 Now, just to be clear, this does not
4 mean that we think that no reasonable efforts
5 proposal would help. We think a properly-
6 constructed reasonable-efforts proposal, one that
7 isn't too complicated, one that doesn't retain too
8 much uncertainty would certainly help compared to
9 what we have now. I mean it's not smart to let, you
10 know, the more good be the enemy of the slightly
11 less good but still very good. All right. So the
12 word "perfect" doesn't belong in that sentence, so I
13 kept it out.

14 But, you know, it is to our mind the
15 power of a registry is that it's kind of an Occam's
16 Razor type solution. If you're careful about how
17 you construct the registry you can make presumptions
18 based on the registry that we think actually track
19 in most cases what people want.

20 MS. PETERS: I have a question that
21 actually goes to what you all are saying. Michael
22 certainly raised it, but it also came up in some of
23 the comments, which was the Copyright Office should
24 do more and more to have group registrations. You
25 mentioned there should be an easier way to register.

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1 When you do a group registration the
2 only title that appears is some kind of a collective
3 title. And my question to you is: Is that good
4 enough? Most people who do copyright go by the
5 work, individual title, even in visual arts numbers,
6 number 4646, you know, textile pattern, you know,
7 plaid number 1000.

8 So my question really has to do with:
9 Does a collective title, do you just have out say,
10 'I am the author. I register'? Like we've had
11 22,000 photographs. Or do you have to actually
12 identify those works and make sure that those titles
13 or whatever identification it is is part of the
14 record?

15 MR. DONALDSON: I'm smiling because that
16 is exactly the question I asked. Jennifer Urban
17 from USC and I consolidated our representation on
18 our reply in order to virtually represent every
19 independent filmmaker in this country and in 49
20 other countries around the world.

21 And then I went out to -- I talked to
22 MPAA and ACL (phonetic), which is the organization
23 that controls about -- well, most of the images.
24 They're located in New York. And that was their
25 position to me: 'Michael, we'll support one hundred

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1 percent if we can group register.'

2 And a one-, two-, three-word title is
3 not going to work for people that want to register a
4 large group. And that's why the rather oblique
5 reference I made earlier to design is very, very
6 important, because for group registrations there has
7 to be a bit of a narrative of what is and isn't
8 covered. And if the narrative is sufficient, the
9 Hearst News Collection from such-and-such year to
10 such-and-such year, covering current events during
11 blah-blah-blah, an owner -- or a potential user
12 would in fact be able to know that that's where they
13 have to go. They pick up the phone. Perhaps what
14 they're looking for isn't covered, but I would think
15 that would -- that we could design something.

16 And I don't have a quick, snappy answer
17 for you right this morning, but I think group
18 registration could be designed in a way that would
19 be very helpful to the user community.

20 MR. CARSON: But what you've just
21 described requires the person to use it to know a
22 fair bit of something about the work already. The
23 Hearst News Collection, you've got to know it came
24 from Hearst. I mean are you usually going to know
25 that? Is that kind of a group registration going to

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1 help you?

2 Of if you just got a photograph or some
3 footage with no attribution on it, how does the
4 registration, which is just broadly descriptive of
5 who the source was or what the subject matter is,
6 going to help you figure out whether there's even a
7 likelihood that the work you're trying out use falls
8 within that registration?

9 MR. DONALDSON: A couple responses to
10 that. Number one, keep in mind what we're doing
11 here. We're providing the first step. So if the
12 registration itself isn't a complete answer, but a
13 phone call will help, we've served the community
14 very well.

15 Number two, in the specific example that
16 I've posited, if you're looking at a 1950s newsreel,
17 A, yes, they are mostly identified; but, B, even if
18 they're not and you're in the business of wanting to
19 use that of that documentary, say, you know that
20 it's got to be Hearst or Movietone, or there's three
21 or four companies, and it would be helpful.

22 And the key here is not so much that it
23 tells you who the owner is but it tells you how to
24 get ahold of them, because the Hearst Movie
25 Collection, you don't call Hearst, you call UCLA

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1 Film and Television Archive. They own it. They own
2 the copyright to it. They license it. So it's that
3 contact information more than anything else that a
4 Directory of Claimants brings to the table and would
5 be so helpful to the -- certainly to the documentary
6 community.

7 MR. SIGALL: I had Christine on my list,
8 then Michael K., then Brewster. I'll put Joe and
9 Maureen and Brian on the list.

10 MS. SUNDT: With -- with regard to
11 registries, we're falling back into the trap of
12 registering the work when in fact we've been talking
13 all morning about contact with the individual, the
14 owner. And I think that that's the most important
15 thing right now because the object, the work is
16 problematic.

17 Web creations are not by one person.
18 They're multiples. And multimedia today is very
19 much that. Or, you know, just look at the film
20 credits. We're not talking about one person here or
21 one title, but if we can get information about a
22 contact of any of the people who are there, then we
23 really are accomplishing a lot.

24 And, again, going back to the issue of
25 visual arts, there are no firm titles, there are no

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1 title pages, there are no ISB numbers, or any of
2 that stuff. Not even a date, nothing. So we --
3 we've got to work with what is concrete. The
4 maker's name is concrete, the work itself may not
5 be.

6 MR. CARSON: Do you need to know the
7 maker's name?

8 MS. SUNDT: In the cases where we know
9 the maker's name, that's a start. But, as I said
10 earlier, most of the time we don't even have any of
11 that, so we're really -- we're talking about true
12 orphan works in visual arts. But when we have a
13 name, that's -- we're halfway home. I don't even
14 consider that to be an orphan work when we have a
15 name in our field.

16 MR. SIGALL: Michael Keller.

17 DR. KELLER: This conversation I think
18 goes back to Steve Gottlieb's opening remarks which
19 had to do with sector-by-sector engagement. It's
20 perfectly reasonable I think in the film industry,
21 the documentary film industry, the art film
22 industry, the entertainment industry where those
23 properties are managed to accept at some level
24 Michael Davidson's [sic] proposition. If it's in a
25 registry, go and check it out. If it's not on the

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1 registry, keep checking. Maybe that works, but I'd
2 like the sector to speak to that. And I would like
3 the sector to include the voices of the public,
4 those who are customers but also those who are
5 occasional consumers.

6 With regard to private registration or
7 government registration, I would encourage if there
8 was to be registration that it should be a
9 nonadvocacy registration. That is, I would hate to
10 see a private registry operation become an agent or
11 an advocate for those who happen to -- for those who
12 paid for the registration. Therefore, my preference
13 would be, if there's going to be a registry, it
14 should be a government-operated registry. It should
15 be detailed. We know how to do that better now and
16 we have lots of capacity to do it in terms of what
17 we can do with data and databases.

18 Whether for some sectors the due
19 diligence needs to continue after discovery process
20 involving a registry or not should be examined on a
21 sector-by-sector basis. It seems to me the public
22 good is not served by a continuous, never-ending due
23 diligence process where one can never get the kind
24 of reliability that one's attorneys or insurance
25 carriers would wish serves the public very well in

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1 the case of works that are truly orphaned or
2 abandoned, truly no one is managing that property
3 anymore.

4 What I think we should be looking for is
5 the management of the property. If the property is
6 no longer managed, then we should assume that it can
7 be applied to the public good very broadly defined.

8 MR. SIGALL: Brewster was next.

9 MR. KAHLE: In answer to your question
10 sort of how does one implement a registry, and
11 especially in the complications that are around
12 websites or collective works, I think we --
13 everything that's been talked about as a registry so
14 far has usually been a database record that would
15 fit in an Oracle database. Right, a couple of
16 fields, kind of a nice, you know, search. You come
17 to a website. You type something in, you get a
18 list, and then you try to figure out what the heck
19 it answered for you.

20 There's an opportunity here especially
21 in the digital domain which is actually fantastic.
22 It's really quite -- it's change, which storage has
23 become inexpensive. It used to be, as I understand
24 it, to get copyright you put a little c on it and
25 then you sent a copy into the Library of Congress.

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1 And this was actually great for the Library of
2 Congress because at least Congress got all these
3 books for free. And it just kept building and
4 building. And then it sort of got to be a problem
5 and they couldn't buy buildings fast enough.

6 So there was sort of this idea of, well,
7 let's not do that anymore because we're getting too
8 many things being sent at us. In the digital domain
9 it's now difficult to send too much in.

10 There were some internet luminaries that
11 were working on a system a bunch of years ago, but
12 things have changed quite a bit since then. So
13 there are a couple of people around the room that
14 actually operate incredibly large data stores.

15 The idea of petabytes is now matter of
16 fact to at least three of us around the room. And
17 it's getting cheaper fast.

18 So the short of it. How do you register
19 a digital work or I would suggest any of these works
20 is to submit a digital copy. And if it's a managed
21 work you probably have a digital copy. It's
22 probably in DVD form, mp2, something. Submit a
23 digital copy into the registry and then it's the
24 food for our library system.

25 We can actually get back to the

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1 Jeffersonian idea of the library system fueled by
2 having some level of people having access to these
3 materials. So not only do I think is it feasible
4 and it won't run into the problems of getting
5 overflow, but it can be a fantastic benefit.

6 If you want protection, send in a copy.
7 And I don't think we'll have the handles problem.

8 MR. SIGALL: Joe was next.

9 MR. LISUZZO: Just an interesting
10 observation and a question. What incentive does the
11 professional photographic community have on a
12 registry idea when they're already covered under the
13 copyright law, where they -- pretty much everything
14 they shoot is covered? What incentive would they
15 have to register anything and how would this help
16 this discussion?

17 MS. PETERS: Do they actually register.
18 The Association of Media Photographs does in fact
19 register using group registration. In fact it
20 became too successful when they sent us 2,000
21 continuation sheets and crashed our system, because
22 they were listing, you know, shoot, every single
23 photograph. They do it because of the ability to
24 get statutory damages and, therefore, to make it
25 worthwhile to bring a lawsuit.

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1 MR. LISUZZO: Can we refer to the common
2 professional photographs, school pictures, for
3 portrait studios, things like that? How is that
4 going to incentivize these folks? Those are the
5 ones that we -- you know, that I would be more
6 concerned about.

7 MS. PETERS: I don't think they do
8 register.

9 MR. LISUZZO: See, that --

10 MR. SIGALL: I think you raise the point
11 is the question of at what point -- depending on
12 where you draw the line as to the level and remedies
13 of protection that you get under copyright, is a
14 primary way to incentivize or not incentivize the
15 provision of ownership information in something like
16 a registry. So that's part of the --

17 MR. LISUZZO: I mean just a suggestion
18 --

19 MR. SIGALL: -- task here is to try to
20 see if there's -- part of my question was, and I
21 think Chris elaborated on it, that's one of the ways
22 you can incentivize --

23 MR. LISUZZO: Right.

24 MR. SIGALL: -- accurate and complete
25 and robust information, is adjusting the effects of

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1 the failure to register or something like that. So
2 that's one of the ways to do it.

3 MR. LISUZZO: Well, I mean a suggestion
4 may be to go back and take a look at that. And I
5 don't know, you know, it's an enacted law now, but
6 take a look at the fact that if they want their
7 works to be completely covered, then they should
8 have a registry. And I guess maybe the registry
9 from my point of view may be an annual-based
10 registry for that particular photographer, you know,
11 where they pay an annual fee to have their name --
12 or from your point of view, Christine, the person's
13 registered. And everything that they do that year
14 is registered and it's a more of line of covering
15 them in whole for that particular type of work,
16 whether it's a still image or video, et cetera.

17 MS. PETERS: Is it important for you in
18 suggesting that that the images that were in fact
19 created, distributed, whatever in that year are part
20 of the file so that there is a digital file of all
21 of the images that would be covered by that
22 registration?

23 MR. LISUZZO: I'm not sure. I don't
24 know if I know the answer to that, because I know
25 that, you know, when you get into the type of

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1 photography we're talking about, it's literally
2 hundreds if not thousands or hundreds of thousands.
3 And I don't know that that's feasible to do
4 something like that, but if the person's registered
5 and they're paying an annual fee to be registered
6 and protected, at that point then anything they
7 shoot, you know, legally can be protected and
8 registered.

9 But kind of going back to what I was
10 saying before, there's no incentive to do that for
11 somebody who's already covered under a law that
12 let's them do whatever they want to do where they
13 don't have to put a stamp on it and not notify
14 anybody who picks up that photograph of who the
15 person is that shot it.

16 And, again, it kind of goes back to the
17 simplistic approach of -- you know, if 20 years ago,
18 a picture's 20 years old and I pick it up and want a
19 copy of it, you know, if it's from a church
20 directory people turn over in the church personnel,
21 no one's going to know who shot that picture, where
22 it came from, but there's no registration mark on
23 it. You know, when does that become available to be
24 orphaned work. Or if it is registered, how do I go
25 about looking at it.

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1 So I guess the idea of a registry sounds
2 fine. It's just that it's still a little wide open
3 when it comes to that still image or...

4 MR. SIGALL: I had Maureen next and then
5 Brian.

6 MS. WHALEN: I have reservations about
7 even a voluntary owner registry, particularly
8 depending on how -- what kind of consequences of
9 being registered or not.

10 I spend a lot of time on false claims
11 and competing claims. And they can basically make
12 or break any activity and you just walk away from it
13 because there is no money in the budget or there's
14 very little and, you know, it's just not worth it.

15 We proposed a sort of -- we flipped it
16 and we propose that there would be a voluntary
17 system of identifying orphan work uses as opposed to
18 owners, claimants. And this really stems from the
19 commitment to attribution that I think is very
20 fundamental in a museum world regardless, you know,
21 context, attribution, where did it come from, you
22 know, loading in as much information as you can to
23 the work or whatever you're highlighting or using.

24 I will in the interest of fairness, even
25 within the museum community not everybody is totally

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1 supportive of this, but it's not so much I think the
2 voluntary side of it. It's, once again, the
3 consequences side of it. How much -- by doing it,
4 how much do you give or take, or whatever.

5 So I guess I just want to be sure that
6 we look at this from both sides, that if -- if you
7 are the user of an orphan work and you identify that
8 it's an orphan work and you try to let people know
9 in this context of these types of photographs, of
10 this type of historical information or whatever, you
11 know, we have used things that we don't know, we
12 don't know where they came from, we know can't find
13 anybody. So call us, let us know. Here we are.

14 We think that that not only demonstrates
15 incredible good faith on the part of the user and
16 the use, but it really helps provide a different
17 kind of roadmap to get people together, so.

18 MR. SIGALL: Brian was next.

19 MR. SCHOTTLAENDER: I'm essentially
20 agnostic on the part of registries except for the
21 mandatory part, but having said that I think if some
22 system of voluntary registry is pursued, I do agree
23 strongly with Michael Donaldson that some sort of
24 group registration is likely to be an incentive for
25 people actually depositing information about their

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1 materials into the registry.

2 So with that as a point of departure in
3 response to David Carson's question, I think it
4 would behoove us if we are going to go down that
5 route to think of copyright registration or the
6 deposit of information into a copyright registry to
7 think of that as one element of the metadata
8 structure that surrounds a particular work or even
9 part of a work.

10 The library and archive community has
11 invested in and does invest a considerable number of
12 resources in developing other metadata elements that
13 also describe works, the very same works and parts
14 of works that an integration of those metadata
15 elements with the copyright registry metadata
16 information could actually go far to speaking to
17 David's point about, you know, how useful is a
18 collection level record that says, you know,
19 collection of 400 Batik objects, where if a museum
20 then has, you know, a finding aid registry that
21 actually details what each of those 400 objects is,
22 some interoperability between your registry and the
23 information community's registries, particularly in
24 a digital environment, it's relatively easy to do
25 with embedded links and the like.

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1 MR. SIGALL: Gary and then Jerry.

2 MR. STRONG: In our submittal we
3 advocated for a registry and also for a clearing
4 house of orphan works identification. And I'd like
5 to build on what Maureen and Brian were saying in
6 that many of us that run large special collections
7 have developed extensive finding lists with item
8 level identification for things that we hold. And
9 embedded within that could easily be developed, I
10 believe, a context for identifying property rights
11 and clearances and a variety of other things. It's
12 the interlinkage and building it so that it works
13 together with-others.

14 We've done that within the online
15 Archive of California, for example, where we linked
16 our finding aids together across multiple
17 institutions in the state. And if we could take
18 that one step further and not start from scratch but
19 build on that and add the data elements that would
20 make that far more useful -- and that includes the
21 film and television archive at UCLA in those finding
22 aids. It includes our photography collections. It
23 cuts across these varieties of collections and uses.

24 And so how do we take what -- some of
25 these things are in place and begin to link them

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1 across in some new ways.

2 MR. SIGALL: Jerry.

3 MR. MCBRIDE: I think this area's a
4 particularly thorny one. I'm thinking of, you know,
5 rather traditional materials where, say, something
6 that's in the public domain has been reprinted and
7 the publisher has a copyright symbol on there. And
8 I think for many users, they're not aware that maybe
9 the reprinted material is in the public domain and
10 what's being copyrighted is some sort of preparatory
11 material or a cover design, or something.

12 And it also happens quite frequently
13 with sound recordings where copyright statements
14 appear on the booklet and people think, the ordinary
15 person thinks that this also covers the sound
16 recording itself.

17 So I'm not sure I know what exactly the
18 solution to it is, but I think in the design of
19 whatever registry or however we handle this or even
20 in how people are notified on the actual objects
21 themselves, it would be helpful to know what is
22 actually covered by the copyright so the average
23 person would know.

24 MR. SIGALL: Steve and Brewster.

25 MR. GOTTLIEB: I'd like to add onto what

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1 Gary said and say this is one of the reasons that we
2 advocate a user registry notice there's an intent to
3 use is that, you know, it adds a documentation of a
4 user search. It adds a point in time at which the
5 user decided that it was in fact an orphan work.
6 But it also -- it gives us the opportunity to create
7 a database of searches. What are the best practices
8 of these searches for any particular industry and
9 what constitutes due diligence.

10 If there's a way to also -- to indicate
11 what searches were in fact successful, this might in
12 fact lead to determinations of what due diligence
13 are for those particular works. And in that way the
14 standards for due diligence will building upon
15 themselves.

16 MR. SIGALL: Brewster and then Alex.

17 MR. KAHLE: One more plug for the
18 registering of the actual works themselves. I think
19 we're really -- the age of us, we're used to having
20 physical objects, but these things just come and go
21 really fast in the digital world. And if we don't
22 make a registry and a submissions of the actual
23 works themselves, I really fear that one of the
24 ideas of copyright is to have longterm preservation
25 so that when things come out of copyright, they then

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1 belong to the public.

2 And I think we're really talking about
3 how to protect owners' rights here rather than the
4 public's rights. And if we have registration by
5 submission of the actual works, we have a much
6 higher chance that these works will then at some
7 point be available to the public. So let me put in
8 a plug for register the things, please, not just the
9 records.

10 MR. SIGALL: Let me -- before we get to
11 Alex, let me just ask you to follow up on that,
12 Brewster, that question. It does seem like that for
13 certain types of work, particularly visual arts,
14 photographs is what I'm thinking of specifically,
15 that it may be a useful registration may have to
16 have some searching of the actual work itself and
17 the information in the actual work itself for the
18 situation that David raised which was you have the
19 photograph but you have nothing else to identify it.
20 It may be possible by comparing the digital version
21 of that photograph with the database of digital
22 photographs, you could be able to match up the image
23 in some way and start down the path of finding the
24 owner through that way.

25 I guess the concern that people have

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1 raised and would raise with the notion of depositing
2 the entire copy of the work would be particularly
3 where that copy and the database of copies that is
4 being collected is made available, is made
5 accessible. The question is would that -- I would
6 expect copyright owners and authors to say, 'I don't
7 want my work to suddenly' -- 'my efforts to sell my
8 work or make it available on this channel have to
9 compete with the Library of Congress or any other
10 depository library who would be getting all of these
11 copies that are there for the purpose of creating a
12 registration system for identifying the owner.'

13 So I guess in some cases -- and it may
14 not even be necessary in some cases, although it may
15 be more useful to have a complete copy of the work
16 as part of a registration system, how do we address
17 the concern that that one place where people are
18 registering their works and their information
19 doesn't become the place everyone goes to get a copy
20 of the work or get access to the work in some place.
21 And the worst case scenario being a real detriment
22 to other online either for-pay or other sources for
23 the works that would be maybe in direct competition
24 with that kind of -- that kind of system.

25 MR. KAHLE: Just because there's a copy

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1 in the Library of Congress doesn't mean that
2 everybody suddenly has it. I think we've kind of
3 gotten over that, you know, if-there's-one-digital-
4 copy-suddenly-somebody-everybody-has-it problem or
5 argument.

6 But there is this issue of if there is a
7 copy of record someplace, is my copy diminished.
8 And in the rare works, artworks or in very limited
9 copy books at editions of less than a hundred,
10 sending in a copy might be of undue burden. In the
11 digital world sending that copy in probably is not
12 an undue burden.

13 Then there's the question is there a
14 problem once it's in the library system towards
15 making it more available. I think that's what we
16 have laws for. And we have this copyright law and
17 we have a very conservative librarian community
18 towards being nice and playing by the rules.

19 Having navigation tools to be able to
20 make access to these orphan works is actually a
21 multimillion dollar project of a commercial company
22 around this table. So there are people that would
23 be very interested in taking -- finding the right
24 level of fair use or orphan work use of these
25 materials. But we're all law-abiding groups. So I

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1 think we're okay, but obviously that's not a great
2 answer for you.

3 (Laughter.)

4 MR. SIGALL: I have Alex on my list and
5 then Chris has his hand up.

6 MR. MACGILLVRAY: Well, I think it's
7 great because we now have at least two uses for the
8 law. On top of being pissed you've also got this
9 keeping people from danger, which is wonderful. But
10 I guess what I wanted to follow up on is what you
11 had said about incentives. I think the Copyright
12 Office and in this procedure has a tremendous
13 ability and opportunity to provide some incentives
14 so that copyrightholders do come forward and are
15 more easily findable.

16 And the only thing I would point out
17 there is when Barbara talks about going out and
18 trying to find a copyrightholder, she has a certain
19 amount of money and resources that she can do that
20 with. And if, let's say, the resources for a
21 particular clip is something like \$5,000, well, if
22 it takes her \$3,000 to find that individual, then
23 there's only \$2,000 left to pay them with. And I
24 think one of the things that you really do have the
25 opportunity to do here is to make it so that more of

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1 that money, more of that finding money actually goes
2 to the artist, to the individual or to the rights
3 holder.

4 The only other thing I would say is that
5 to the extent that we propose things here, we do
6 have the ability to create incentive structures and
7 to have technology really grow into that. And I
8 think, you know, Steven's organization is a great
9 example here, where there was a problem in terms of
10 music that was available online. And Steven's
11 organization has done a tremendous amount in terms
12 of innovating on that problem to be able to
13 recognize when a user has mistyped the name of a
14 song and not just have to rely on copyright records
15 in order to try to figure out what is out there and
16 what is the same work from work to work to work.

17 MR. SIGALL: Okay. Coming up on the
18 lunch break, and we're only going to do an hour, so
19 I want to make sure, Dwayne, go ahead. And
20 Christine, Maureen, and Bruce. That'll be it.

21 DR. BUTTLER: I don't know that I
22 necessarily like a separate registry system separate
23 from the registration system, but I do think that to
24 the extent that we need incentives to get folks to
25 engage themselves at registration, that those

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1 already exist. Chris ran down those a while ago,
2 and those are actually very powerful incentives.
3 And I think that the people that are interested in
4 exercising the rights and protecting the rights are
5 already using those.

6 And I'm not convinced that you're going
7 out create another incentive system that are going
8 to further encourage people that let their works
9 become orphans now go onto this registry list.
10 Because I think that the ones that they're
11 interested in protecting in a commercial marketplace
12 kind of sense are being registered.

13 MR. CARSON: Not true. It'd be nice,
14 but not true.

15 DR. BUTTLER: Why is that happening
16 then? I mean what does not trigger a commercial
17 actor to say, 'Well, if I want to protect statutory
18 damages and I want to get attorney's fees,' why
19 would they not register it?

20 MR. CARSON: That's a good question, but
21 we can tell you, for example, that in the record
22 industry where you'd think there's value, the
23 registration rates are abysmal. Why? We don't
24 know, but where you've got incentives already
25 written into the law, where you'd think they work,

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1 they haven't.

2 DR. SPRIGMAN: You know copyright
3 proponents I think have a particular form of hubris
4 and that is that in order to make a business case
5 out of a piece of creative work, you need copyright.
6 Sometimes you do. Often you do. But sometimes you
7 don't.

8 And the music industry is a good example
9 where, you know, the way music is developing is
10 we're fragmenting the audience, we're satisfying a
11 lot of niche tastes and these tastes come and go.
12 And so being first to market with a marketing plan
13 and doing it well might get you the rents that you
14 want out of a work, and so copyright becomes of
15 relatively limited utility.

16 You know, again, historical research
17 that I've done that looks at, for example, the San
18 Francisco publishing industry in the late eighteen
19 hundreds shows some publishers, the same publisher
20 publishing works in a year that they register and
21 some that they don't. And they charge money for the
22 works that they don't registration and the reason
23 that they think they can get away without
24 registering is they think for 'This particular work
25 copyright is not really going to drive the success

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1 of my business plan. Something else is.'

2 And so for the music industry I think
3 that's perfectly plausible, that for lots of works,
4 you know, this hottest dance track in the clubs:
5 Copyright irrelevant, because by the time someone's
6 pirating it, they're moving on.

7 The fashion industry, okay, copyright
8 does not apply mostly to dress designs. I mean
9 there's a very limited application of copyright to
10 dress designs. The fashion industry dwarfs most
11 other content industries. It's intensely creative.
12 There's tons of thievery. And, if anything, the
13 thievery drives creativity.

14 So I'm not -- I just want to make clear.
15 I'm not someone who -- I'm not someone who, you
16 know, says that copyright doesn't have a place. I
17 think copyright's incredibly important. I think if
18 someone's going out invest a hundred million dollars
19 in the making of a movie they better copyright it,
20 right, they better register. But copyright
21 shouldn't be seen as the answer to every business
22 problem.

23 MR. SIGALL: I had Christine and Maureen
24 on my list. We're coming up on lunch. I have a
25 feeling most of these issues will be -- will be

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1 talked about again after we come back from lunch,
2 but I'll give you a chance if you like to make a
3 final comment.

4 MS. SUNDT: Well, I agree with the
5 notion of the -- there's more than copyright in this
6 question. And with art, visual art, it's an ongoing
7 process. It doesn't stop. And I think that this is
8 the reason why a lot of artists don't register, is
9 because when do you call it the end. It's not like
10 a book that you send in for publication. It's
11 definitely a work in progress at all times. Artists
12 go back and change things, so that's part of the
13 problem.

14 I do think that the registry idea is
15 just one step in the identification of orphan works.
16 And I also see that this is a great opportunity for
17 grassroots outside the copyright arena office and
18 for some enterprise to come up with other kinds of
19 registries that will help.

20 And so let it happen. Let the forces
21 move. And I think that a lot of things are going to
22 be solved without us solving them here. And I think
23 it's going to be actually a good thing in the end.

24 And the last thing that I would like to
25 say, because I won't be in the afternoon panel, is

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1 that my greatest hope is to see balance, to see the
2 balance between the rights of the owner and the
3 rights of users. And I think that in the past we
4 have forgotten that users have rights and we have
5 been concentrating entirely too much in the last
6 years dealing with copyright to give much more power
7 to the owner at the expense of what the user should
8 be getting in the deal. It's a deal, and we're
9 being -- short-changing our users a lot.

10 MR. SIGALL: Okay. Maureen.

11 MS. WHALEN: I almost hate to comment.
12 That's such a nice thought to go to lunch with, but
13 I do want to make sure, just a point of
14 clarification. When the museum group talked about a
15 voluntary notice or of use of orphan works, we did
16 not intend nor do we think it's a good idea to do an
17 intent to use. It really would be concurrent of
18 afterwards, but intent to use doesn't work for us.

19 MR. SIGALL: Okay. Let's -- thanks of
20 that good start to this Roundtable. Let's go to
21 lunch. Let me -- a couple of warnings.

22 The warning is there is a small
23 cafeteria across the way, but we're told that if
24 everyone of us went over there it would be the
25 physical equivalent of a denial-of-service attack on

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1 them and they wouldn't be handle us, so we're
2 encouraging a lot of people to just take a stroll
3 down the street and down Telegraph Avenue or places
4 around to eat lunch, so we don't -- so we don't
5 bombard them.

6 And let's still shoot to get back here
7 by 1:00 so we can get started and talk about the
8 next topic, Topic 2.

9 (Luncheon recess taken at 12:10 p.m.)

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1 A-F-T-E-R-N-O-O-N P-R-O-C-E-E-D-I-N-G-S

2 (1:15 p.m.)

3 MR. SIGALL: Our second topic is:
4 Consequences of an Orphan Works Designation. And
5 Oliver is going to tee that up for us and give us an
6 intro to it. But before we do that, I just want to
7 -- we have some new faces at the table and I just
8 want to make sure for the record we identify
9 everyone. Even if you've told us who you are
10 before, let's go around and identify yourselves and
11 your organization for this afternoon session of the
12 Roundtable.

13 MS. LEE: Hi. My name is Megan Lee.
14 And I'm with the Defense Language Institute in
15 Monterey, California.

16 MS. SUNDT: I'm Christine Sundt,
17 resurrected from the dead. I've been allowed to
18 come back to the table.

19 (Laughter.)

20 MS. SUNDT: And I am with University of
21 Oregon. I'm here representing College Art
22 Association and Visual Resources Association and
23 independent artists.

24 MR. MACGILLVRAY: Alexander MacGillvray
25 of Google.

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1 MR. HAMMA: Ken Hamma from the J. Paul
2 Getty Trust.

3 MR. JOHNSON: Carl Johnson, Brigham
4 Young University.

5 MR. KAHLE: Brewster Kahle, Internet
6 Archive.

7 MR. LISUZZO: Joe Lisuzzo, WalMart and
8 also representing a seat from the Photo Marketing
9 Association.

10 MR. MCBRIDE: Jerry McBride, Music
11 Library Association.

12 DR. BUTTLER: Dwayne Buttler, University
13 of Louisville University Librarian.

14 MR. PETIT: Charlie Petit, Science
15 Fiction and Fantasy Writes of America.

16 MR. EBER: David Eber, Houghton Mifflin
17 Company.

18 MR. FUNKHOUSER: Bruce Funkhouser,
19 Copyright Clearance Center.

20 DR. SPRIGMAN: Chris Sprigman,
21 University of Virginia Law School, here on behalf of
22 Creative Commons and Save the Music.

23 MR. STRONG: Gary Strong, University
24 Librarian at UCLA.

25 DR. CREWS: I'm Kenny Crews, from

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1 Indiana University, where I direct the Copyright
2 Management Center and serve on the faculty.

3 MS. WHALEN: Maureen Whalen of Getty
4 Trust.

5 MR. GOTTLIEB: Steven Gottlieb with the
6 Recording Industry of America.

7 MR. MEYERSON: Mark Meyerson,
8 representing the Motion Picture Association.

9 MR. SCHOTTLAENDER: Brian Schottlaender,
10 University of California, San Diego.

11 MS. SILVA: And Gail Silva, President of
12 Film Arts Foundation.

13 MR. SIGALL: Okay, I'm going to turn it
14 over to Oliver to describe the general topic of this
15 section and to ask the first question.

16 MR. METZGER: Welcome, everyone, and
17 welcome back for those of you who were here this
18 morning. This topic is Number 2: The Consequences
19 of an Orphan Work Designation. So for this
20 discussion we're going to assume that a work is an
21 orphan work and has been properly designated, but --
22 and we will not be discussing the criteria that we
23 were discussing this morning.

24 The written comments we received ran the
25 gamut from saying that the consequence should be

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1 nothing, that the law should not change to
2 accommodate orphan works, to the opposite extreme
3 that the consequence should be that the work falls
4 into the public domain.

5 Many comments were in the middle of that
6 spectrum and proposed some sort of limitations on
7 remedies approach. In this discussion we'll be
8 discussing what the precise parameters of those
9 limitations should be, the measure and the timing of
10 any payments that might come under that regime, and
11 any additional conditions that the orphan work
12 should meet under that regime, and also the issue of
13 piggybacking, which we didn't really discuss this
14 morning: Can one user rely on the search of a
15 previous user.

16 One of the issues that's come up, and
17 I'd like to start the discussion with this, is a
18 reasonable search has been done. Whatever criteria
19 for orphan works that is established has been met.
20 At that point the user can go forward and use it,
21 but what happens if the user subsequently does come
22 into knowledge of who the true owner of the work is?

23 This could happen in a variety of
24 different ways. It could just be accidental. It
25 could be in searching for another work, but the

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1 question we're hoping to hear input on is on day
2 one, I've satisfied whatever criteria there are.
3 Day two I find out, oh, wow, now accidentally I did
4 find out who owns this, or maybe it's day 200. How
5 does that affect the use that I've already started?

6 Sure, go ahead.

7 DR. CREWS: Thank you. Again I'm Kenny
8 Crews. The -- in general we have other examples
9 like this problem in the existing law. For example,
10 under Section 108 there are requirements or
11 permissions for users to make certain uses of works,
12 but subject to a search of the market, for example.
13 And that means that a use may be allowed under
14 Section 108 on day one because a search of the
15 market reveals that this work is not otherwise
16 available, but the market may change. The work may
17 become available. And once it becomes available
18 then on day two, when it's available, then Section
19 108 may not allow the particular use.

20 So we do have examples like this in the
21 law already. So what you're suggesting really is
22 not something that we should treat as new or
23 necessarily a problem.

24 So to answer the question then more
25 directly about it, my suggestion is that at least

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1 there are two broad types of uses. And for lack of
2 a better label, and I certainly am looking for
3 better label, one label is a changeable use and the
4 other label is an unchangeable use. And we've
5 alluded to this already in the earlier discussion.

6 A typical changeable use would be if I
7 post something on my website. That if you were to
8 surface and make whatever appropriate objection, I
9 could remove that expeditiously, to borrow the
10 language from the Act. And that that would be --
11 that is a typical kind of changeable use. And I
12 think that that should be treated in one matter, as
13 opposed to what might be labeled an unchangeable
14 use.

15 If I, as we've already alluded to this
16 morning, am using your work as a proper orphan work,
17 using it in a proper manner, but I print it in a
18 book, now that book is going to stay on people's
19 shelves in the libraries, et cetera, indefinitely.
20 That we might call an unchangeable use because I
21 can't remove it once it's there and once it's out in
22 circulation. And so I think that these two types of
23 uses should be treated differently with different
24 types of mechanisms for the allowance of use,
25 different types of mechanisms for getting us to this

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1 stage disallowing the use, and probably different
2 penalties should the use continue.

3 MR. SIGALL: Christine, David.

4 MS. SUNDT: Nowadays we have the
5 Internet Archive and we also have Google Cache, so I
6 mean the fact that something is taken off the
7 internet doesn't mean that it's gone forever. So,
8 again, I think we've got to get out of the mindset
9 of thinking only in the way things happened in the
10 text, print world, and move beyond that.

11 I do think that Kenny's right, that
12 there's enough in the law that tells us how we
13 should -- how we should do this. We also have the
14 possibility that if somebody doesn't agree to a
15 negotiation, which is step number one beyond the
16 identification and the -- being told or telling you
17 to stop using something, that there is recourse in
18 the law. It's already written in there, and we can
19 -- we can accept that.

20 MR. SIGALL: Charles.

21 MR. PETIT: One of the principal issues
22 that frequently arises even aside from the archiving
23 issue is the question of exactly what steps one has
24 to take in order to withdraw that. I'm not sure
25 that we could legislate, for example, where that

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1 boundary is as far as technology changes, but there
2 is also the question, and I think this is kind of
3 intertwined as to the nature of what the exact use
4 was, I would imagine we would want to take a
5 different step between a literal copy of an entire
6 work versus something that had been a derivative.

7 And I know that that may be jumping a
8 bit far ahead looking at the other questions, but I
9 think that that's equally relevant here, is trying
10 to figure out not just whether it's a changeable use
11 or a nonchangeable use but what kind of use was made
12 that makes it changeable or not changeable.

13 MR. EBER: If I understand the question,
14 it's assuming that the reasonable search had been
15 made and it was -- it satisfied that standard, if
16 then somebody comes forward. The position --

17 MR. SIGALL: Let me just clarify. It's
18 not precisely if someone comes forward --

19 MR. EBER: Or if there's knowledge --

20 MR. SIGALL: -- or claims, but if you
21 discover information. It would be --

22 MR. EBER: Right.

23 MR. SIGALL: -- akin -- it would be the
24 question, and I think to clarify from Kenny's
25 response, it would be let's say you have put it up

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1 on a changeable use on a website, but you discover
2 who the owner is before the owner ever says anything
3 about it. Is there any obligation for you to change
4 that use before someone ever shows up. That's --
5 that's sort of the trigger.

6 MR. EBER: I mean the position that I
7 take on just the broader issue of what kind of
8 limitation of remedies, for example, there would be,
9 which is the position that I believe in, is that one
10 of the remedies you don't get if you have properly
11 satisfied the reasonable -- reasonably diligent
12 search element is that there can be no injunctions,
13 because that's actually extremely serious and one of
14 the most difficult things to imagine happening after
15 you've put something in a publishing program, for
16 example.

17 If we were not -- if we were not
18 protected, we would be facing a situation where we,
19 depending on the nature of the injunction or
20 whatever it was, we might have to either rip up
21 existing materials or just not do another reprinting
22 or something like that, if we're going to have a
23 solution that says you have to remove it, even if
24 it's easy to remove and technically because it's on
25 a website, it still seems to me has vitiated the

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1 value of the orphan works provision getting rid of
2 injunctions because it affects the same thing, which
3 is to say you have spent a lot of time assembling a
4 publication, a work, all the pieces go together,
5 and then all of a sudden you have to remove
6 something.

7 So I don't think -- whether it's the
8 fact that someone affirmatively shows up and tells
9 you or you just happen upon it later, it seems to me
10 once you have satisfied that first prong where you
11 get out make some sort of less risky use, that you
12 shouldn't have to -- you shouldn't have to remove
13 something.

14 Now there is a further distinction,
15 which I know a lot of the -- which is a very of
16 tough decision which is can you continue making your
17 use if it's the same use forever, for a certain
18 amount of time. Can you create a derivative of your
19 use. Those are very difficult issues. And my
20 position on them, maybe we'll get to them, but at
21 least I think that we don't want to have the effect
22 of an injunction if the idea is that you eliminate
23 the remedy of an injunction.

24 MR. SIGALL: I guess to state the
25 question I think a little bit differently is at what

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1 point does the user get the benefit of that sort of
2 no-injunction status in a reasonable efforts search
3 system?

4 Or, stated differently, it's when does
5 your obligation to stop, when -- when can you stop
6 searching? When can you -- I mean at what point --
7 from that point forward you don't have to be looking
8 anymore. And if you come across information, then
9 we're in the realm of assessing what the limited
10 remedies might be available, what the limitations on
11 remedies would be.

12 Do we need to a fix point in time
13 somehow at which your reasonable search has been
14 concluded and -- or do we not? Can we leave it as
15 sort of a flexible approach that just you assess it
16 looking backwards? That's part of that answer.

17 David and then Carl.

18 MR. EBER: Sort of the reasons I said in
19 response to what I -- the other question, which I
20 thought was the question, it seems to me it cannot
21 be an ongoing, never-ending search because then the
22 -- again, the value of having no injunctive -- the
23 potential of injunctive relief over your head,
24 you're never going to be free of that. So, you
25 know, if you can't get that, then you've lost a lot

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1 of the value.

2 I mean at some point, as I said earlier
3 and this morning, I view the reasonably diligent
4 search to be more or less -- I mean it will change
5 depending on people, but it's more or less supposed
6 to replicate let's say we, our authors do when we're
7 searching somebody. The only difference is that at
8 the end if you have a dead end you can use it as
9 opposed to can't use it.

10 You do end those things. I mean you
11 move on, you do other things. I -- so you do what
12 you do. You create whatever record you want to
13 create in case you're challenged later, and then
14 you're done. But I don't see that you can kind of
15 keep doing it forever.

16 MR. JOHNSON: Well, is your question
17 kind of suggesting that once an orphan always an
18 orphan; is that part of your -- the --

19 MR. SIGALL: It was -- it's really a
20 question of --

21 MR. JOHNSON: -- before exploring that
22 at least.

23 MR. SIGALL: I guess it's a question of
24 when the once an orphan begins in the reasonable
25 search scenario. At what point is it -- should it

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1 be something where the user sort of self-certifies
2 that they've done the search and from that point
3 forward they're -- they believe they're within the
4 orphan works regime. Or is it a point at which they
5 don't have to do that down the road, when an issue
6 arises with an owner who surfaces, we just sort of
7 sort that all out by looking back over the record
8 that they've created and the record that existed at
9 the time.

10 Is it necessary for us to sort of make
11 as part of the system as you've reached the dead-end
12 point that David was describing, do you have to put
13 a statement somewhere that says, 'I've searched.'
14 And -- or do you not have to do it. So when does
15 that once an orphan begin, I don't think we're
16 suggesting that it's always an orphan, but when does
17 the once-an-orphan time begin?

18 MR. JOHNSON: Well, without recounting
19 all of the discussion of the morning -- of the
20 morning, but to me it -- the answer to that specific
21 question might be that it goes to the definition of
22 the orphan work itself, that discussion. I offered
23 the comment not only unlocatable, unidentifiable but
24 unresponsive, and I still make that point.

25 But whatever definition we settle on I

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1 think inherent in the definition is a changing
2 result based on new discovery. And so I don't
3 think, to answer my own question, I don't think it
4 can be once an orphan always an orphan. It
5 shouldn't be. It can't be and it shouldn't be.

6 MR. SIGALL: Oliver has an example, I
7 think.

8 MR. JOHNSON: And so now to answer the
9 question what happens when there is more discovery,
10 I think that's part of your question, the underlying
11 question. The original question was what happens
12 when there is discovery. And I think that to answer
13 that we should ask the question who's in the best
14 position to evaluate due diligence or a reasonable
15 search, and do that on the least inexpensive,
16 transactional communication level. And that is, to
17 me is for a user to present the evidence to the
18 copyright owner. And that discussion can be a
19 discussion; it can be a disagreement; it can be a
20 number of things.

21 But if the copyright owner disagrees,
22 then all of the options of adjudication are open.
23 It's either an orphan work by settling it by person-
24 to-person communication or it's a disagreement and
25 it's the same way we would look at an infringement.

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1 'I don't agree with your cursory search.
2 You've infringed my work. I'll give you just
3 notification, whatever. I'll start the process of
4 notifying you about copyright infringement. Or we
5 will continue to talk until we have an equitable
6 settlement, a negotiated settlement about
7 prospective uses and past uses perhaps.' Although I
8 think as a policy we shouldn't put any undue burden
9 on past uses.

10 MR. METZGER: It may help to clarify the
11 question to give an example. If I have a book that
12 has 20 photos in it and it comes time for me to
13 clear the rights in them and I put aside a
14 reasonable amount of time to do that.

15 And I say, okay, number one -- and I do
16 everything humanly possible to find the author of
17 the photograph and I'm unable to. And I am
18 perfectly willing to swear under oath that I've done
19 everything reasonable and everyone would agree that
20 I have done everything reasonable; I'm done with
21 number one. And that was this morning's criteria,
22 done.

23 I go onto number two and I say, oh, this
24 one's going to be a little easier because it's got a
25 name on it. So I actually track that person down on

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1 a website and so on. Maybe they've got all their
2 works listed there. And as I'm scrolling through, I
3 say, 'Oh, wow, there's photo number one.'

4 So yesterday I just determined that
5 after weeks of work that it's not locatable, the
6 next day I quickly find by fortuitous accident
7 there's the photo. Now I'm still a month away from
8 publication. Do I get to publish number one under
9 the orphan works regime?

10 MR. JOHNSON: Not by definition of the
11 change unidentifiable to identifiable.

12 MR. METZGER: Well, and Jule's point was
13 yesterday I had reached the point where all the
14 criteria were satisfied. Does that ball of string
15 get unwound?

16 MR. SIGALL: Okay. Let's start with Joe
17 and then Dwayne. Let's go to Alex, then Charlie and
18 then Kenny.

19 MR. LISUZZO: Yeah. I think at the
20 point you find it's not that it's not copy-written
21 anymore. I mean it's still protected under
22 copyright. It's not that you -- I mean you did what
23 you had to do, but it wasn't marked clearly enough
24 to find the owner. Now that you found the owner --
25 I mean think of it this way: If you found the owner

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1 in the first place what were you going to do. Were
2 you going to spend money and get -- you know, get
3 that release. Well, that's -- you got to do the
4 right thing. You got to 'fess up and say, 'Okay, I
5 missed it and now I got to pay them.'

6 And I mean just an example, I mean just
7 from our side, again a very simplistic piece. We've
8 done it several times where we've had folks bring
9 pictures in and we've copied them based on the
10 criteria that they've gone and searched for the
11 photographer, couldn't find them. Once they copied
12 the picture, maybe weeks, even months if not years
13 later we found a photograph come forward and say,
14 'You copied one of my pictures.'

15 Doing the right thing is paying a
16 photographer what they would have gotten had they
17 sold that picture to the customer. So I guess if
18 you're asking what you should do if it does happen,
19 it should be based on a reasonable amount of money
20 paid to that person based on if you went to them in
21 the first place and got the -- you know, whether
22 it's a photograph or a music work, or whatever.

23 So I mean if you were going to sit down
24 and negotiate and it cost you \$5,000 to use it,
25 well, then you should be paying them \$5,000 if you

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1 discover it. I guess that's just my take on it
2 based on what we do. Just do the right thing.

3 MR. SIGALL: Dwayne was next.

4 DR. BUTTLER: Well, my question on that
5 particular hypothetical is whether you could then
6 still argue that that's reasonable if you have that
7 subsequently-acquired information. Because it's
8 kind of like even though they're separate entities,
9 the use is still that one kind of activity, 'I'm
10 going to publish it in that book.' So the search is
11 kind of multiple pieces, but it's the one use. So
12 in that sense one might not be finished until all 20
13 are finished. That -- and that might go to the
14 reasonableness of that kind of activity.

15 MR. SIGALL: Wait. It was -- Alex was
16 next. Then -- then Dwayne -- wait. Alex and then
17 Charlie and then Kenny and then Christine.

18 MR. MACGILLVRAY: I'll just go, I guess,
19 one step further in terms of the benefit, one of the
20 great benefits we see of this process is that it
21 will help people who want to get authorization for
22 something actually find the person that they can get
23 authorization for. So Google's preference would be
24 in that case to actually go and talk to the person
25 that did photograph one and photograph two because

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1 you now know they're both out there.

2 And I think in terms of Google's use,
3 and this goes back to some Brewster's comments in
4 terms of our ability to stop using something, we'd
5 be fine with something where you had to check some
6 sort of location, like a voluntary registry or
7 something every once in a while. And if something
8 then turned up in the voluntary registry, even
9 though there was nothing you could have done,
10 foreseen that it would turn up, that would then stop
11 your use and you'd go and contract with the
12 rightsholder once you found them.

13 MR. SIGALL: Charlie's next.

14 MR. PETIT: One of the comments that was
15 made this morning regarding the registry idea was
16 whether a registry should be based on an intent to
17 use or a prospective basis or an actual use. And I
18 think that fits into this issue, too.

19 And our position is actual use only,
20 because until the book in the hypothetical has
21 actually been published all we've got is intent to
22 use. In other words, until that book is out there
23 we're still in the clearance process. So even
24 though I have marked on my checklist that I've
25 completed the process for photo one, I haven't

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1 really done so because I'm still in the preparatory
2 phase. This is a frequent problem with older works
3 that originally appeared in periodicals and that's
4 why my organization is familiar with that.

5 Frequently older works that appeared in
6 periodicals, short stories, serializations of novels
7 appear five or six or seven generations of name
8 removed from the actual copyright holder, whether
9 it's because of work for hire, whether it's because
10 of the old invisibility-of-copyright doctrine,
11 whatever, the problem is if I look in a magazine --
12 or it'll say copyright 1942 Street and Smith
13 Publications when the actual holder might be
14 Nightfall Incorporated, which is Isaac Asimov's
15 holding company.

16 I only need to spot one of those in the
17 course of my 20 in order to get the knowledge for
18 all of the rest. And that's where the intent-
19 versus-actual-use distinction becomes useful in this
20 context, too.

21 MR. SIGALL: Kenny was next and then
22 Christine and Brian.

23 DR. CREWS: Yes. Sticking with the
24 example by Houghton, for example, you're mainstream
25 book publishing industry, you're so good at for 200

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1 years, right. The -- if step one was this morning,
2 the definition of what constitutes an orphan work.
3 And I think to deal with the little piece of the
4 struggle that we've had in this latest conversation
5 about what if I finish what I think is finished, my
6 search in July, but I really don't publish until
7 December, but in October something comes to my
8 attention, I think realistically you weren't really
9 done with your search in July. You know, it's got
10 to be determining the status of the orphan work,
11 determining it is an orphan work at a time
12 approximately, reasonably close to the moment of
13 actual use, when you put this book to press.

14 So that was this morning's conversation.
15 I think there's a timing element we just struggled
16 with. But this afternoon's conversation is step
17 two: Defeating that orphan work status. And that
18 would come after the use has been made. After the
19 book has been published, after the website has been
20 launched, whatever the resource may be.

21 And this is where I think it has to be
22 fairly explicit, that they were talking about
23 defeating the orphan work status with information
24 about the copyright owner that in fact comes to the
25 attention of the user. In fact. Not reasonably

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1 searchable, not could have been found if, but in
2 fact comes to the attention of that user. And that
3 may mean you stumbled across it or it may mean that
4 the copyright owner showed up on your doorstep, but
5 either way the information in fact came to your
6 attention verifiably that this is the status. And
7 that may shift it out of that orphan works category,
8 and this takes us right back to my opening point
9 about what do we do then, your opening question.
10 And my suggestion is I see two paths.

11 Some of these uses are changeable, and I
12 put to the Internet Archive. You're mimicking the
13 512 model. 'Send me a notice, and I'll take your
14 stuff out of the archive.' And I think that's
15 pretty much where we are with changeable uses.

16 Unchangeable uses, the book is printed.
17 It's out on the shelf -- shelves of a thousand
18 libraries around the country and we hope 10,000
19 households in the country. And there's the book out
20 there. We can't change it, but you can change
21 future editions and you probably have to.

22 And then next step, step three, which we
23 haven't gotten to in the conversation, and I won't
24 take you there, is what's the remedy for that past
25 use. And I'll toss that one back to you to help us

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1 deal with that.

2 MR. SIGALL: Christine was next, and
3 then Brian.

4 MS. SUNDT: I think that we need to
5 consider research and searching as the same thing.
6 In other words, if somebody were to find facts that
7 they had included in a whatever, that were changed
8 because of a recent discovery, those would be
9 changed. And search is the same sort of thing,
10 searching for rights clearance or searching for the
11 image. If you stumbled on that image even after you
12 had the thing up in galleys, you'd still have an
13 opportunity to change it.

14 So I think that the notion of when it --
15 when is the critical point is after it's in print or
16 after it's up, but not at the point of doing the
17 clearance.

18 MR. SIGALL: Brian is next -- Maureen is
19 next.

20 Maureen, you're next.

21 MS. WHALEN: I'm next? Oh, I'm sorry.

22 You know I think all of us have received
23 a call more than once probably who is somebody who
24 may not even be in the United States saying, 'I'm
25 going to print this. Is there anything you want me

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1 to do differently.' That last minute, this is it
2 speak now or we're printing.

3 And so somewhere between when the
4 editors or the curators or the authors are first
5 starting to put the plan together, you know, have
6 the first draft, the second draft, the third draft,
7 this picture, that picture, some point from the
8 start of that work in progress to the 'We're here,
9 we're printing, I hope it's okay,' I think there is
10 a proximate point in time when you know that it's
11 fixed. it's not in the bookstores. It may not even
12 be on the shores of the United States, but it's
13 done.

14 And I think that we have to -- we have
15 to allow people to use the material at that point so
16 their investment is not lost. Now how you like draw
17 that line, I'm not sure.

18 I also like the idea of actual
19 knowledge. We've all had to deal with that concept
20 as well. Actual knowledge versus, you know, that
21 there's known or should have known. And I think
22 what we have to figure out is does the second piece
23 of that should have known apply if at the time, for
24 whatever reason, you've crossed the bridge and you
25 passed the test.

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1 So I think upon actual knowledge, before
2 that that point in time when your investment goes
3 way up because of printing or fixation, and I would
4 include digital in that point in time when your
5 investment becomes big because, you know, there's a
6 lot of investment in putting stuff together for a
7 web or a presentation, or whatever. You know, it's
8 part of a whole thing that you're doing.

9 So I think we have to look at proximate
10 timing and actual knowledge, and not continue this
11 burden forever of constantly searching.

12 That said from the proposal that we
13 submitted, we proposed a safe harbor time period.
14 And that contemplated any reuse or new use that you
15 would have to redo your search before you entered
16 into your new period of -- your new safe harbor
17 period.

18 So I think when we were thinking about
19 this we felt that it was important that you saw this
20 as a dynamic activity, but recognize that it can't
21 be every single day.

22 MR. SIGALL: Jerry and Charlie.

23 MR. MCBRIDE: I'm wondering sometimes
24 how changeable certain things are. In looking at
25 perhaps a website that you're designing, it may be

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1 technologically possible to change it quite easily
2 as compared to withdrawing half a million copies of
3 a book. But I'm thinking in terms of some of the
4 things that we're thinking about doing as
5 noncommercial libraries if we had material that the
6 copyright owners could not be found. And we go to a
7 funding agency or source and apply for a grant.

8 And we say to them -- or they say to us,
9 'Okay, have you cleared all the rights on this'; and
10 we go, 'Well, you know, here's x number of things
11 that will be in this website for which we can find
12 no owner'; and it's still opened-ended, that
13 somebody could come forth at any time, would they be
14 willing to provide that kind of investment where the
15 entire project could be pulled off, could be pulled
16 of entirely.

17 So I'm not so certain that some things
18 are quite so easily changed even in the digital
19 realm. So we would look -- I think that's why the
20 -- having some sort of clearly definable criteria
21 for determining the orphan work is really important.

22 MR. PETIT: One of the other issues that
23 goes along with this is the shelf life of the use,
24 for lack of a better term. Particularly at Houghton
25 Mifflin they don't ordinarily anticipate selling out

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1 an entire print run in one month, unlike with a
2 magazine typically where, for all practical
3 purposes, the magazine is gone in a month. That
4 leads to one possible problem with -- that we would
5 have with Mr. Eber's suggestion that an injunction
6 not be available is whether that injunction might be
7 available against items that are in stock but not
8 yet distributed.

9 We would -- from our perspective we
10 would not want something to be further distributed
11 if it can be kept from leaving the warehouse at that
12 stage, but that gets again into the question not
13 just within printed publication but as things change
14 and as media change and as the new media are
15 developed, how are we going to define what our,
16 quote, shelf life really is for this purpose. I
17 don't think it's an easy question, but I think it's
18 one we're going to have to face.

19 MR. HAMMA: I'd like to go back to this
20 notion of easily changeable publications. I
21 wouldn't be so sanguine about the ease with which
22 that is done. Once you put something into a network
23 environment, Brewster isn't the only one who is
24 going to look at it and copy it potentially. That's
25 -- if it's an object that nobody's interested in, in

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1 two months maybe one person's copied it and you can
2 sort of repair that.

3 If it's something that everybody's
4 interested in and so probably has high commercial
5 value, it'll be copied and fly around the network
6 very quickly. And that's as difficult to undo as
7 pulling all the library -- all the books back out of
8 the library and putting them in the warehouse. So
9 I'm not sure there's a real distinction there.

10 MR. SIGALL: Brian was next.

11 MR. SCHOTTLAENDER: So on the web Kenny
12 has appraised that nobody has used it yet. In
13 Kenny's dichotomy -- the dichotomy is between
14 changeable and unchangeable. Ken talked about
15 easily changeable, and so much has been made in the
16 last two minutes about how uneasy some of these
17 easily changeable things really are to change. And
18 I would say the reverse is equally true.

19 I mean we tend to act as though pulling
20 thousands of books off of library shelves is like
21 the end of the world, but the fact of the matter is
22 it isn't really. It's all a matter of degree.

23 So I think what does need to enter in,
24 which I haven't heard anybody raise yet, I sort of
25 thought Brewster might, is this notion of what it is

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1 -- what it is you've done with the item.

2 So I can imagine certain consequences,
3 let's say, in the digital realm in which Brewster
4 may have archived something for preservation
5 purposes and it may be relatively to pull access
6 copies, but Brewster may have philosophical reasons
7 not to want us to pull something that he has
8 actually preserved for a particular community.

9 And I don't think it's as easy as simply
10 saying something is easy to change or not. You have
11 to also take into consideration what -- what
12 specific use has the item been put to.

13 MS. SUNDT: We're not considering also
14 the possibility that the owner of the used work
15 might be really happy to see it there and just say,
16 'Just put my name on it and move on.'

17 So I think, again, we're looking --
18 we're looking at a lot of negatives right now, which
19 is what our job is. But we have to think that there
20 is probably going to be some benefit, ultimate
21 benefit by doing it and not being stymied in the
22 finite detail that may apply to .1 percent of
23 situations.

24 MR. SIGALL: Let me focus this
25 discussion a little bit based on Christine's

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1 comment.

2 What we're trying to explore here is
3 maybe somewhere between what Kenny described as step
4 one and step two, which is useful done the search,
5 but before the owners surfaces what other things
6 should the user be obligated to do in that interim
7 period.

8 The first thing we talked about was, you
9 know, sort of certifying their search in some way or
10 taking some step to say that they've done their
11 search. But Maureen's organization's comments raise
12 other types of things like notice that they're
13 invoking the orphan work system, what it says, on
14 the -- on the work -- or their use if it's a
15 derivative work that they're making.

16 Christine mentioned attribution. Should
17 they -- should there be an obligation to try to
18 attribute, to the best extent you could, of a work.

19 Term of your use. Maureen mentioned her
20 organization also suggested that it only lasts for
21 five years or seven years, or some period of time.

22 I view this sort of as the terms and
23 conditions of your orphan work use, beyond payment
24 or incurring a payment obligation or making
25 payments, the other things that you might see in a

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1 licensing agreement as to what you're required to do
2 with the work.

3 So thoughts on things like that, whether
4 it be notice of -- on the use that you're making or
5 in connection with the use that you make,
6 attribution if you can make any, a limited term of
7 your use that you might -- you can only enjoy it for
8 a certain period of time, other types of obligations
9 that you have to incur to avail yourself of this
10 system and that would exist before the owner comes
11 back and tries to reclaim, so let's have some
12 thoughts on that.

13 Chris.

14 DR. SPRIGMAN: Okay. So the notion of,
15 first, the continuing search obligation I think is
16 really problematic. All right. If we're going to
17 have some kind of reasonable search standard -- and,
18 again, I mean what constitutes a reasonable search.
19 You could think of in a lot of different ways, and
20 we explored that. But if we're going to have some
21 kind of reasonable search standard, I think at some
22 point, you know, maybe the point is when some kind
23 of significant reliance is undertaken, that
24 obligation has to terminate, okay.

25 I think Kenneth made a very good point

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1 that, you know, what we're talking about here I
2 think is a rare case where you actually find out
3 something, you get some real information that you
4 didn't have a day before, okay. And, again, I think
5 the reliance, the reliance barrier should apply.

6 Once you've spent significant money to
7 get something underway, again if there's the
8 possibility of that money having been wasted because
9 you have an obligation under the standard that
10 continues past your reliance, that's going -- that
11 -- the extra uncertainty that that creates is going
12 to make it difficult for people to justify
13 investment under the orphan works.

14 Okay. What happens afterward. Now
15 we're moving into this. So if we're sure
16 something's an orphan work and we've relied and some
17 work is now out in the marketplace that you've
18 created based on the use of this orphan work, what
19 happens if someone comes forward.

20 Now what Christine suggested about
21 attribution I think is very intriguing, in the sense
22 that I think attribution is a norm that is under
23 respected in the cadre of law and under respected in
24 our culture generally. And the reason I say this is
25 because Creative Commons provides an opportunity for

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1 people to say, for creators to say, you know, 'You
2 can use my work, but give me attribution.'

3 And of the creators who choose to use
4 the Creative Commons' license, something like
5 between 97 and 98 percent of them want attribution,
6 so that norm -- if the Creative Commons', you know,
7 population is at all representative of creators as a
8 whole, that norm of desiring attribution is very
9 strong.

10 So it's going to be, I think if we
11 define orphan works correctly a comparative rarity
12 that someone comes forward and says, 'I want money'
13 or 'I want this stopped.' But I think it'll be even
14 more of a rarity if we give them the respect that
15 they want and if we build in some kind of mechanism
16 for attribution into the law, I think again we make
17 the orphan work system usable and we make it more
18 respectfully, and that's both good things.

19 MR. SIGALL: Mark.

20 MR. MEYERSON: To take exception that
21 people won't want money --

22 (Laughter.)

23 MR. MEYERSON: -- based on the nature of
24 the industry that I work in, if they smell a buck to
25 be made from *Titanic*, you can bet they're going to

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1 come after us.

2 MS. SILVA: It's an interesting
3 discussion. I'm concerned about having a situation
4 where, you know, the value can be whatever the
5 market bears. And obviously from the filmmaker's
6 point of view, when they're doing a lot of --
7 spending a lot of time and work before the
8 production is actually even done, trying to figure
9 out how much they're going to have to budget for
10 everything including rights, they have to -- they
11 can't always find everything on that first round.

12 They also find a lot of material and it
13 gets into that whole area of intend to use. They
14 may do the research on it. By the time is film
15 actually completed and done, that -- that footage or
16 that photo, or whatever, may just drop out of
17 possibility in the whole editing process or the
18 story -- you know, there -- it could be artistic.
19 It could be historical, a presentation of a certain
20 idea or policy a time in history.

21 I guess there has to be the assumption
22 -- and I actually like the assumption about
23 attribution a lot, there has to be an assumption
24 that if people go to the trouble of researching for
25 copyright, of using all due diligence to get at the

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1 source of a particular thing and they can't find it,
2 it doesn't exist from their research, then it's in
3 the orphan works category, so they use it.

4 You can't put into -- and then something
5 comes up months later and somebody says, 'Well, I
6 think that belongs to so-and-so.' You can't be in
7 this position, I think, where people are limited
8 from completing the work or distributing a work
9 because the threat of litigation or, again getting
10 back to my idea of whatever the market will bear,
11 somebody can say, 'Oh, I'm just happy you use my
12 name'; somebody else can say, 'Well, that's going to
13 cost you a million dollars.' There has to be some
14 good faith effort, and I like, by the way, the
15 figures down here about -- that were quoted about
16 common use.

17 I just think that if everything's done
18 in good faith all the search is done, perhaps there
19 could be some sort of a set-aside that -- of money
20 that would, if you will, protect the -- if the owner
21 popped up or the filmmaker in this case found out
22 about it much later that there wasn't the
23 possibility of stopping something from being shown.

24 I understand the industry's -- the
25 larger industry, film industry's perspective. On

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1 the other hand, I do think that it limits what the
2 American public could see.

3 MR. SIGALL: And we'll talk about
4 payments or escrows, or some sort of set-aside in a
5 moment. But I want to press Chris a little bit on
6 this concept of attribution in the sense of do you
7 have a sense of what kind of mechanisms to be used
8 to do this?

9 I mean it seems like on the one hand if
10 you make it a requirement there is always the
11 question of did you get it right, you know, and if
12 that could trip a lot of users up if they do it
13 incorrectly, but otherwise short of a requirement
14 that you try to attribute to the best you can, is
15 there -- is there a mechanism you could do that
16 could build in?

17 DR. SPRIGMAN: Yeah. My suggestion
18 would be relatively limited in that if someone comes
19 forward and says, 'This is my work,' then give them
20 attribution.

21 Now, again, there's the possibility
22 around the edges that someone's going to come
23 forward and say, 'This is my work,' and it's not
24 their work. You know, but under the system that we
25 propose, what they're going to do is a relatively

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1 nominal default license fee and some attribution. I
2 mean that's -- if people are willing to potentially
3 run afoul of the criminal law in order to make false
4 claims and get that, well, you know, some criminals
5 are stupid. But this is -- that's okay.

6 MR. SIGALL: I was thinking short of --
7 I was thinking in advance of the owner showing up,
8 should there be an affirmative obligation that --
9 that you -- in a sense this is one portion of
10 disclosing what your search was to the world.

11 DR. SPRIGMAN: Right.

12 MR. SIGALL: You're sort of saying, 'I
13 found out that it looks like it was written by this
14 person, but I can't track them down. I can't track
15 their heirs down.' Anything -- and maybe that's we
16 could talk a little bit about because there was some
17 discussion of this in our Washington Roundtables.
18 To what extent should a user be obligated to
19 disclose the results of their search in availing
20 themselves of this -- of this system.

21 So Kenny and Maureen.

22 DR. CREWS: I am -- I am very reluctant
23 to support the disclosure of a statement that said
24 for something like, 'This item is included in this
25 project under the Orphan Works Provision of the

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1 Copyright Act,' because that would invite, I think,
2 problems. It would -- it would invite false claims,
3 the potential for false claims. I think I would
4 quit what I'm doing and set up a business scouring
5 for those statements and finding copyright owners
6 and trying to match them up.

7 So I'm very reluctant to support that
8 unless, unless it comes with the largest reward. In
9 other words, if I were to say, 'I have done my
10 homework. This is included under the Orphan Works
11 Provision' and that is nearly complete exoneration
12 from any liability. I mean there was one proposal
13 that I know is probably not very popular that says
14 there would be a hundred dollar maximum penalty. I
15 mean something on that order, where somebody can
16 barely afford to pay the 37-cent stamp to contact
17 me, that my liability is reduced to almost zero if
18 not to zero. Then that would be a good thing.
19 Otherwise I think it's a bad thing. There is a
20 serious downside. You were looking for downsides to
21 ideas, and I think that declaration has bigger
22 downsides than upsides, unless.

23 MR. SIGALL: Maureen was next and then
24 Christine.

25 MS. WHALEN: Well, as I said this

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1 morning, from the part of the world that I come from
2 and Ken comes from, attribution is essential. It's
3 part of the mission. It's part of what you do, is
4 out put things in context and provide information
5 about who did it, when they did it, how they did it,
6 why they did it. So to the extent -- I'm trying to
7 think of different collections.

8 For example, in an archive with letters,
9 you know, or drawings or -- we know certain things
10 about where these things came from, but we don't
11 know who the copyright owner is or we cannot find
12 them, which is, you know, why it's an orphan work.

13 So I do think on a voluntary basis, but
14 I do think some level of attribution is important
15 and indeed it would happen within the museum world
16 regardless of what may be legislated or regulated.

17 I guess I feel that the -- certainly you
18 know one of the things we try to do here is we're
19 talking about one piece of a puzzle, but obviously
20 there's a lot of moving pieces here. So attribution
21 is important, but we would hope that there would be
22 an incentive built into whatever overall scheme
23 comes forward that gives credit for good faith,
24 gives credit for the time and money and paper and
25 space that went with the attribution.

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1 I am not sure it makes sense to disclose
2 your search, per se. I think that that just -- that
3 layers on a lot of work, you know, being sure to use
4 consistent language, and you get into real issues of
5 privacy. So I would not -- I think you have to do
6 your search. I think you have to have it in the
7 file to be available to somebody who comes looking
8 for it with a legitimate claim, but I don't think
9 you need to write it up and post it along with your
10 attribution.

11 MS. SUNDT: I'm glad Kenny mentioned the
12 hundred dollar cap. That's College Art Association.
13 Thank you for acknowledging that. It's a reasonable
14 cap.

15 I do want to bring up, following up on
16 what Maureen is saying, and I agree the disclosure
17 of a search. If you think scholarly footnotes are
18 onerous now think of what they might look like if
19 you had to disclose every step of the way that you
20 got from point A to point B.

21 So, again, I think that we are -- it's
22 part of the tradition, we do certain things and we
23 do those things honorably and ethically. And we
24 will continue to do that with orphan works, but the
25 disclosure business, I think again if I were to come

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1 up with a photograph that had a name on it, I would
2 include that name even though I couldn't get -- I
3 couldn't contact that person, I couldn't verify it.
4 But I would include that. We do that with artwork
5 and artists' work is attributed. And we're not
6 always sure that it belongs to that artist, but we
7 -- that's our best guess and so we're putting it
8 down.

9 So, again, let's look at the traditions
10 of scholarship and research and build on that
11 without adding too many layers.

12 Now I'd also like to bring up the point
13 and I do understand that, you know, the motion
14 picture industry is a world apart from what I do in
15 my visual resources collection. And your community
16 has different financial requirements and obligations
17 and expectations. And so this is where communities
18 around certain areas will define what works best for
19 them and what your -- what you expect from somebody
20 who's using something that belongs in your
21 community. Whereas in my community even the hundred
22 dollar payment is high because we often get our
23 stuff for free from very good, honorable, generous
24 museums.

25 MR. SIGALL: Dwayne.

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1 DR. BUTTLER: I agree with everybody. I
2 think the issue in my mind, you know, I do think
3 that -- you know I'm an academic person. And as an
4 academic person we have a culture of giving context
5 to things. And I probably wouldn't choose
6 attribution, because it seems like we would have a
7 name and if it's an orphan we don't have a name.
8 But I think we could give context to things. And I
9 think we can do that useful and I think we already
10 do that. I don't know whether we need to put that
11 in the law.

12 But I also think that -- I'm a little
13 concerned and I agree with Kenny that if we're going
14 to put a statement that 'I used this under the
15 Orphan Works Provision,' then that needs to be
16 almost an absolute defense in some context because I
17 work with the NDF Project. I'm working with some
18 folks preserving Southern culture. And they're
19 going digital, but they also have lots of things
20 that are already existing under -- since 1923, so
21 there's lots of good copyright questions in it.

22 And in the context of looking at those,
23 if I say these are used under the Orphan Works
24 Provision, what are the other ones used under?
25 Because some of them are going to be fair use. And

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1 I'm assuming this Orphan Works Provision would work
2 in parallel with Section 107 and Section 108, and it
3 wouldn't change the existing framework. But do I
4 say, 'These are used under the Orphan Works
5 Provision but all the other ones you have to guess
6 at'?

7 MR. SIGALL: Jerry and then Joe.

8 MR. MCBRIDE: I'm kind of wondering
9 about since we've thrown out a hundred dollars as
10 kind of a possible penalty for this, I can think of
11 certain cases where maybe that might basically
12 eliminate certain projects for consideration. I
13 think in particular the project that Gary brought up
14 earlier of the collection they have of recordings,
15 and that's a fairly large project, I think in the
16 tens of thousands.

17 If that were mounted and then later on
18 they were able to discover the owners of various
19 recording labels which they had not been able to
20 discover, this could easily go into the hundreds of
21 thousands of dollars, which for certain nonprofits
22 would be quite onerous to take on.

23 I think what we would like to see is
24 that -- or hope that we could be able to define what
25 the process is for the due diligent search or

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1 registry, or whatever you would decide upon, and be
2 able to trust in that that we have truly identified
3 orphan works, then if someone were to come along
4 later and we were able to discover who they were, I
5 think in cases where it could easily be
6 technologically easy to change something that
7 perhaps a copyright notice would -- the person who
8 used it could put up the copyright notice for the
9 real copyright owner. But that the person using it
10 would have in essence sort of a nonexclusive license
11 to continue using that work and perhaps that's a
12 legal term that I'm not qualified to use.

13 But I think that if you've gone to the
14 investment of, you know, creating a website or going
15 into a large project that for it to all just go away
16 and disappear could be problematic. I'm thinking
17 here of -- again, I'm talking about in noncommercial
18 uses.

19 MR. SIGALL: Right. Let's turn to the
20 question of -- someone mentioned before -- the
21 question of whether users should be required to make
22 interim payments or escrow -- payments to an escrow
23 or escrow funds in advance of an owner coming back
24 and trying to reclaim the orphan work. We had a lot
25 of discussion about that in Washington. I'd like to

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1 get folks' thoughts on that, whether that should be
2 a requirement that you are -- you make some payments
3 to somewhere in anticipation.

4 And one of the -- one of the questions I
5 raised back in Washington which was this: If your
6 orphan works' designation function, your system
7 you're using to determine whether something's an
8 orphan work or not, that filter is good, wouldn't it
9 be the case that requiring all orphan works' users
10 to pay into an escrow be wildly inefficient because
11 only some very small percentage of users -- of
12 owners will actually show up.

13 So you'll have everyone paying and
14 everyone sort of shoveling money back and forth, and
15 it actually only going to a very small handful of
16 owners who might actually show up and have a
17 legitimate claim and be entitled to those royalties.

18 So let's talk about the question of
19 payments and whether it's efficient or appropriate
20 or useful. Let's go with Steve and then Gary and
21 then Brewster.

22 MR. GOTTLIEB: I'm going to start off
23 with the reason to discuss the payment at all is in
24 anticipation of the owners coming forward. And in
25 that case the most reasonable response is to pay a

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1 reasonable fee for that work, use of that work. The
2 -- the goal is not to create some sort of filings
3 base or enough discount copyright works. It's to
4 approximate a reasonable bargain between the user
5 and the copyright owner.

6 I actually want to touch on the second
7 part which is -- and this has kind of been bubbling
8 up, the concept that the time and effort made can be
9 a substitute for payment, and that's just not the
10 case.

11 Actually let me cut off there. Pass it
12 on.

13 MR. SIGALL: I had -- Gary was next.

14 MR. STRONG: I would be really
15 uncomfortable with some kind of required payment
16 given the magnitude of what we're doing in
17 digitization and particularly for preservation
18 purposes. We would -- if we can find and pay a
19 license, we will do so. I think that's -- our
20 practice is more -- speaks more to the context than
21 a fund into which we would pay from which we would
22 get no particular benefit. If in fact we had some
23 benefit back out of paying into a fund, I could see
24 that perhaps that would be worth discussing.

25 MR. SIGALL: Brewster. Brewster was

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1 next. I'll put David on the list.

2 MR. KAHLE: To back up Gary's statement
3 that it's kind of difficult when you're dealing with
4 these large-scale archives, you just take a large
5 number and multiply even by a couple dollars and you
6 get a big number, but we have some practical
7 experience in this. And it just doesn't seem to be
8 warranted.

9 We've been collecting billions of
10 webpages for nine years and it just hasn't come up
11 as a problem.

12 We also have a lot of music, a lot of
13 movies, and these are made available publicly. And
14 we do as much as due diligence as we can, but in
15 these archives case it's hard to come up with what
16 that number would be. And based on our experience,
17 it's not needed. Maybe because we're noncommercial,
18 maybe because we do give attribution, I don't know.
19 Or we take things down. There are things working in
20 our favor that wouldn't work in everybody's favor,
21 but there's some example.

22 MR. SIGALL: Christine is next.

23 MS. SUNDT: My sense is that money that
24 would go into an escrow would be spent essentially
25 managing the escrow account.

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1 (Laughter.)

2 MS. SUNDT: It would not go to the user.
3 And if we know from how money that is put into
4 escrows now go to needy users, we know that that
5 doesn't happen.

6 I also think that when we acquire, when
7 we are given collections, this is how collections
8 end up in libraries essentially, they come to us for
9 free. And now we're going to be paying into an
10 escrow account to use them? There's something wrong
11 with this picture.

12 MR. SIGALL: Maureen was next.

13 MS. WHALEN: Well, the museums greatly
14 oppose an escrow or a compulsory license or any kind
15 of payment upfront.

16 And on this, you know, one-size-fits-all
17 solution, I think -- I think when you're looking at
18 scholarly works, when you're using scholarly works
19 and when you're -- you know, you're making scholarly
20 works and they're in and they're out, you have to
21 compare it against existing law today when you're
22 doing your risk analysis.

23 And when you're dealing with works that
24 potentially are no longer, you know, works that may
25 be -- may be under copyright, maybe not, going

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1 forward. You know, they were never registered.
2 There's no notice on it. You've done your best.
3 The person comes forward. I mean nobody -- you make
4 a deal there. And it's usually a very cordial,
5 nonmonetary deal.

6 I mean we even put things in our books
7 that say, 'We don't know everybody. We want to give
8 you credit, but we don't know. Please tell us.' So
9 any kind of scenario that deals with attributing
10 money and payment upfront or in there someplace, you
11 know, this falls into the category: A bad solution
12 is better than no solution.

13 To our particular nonprofit,
14 educational, scholarly works, scholarly -- you know,
15 if we're publishing a thousand or two thousand that
16 can be moved over a five-year period, you know,
17 that's good business. So, so no escrows please. No
18 money.

19 MR. SIGALL: I have David and then
20 Charlie and then Kenny and Joe.

21 MR. EBER: I guess I'll just add my
22 voice to the people who don't like paying into an
23 escrow because I don't either. I mean one question
24 is of course how much do you pay and how is that
25 figured out. I mean you look at the Canadian

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1 system, but they had to set up a whole tribunal and
2 no one uses it. So I think that's difficult. And
3 if you make that unilateral decision, well, you have
4 to somehow monitor that and enforce that, so I think
5 it's very difficult.

6 What I would say about the whole idea of
7 escrow and payment is that if there's going to be an
8 orphan works system that does what it should do in
9 my mind, it has to yield only the tiniest percentage
10 of people who actually come forward after you've
11 done your search. The search requirements should be
12 robust, meaningful, and actually done as opposed to
13 just sort of gone through the motion so you get the
14 benefit of whatever it is. And for that reason
15 there shouldn't be a lot of payments happening under
16 the system. If there are a lot of payments then it
17 wasn't a well designed system.

18 MR. SIGALL: Charlie is next.

19 MR. PETIT: I want to agree with the
20 last half of what David just mentions there, that
21 from the perspective of authors that is a
22 particularly important issue. But I also want to
23 point out that we've got the honorable people around
24 the table here today. And I wish I could say that,
25 for example, the publishing industry was entirely

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1 made up of people as honorable as those at this
2 table, and I can't.

3 There is a substantial and difficult-to-
4 quantify-but-nonetheless-substantial proportion of
5 publishers out there who are less careful than they
6 should be with the entire permissions process, to
7 start with. And I think that needs to be taken into
8 account before we decide blanketly there isn't going
9 to be an escrow merely because we've got input that
10 says we would pay, we want to give attribution
11 anyway.

12 Unfortunately I have enough clients who
13 have gone through problems of that nature to say,
14 'Well, no. It's not something that's not going to
15 happen under an orphan system.' So even if we
16 decide for the purpose of the museum use that we
17 don't want to put an escrow fund in there, maybe we
18 want to consider dividing by the nature of the user,
19 again commercial-noncommercial that's for another
20 time, but I'm not sure that a single blanket rule is
21 going to cover everything.

22 MS. PETERS: Could I ask a question?

23 MR. SIGALL: Sure.

24 MS. PETERS: Can you tell me, you made
25 the statement that some publishers are not as

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1 careful as others with regard to permissions. What
2 exactly does that mean?

3 MR. PETIT: Without going into a great
4 deal of detail based on a particular --

5 MS. PETERS: Well, that's fine.

6 MR. PETIT: -- instance, most publishers
7 such as Houghton Mifflin with its extensive
8 educational division, they have people at that
9 publisher who day in day out they do permissions
10 coordination work.

11 MS. PETERS: Okay.

12 MR. PETIT: A lot of smaller publishers,
13 a lot of new publishers don't. These are people who
14 have no experience with it or who have no intention
15 of doing anything with it in the worst case. And,
16 unfortunately, those publishers do exist.

17 MR. SIGALL: Got -- Joe is on the list,
18 then Alex, then Christine.

19 MR. LISUZZO: Just kind of a --

20 MR. SIGALL: I'm sorry. I skipped
21 Kenny. I think Kenny was on the list.

22 MR. LISUZZO: Oh, go ahead, Kenny.

23 DR. CREWS: I'm not sure what I have to
24 add to this conversation other than the -- I agree
25 with the no money and one reason is because of some

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1 -- a very powerful concept that Bruce here
2 articulated the best this morning. And that is that
3 -- I'll put it in my words.

4 Look at all of us spending all this time
5 working on this issue to dealing with robust,
6 honest, aggressive searches and et cetera.
7 Ultimately to deal with a body of works owned by
8 people that for the vast majority of them, the
9 copyright owner who is out there doesn't care.

10 And a robust honest search is, for the
11 most part, going to underscore that part, that the
12 owner out there doesn't care. And that -- and
13 therefore if we're putting money on it from an
14 economic analysis, what's an arm's-length dollar
15 licensing fee between somebody who wants to use it
16 and somebody who doesn't care? The dollar amount is
17 zero. It's zero from an economic analysis. So stay
18 away from money.

19 MR. LISUZZO: I definitely agree the
20 escrow isn't something we would be favorable to,
21 only because, I guess the way I look at it as an
22 escrow, it's an insurance policy. I don't know
23 about you, but over the years with insurance
24 policies going up, the people that drive properly
25 and don't have accidents are the ones that get

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1 screwed out of the money. And the folks that ignore
2 it and don't care are the ones that end up
3 benefitting. So I think from there you avoid that.

4 But I got to something else, too. And
5 this comes from a representative of a company who
6 loves taking in money from people, not paying out
7 money -- I'll precurse with that -- is that I guess
8 I look at it from this sense on a monetary
9 standpoint. If you enter into a project, whether
10 it's musical, archives, a book program, if you have
11 ten images that you plan on using and you've made up
12 your mind to use those ten images, and you go
13 through all of the due diligence to find the
14 copyright owner and you only find five of them, my
15 point is -- again, I'll go back to it before -- when
16 you entered into using those ten images and making
17 that decision, you had some kind of budget or number
18 in mind that you were willing to pay out for those
19 images.

20 So whether or not you find the person
21 upfront or they step up later on, you should just
22 understand you were going to use those images. They
23 still own the copyright. You were going to spend
24 money, in the first place, on using them. What's
25 the difference if you do your due diligence and

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1 don't find the person and then they step forward
2 later, to pay them before or pay them after.

3 I guess my point is it's an ownership
4 piece and I look at it as the person owns it,
5 period. I mean what if, what if -- and I'm just
6 stating -- what if the person was on a vacation for
7 six months, you know, in the Arctic doing some kind
8 of expedition and you did try to get ahold of them
9 and you did not yield any kind of verification of
10 it.

11 I mean I'm just using a farfetched idea,
12 but that's something that could be possible. What
13 if that happened. And they come back and your
14 book's being run through the publishing and they
15 find messages stating that you were trying to get
16 ahold. And they come to you and say, 'Hey, you
17 know, what can we do to work this out.'

18 You had a number upfront you were going
19 to use, in the first place, if you did find them. I
20 guess what I'm saying is that it seems like we're
21 trying to skate paying somebody their due money just
22 because we have this thing called the Orphan Works
23 going into effect, and I don't know if I agree with
24 that.

25 MR. SIGALL: Yeah. Let me -- that's --

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1 I have two on my list. I have Alex and then
2 Christine. Let's take their comments, then we'll
3 take a break. And we'll come back and round this
4 off by talking more about -- talk about two things:
5 Piggybacking or relying on a prior search, and then
6 talk about the limitations-on-remedies approach that
7 garnered a lot of support in the written comments.

8 And we'll get into questions of exactly
9 what that means, which will take us into our topic,
10 our third topic on what happens when the owner
11 resurfaces and how you resolve the disputes. But
12 we'll get into questions of exactly what we mean by
13 limitations and remedies and where there are
14 obligations you might have to incur when the owner
15 resurfaces.

16 But let's go to Alex and Christine.

17 MR. MACGILLVRAY: Okay. First of all,
18 I'm all for contracting with people who come back
19 from the Arctic. Hell, if it's Hawaii I'll go
20 there.

21 (Laughter.)

22 MR. MACGILLVRAY: But the point that I
23 wanted to raise was just to make something more
24 explicit that Maureen brought up and I think
25 explained quite well, which is that there are a

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1 bunch of these orphan works that will be
2 indistinguishable from public domain works.

3 And if what you're talking about is us
4 paying escrow to some sort of escrow agency with the
5 money never going to the authors, to be able to use
6 public domain works, I just don't know how that's a
7 starter.

8 MS. SUNDT: Okay. I want to find out
9 how it is that the publishers I work with require me
10 to do all the clearances and --

11 (Laughter.)

12 MS. SUNDT: -- as an author...

13 MR. EBER: I don't know whether this is
14 through the industry, but in educational publishing
15 frequently the publisher itself will have its staff
16 do it. In trade publishing and other types of
17 publishing, the authors are the responsibility. So
18 it depends on the -- depends presumably on the
19 publisher and on the particular industry.

20 MS. SUNDT: Obviously I haven't been
21 publishing with the right publisher, but the other
22 issue is taking exception on the insurance analogy
23 here. Have you looked at your insurance policies
24 lately? They change. And, for example, mold is no
25 longer covered in Oregon because there have been too

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1 many cases of mold in Oregon.

2 So I'm not going to use that as a safe
3 harbor. I'm paying into something that -- where
4 they can change the rules on me.

5 The third point is having a dollar
6 amount in mind, when I'm looking to clear rights I'm
7 looking for what I can afford. And it might be that
8 I had in mind to use an Andy Warhol in my work, but
9 the Warhol Foundation is asking me for \$5,000. And
10 I'm saying, 'Oops, I think I'll change that chapter
11 and I'm going to do something else with an artist
12 whose work I can afford.'

13 So, no, we really don't have a dollar
14 amount in mind because it can vary from free to
15 exorbitant. And we don't have the budgets to allow
16 us to put that kind of money into escrow.

17 MR. SIGALL: Okay. All right. I'll let
18 one comment, then we'll take a break.

19 MR. SCHOTTLAENDER: Nobody's brought
20 this up yet, so just for the matter of the record, I
21 want to suggest and I notice that you didn't pose
22 your questions this afternoon the way you did this
23 morning, which is those of you who think x is a good
24 idea, tell me what the downsides are. So if there
25 were any of us, and obviously there aren't, who

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1 think escrow accounts are a good idea, what might we
2 think the downsides could be.

3 Nobody thus far has suggested the
4 possibility that payments into an escrow account
5 could either advertently or inadvertently actually
6 be used to skirt the research obligation, because
7 they could be construed to serve as a safety net.
8 And so one might in fact very easily say, 'Well, all
9 right, I've taken it about as far as I care to take
10 it. I'll put something into the escrow account. If
11 the chickens come home to roost, yes, it's cheaper
12 than the research.'

13 MR. SIGALL: Okay. That's a good thing
14 to think about over the break. Let's take a ten-
15 minute break, come back at 20 to 3:00, and then
16 finish off this discussion and then move into topic
17 3 at the time of the hour.

18 (Recess taken from 2:31 p.m. to 2:48
19 p.m.)

20 MR. SIGALL: Okay. Let's finish off the
21 discussion of what happens before the time the
22 copyright owner might resurface with the discussion,
23 as the provisional agenda in the notice pointed out,
24 what we call piggybacking: The ability to rely on
25 another prior user's -- a prior search of a user and

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1 if you want to make use of the same work that they
2 have made use of.

3 And I'll do it this way in the sense of
4 just -- the discussion in Washington seemed to go on
5 for a bit but then come down to not -- I can't -- I
6 don't know if I can call it a consensus, but a
7 general feeling that most people agree that you
8 could rely on a prior search, but it would just be
9 part of a reasonable -- whether it was reasonable to
10 do so would just be part of the calculus for
11 reasonableness. That if the search was good and you
12 double checked it and it looked fine and it was
13 relatively recent, if that was reasonable to do that
14 under the circumstances to rely on, then you would
15 be okay on your reasonable search.

16 There did not seem to be a strong
17 feeling in the room in Washington that there should
18 be some sort of per se rule that you can
19 automatically or otherwise rely on a search without
20 considering whether it was reasonable to do so under
21 the circumstances.

22 And I just put out the question: Does
23 -- do the folks here think that that's probably the
24 right way to go, that -- just it becomes part of the
25 reasonableness calculation or is there a different

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1 rule or a different approach that should be taken
2 for considering how subsequent users can rely on
3 searches conducted by -- for the same work by other
4 users?

5 Charlie and Christine.

6 MR. PETIT: First of all, yes, to answer
7 the question the short way. I believe that should
8 be part of the reasonableness calculation. But I
9 think what that really goes back to is that whole
10 actual knowledge question comes into it.

11 When you piggyback on somebody else's
12 search result, the probability is, at least in my
13 experience, that the piggybacking is going to be
14 find the owner when it's not an orphan. To find the
15 contact information for that owner when the work
16 wasn't an orphan, that's the kind of piggybacking
17 that in my experience I've seen a lot of.

18 I think what you were asking about was
19 can I piggyback on somebody else's negative-results
20 search. And that, you know, again, comes right back
21 into the actual knowledge issue, because looking at
22 a search that was done six months ago by Houghton
23 Mifflin is going to be different than a search that
24 was done three and a half years ago by a publisher
25 that is bankrupt and I have no idea who any of the

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1 people who did the search were.

2 So, yes.

3 MR. SIGALL: Christine.

4 MS. SUNDT: Yes, as well. And also
5 remember that there's a strong tradition in finding
6 aids as well as indexes, picture researchers'
7 guides, et cetera, et cetera. So those are in and
8 of themselves examples of piggyback mechanism, so
9 that somebody has done some work up to a point. And
10 then the next point is to take it beyond that.

11 And it's also, you know, how who's who
12 are done. So who's who, you may appear one year and
13 not another, and then come back the other. I mean
14 we never have all the information in one place, but
15 we take it for granted that we're going to use some
16 of what somebody has done and then carry on beyond
17 that.

18 MR. SIGALL: Alex and Bruce.

19 MR. MACGILLVRAY: So one of the most
20 useful searches -- and I agree with Charles that
21 often it will be a search that returns a positive
22 result, so a nonorphan. But one of the most useful
23 searches that could be contained in some sort of
24 registry or notice base like that would be the
25 search by the potential copyright holder.

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1 So a book that, let's say, was published
2 by Houghton Mifflin or somebody else, and then they
3 were asked, 'Are you the copyright holder' as part of
4 an orphan work search. And they looked through
5 their records and couldn't find any of the copyright
6 registration or ownership records, and so we're able
7 to say to you, 'You know, no, we don't know if we're
8 the owner' or 'We think it might also be orphaned,'
9 that would be extremely useful so that the person
10 that then, you know, sees on the face of the book
11 that it's a particular copyright holder will know
12 that it's -- that at least the last time they
13 checked it wasn't.

14 MR. STRONG: I come back to the frontier
15 archive again where we've been try to search down
16 some of these rights owners in terms of music
17 publishers, very small ones, and we often will work
18 on somebody else's search that they had started and
19 have been able to turn over records to us and either
20 find people or not, as we did. So it's an additive
21 sort of thing. And it would be extremely costly for
22 us to have gone through and replicated all of that.

23 MR. SIGALL: Bruce, did you have your
24 hand up? Okay.

25 Well, now I think we're going to

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1 transition into the third topic here, in part
2 because the last -- one of the things in the
3 provisional agenda of topic 2 was a discussion of
4 the limitations-on-remedies approach. And I think
5 Matt will introduce the topic to us and ask the
6 first question about: Dealing with the situation
7 when the copyright owner has resurfaced and how do
8 you apportion the rights and apportion the -- what
9 you do in that situation to resolve a potential
10 dispute between that owner and the user who's relied
11 on the orphan works system.

12 MR. SKELTON: Right. We did identify
13 topic 3 in the provisional agenda as "Reclaiming
14 Orphan Works." And I'll just touch on some of the
15 subtopics that we kind of grouped underneath this
16 general topic:

17 What happens if the owner resurfaces
18 during an ongoing exploitation? That's an
19 exploitation that has been completed and commenced
20 prior to the resurfacing of the copyright owner.

21 Who should bear the burden of proof in
22 litigation? There seems to be some dispute in the
23 written comments about whether the owner -- or
24 whether there would be a presumption of
25 reasonableness that the owner would have to rebut in

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1 litigation while there was -- there was some
2 argument that maybe the user should bear that burden
3 given that they have access to the search that
4 actually was conducted.

5 Another subtopic was: The availability
6 of statutory damages and attorney's fees.

7 And, finally: The status of copyright
8 and derivative or transformative uses of orphan
9 works.

10 We did initially list the question of
11 "What type of limitation on remedies should be
12 available" under "Consequences of an Orphan Works
13 Designation," which was topic 2, but it is kind of
14 very much related to topic 3 of "What Happens When
15 the Owner Resurfaces." So I think it is fitting
16 that we take it up now.

17 And my first question is along the lines
18 of how we characterized our questions earlier this
19 morning about the downsides. Some people advocated
20 a cap on actual damages, either \$100 or \$500. Other
21 people suggested that an appropriate limitation on
22 remedies would be the payment of a reasonable
23 royalty for ongoing uses determined by reference to
24 comparables, what similar works are trading for in
25 the market.

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1 For those of you who advocated the
2 actual cap on damages talked about the downsides.
3 Some people suggest that in such a situation the cap
4 would act as a de facto license, when in fact the
5 value of an ongoing use would be maybe worth more
6 than a hundred dollars or \$500.

7 For those of you that talked about a
8 reasonable royalty, maybe there's a situation where
9 you couldn't really determine what was reasonable.
10 Or keep in mind that reasonable under the
11 circumstances might be zero.

12 So if anybody wants to take that, feel
13 free.

14 MR. SIGALL: Chris.

15 DR. SPRIGMAN: There's a lot there to
16 grapple with, so let me try to break some of the big
17 rocks into little rocks.

18 So our proposal was that we not really
19 rely on courts at all. Rely on them only in
20 extremis. So one of the downsides of a limitation-
21 on-liability model, at least the model that relies
22 on a court as the forum for an owner who shows up
23 getting whatever cap liability he or she can get, is
24 that the cost of going to court is ordinarily going
25 to overwhelm what they might get. And so, you know,

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1 from an economist's point of view, that work is
2 effectively, the rights in that work are effectively
3 unenforceably, practically unenforceably. Okay.

4 So one possibility, then you could say,
5 'Well, we're going to maintain attorney's fees and
6 statutory damages,' well, if you do that then we
7 haven't really moved the ball past what we have now,
8 which is, you know, you can do a diligent search now
9 and you can -- you can get some clue that this
10 property, this asset, this work is not actively
11 managed and that suggests that this is a person who
12 doesn't really care much. You can't be sure, but it
13 suggests that. And in some fraction of the cases
14 someone's going to come forward and with attorney's
15 fees and statutory damages available, they can tag
16 you and the tag can be quite painful.

17 So either you limit damages, but that's
18 only kind of a notional enforcement mechanism or you
19 maintain damages, and then we haven't moved the
20 ball. So the idea is, well, how do you get around
21 that. One way you get around that is you don't use
22 the courts as the forum. You basically give people
23 the right to come forward and claim some kind of fee
24 due under a default license, a kind of liability
25 rule. And you let them make a collection action if

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1 the person doesn't pay, okay.

2 One thing about market -- market
3 damages? Okay. So we're back in court now, because
4 in a lot of cases the person who uses is going to
5 have some value that that person puts on, if the
6 person who has come forward has come forward because
7 they have a different value, a much-greater-than-
8 zero value that they put on the use of the work and,
9 you know, we're going to have to fight out where the
10 ball is going to land in between those two values.

11 And, you know, for the works that a lot
12 of users might care about, okay, in D. C. you know
13 Jeffrey Cunard from CAA went through a whole list of
14 works that users might care a lot about, academic
15 users, historians, archives, that don't have a
16 market from which you can draw readily comparables.

17 Now setting a market price for this in
18 court is just going to be -- it's going to be a kind
19 of abstraction. So -- and it's going to be an
20 expensive abstraction.

21 So, again, I mean the downside of using
22 courts is large. And, you know, I advise -- I'd
23 hope that people would think about another way.

24 MR. SIGALL: Charlie.

25 MR. PETIT: I just want to make one

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1 comment on the attorney's-fees issue. Attorney's
2 fees are available under the Copyright Statute.
3 They are increasingly less awarded to winning
4 parties, so I'm not entirely sure that those
5 attorney's fees are going to be a significant
6 deterrent to litigation, particularly since the
7 value of -- I'm sorry, not value of -- but the
8 quality of the search that went in to determining
9 something was an orphan would certainly fall within
10 one of the four factors that are used for
11 determining an award of attorney's fees. That is,
12 whether the party's position was substantially
13 justified.

14 So I'm not seeing a need for a change
15 there because the fact of having done the search is
16 going to go into that calculus of whether attorney's
17 fees are at issue in the first place.

18 MR. SIGALL: I think that the consensus
19 or the strong support from the written comments and
20 from the discussion last week was that monetary
21 liability in the case where you've done a reasonable
22 search and it was reasonable and you've identified
23 the orphan work properly, monetary liability should
24 only be limited to something like reasonable
25 royalty, damages capped at a certain amount, that

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1 the statutory damages remedy and the attorney's fees
2 and costs remedy made available in the Copyright Act
3 wouldn't be available in those circumstances. That
4 would -- that seemed to be where a lot of people
5 were -- a lot of folks were proposing.

6 I guess the question here that we're
7 trying to focus on is really, and the debate in
8 Washington centered around, you know, the dispute
9 between going with a reasonable-royalty approach,
10 that you would incur an obligation to pay a
11 reasonable royalty, versus incurring an obligation
12 to pay damages up to a very small maximum amount,
13 which was \$100 in some cases, \$500 in some cases.

14 The question is: Is there -- what are
15 the downsides -- I think Chris articulated the
16 downsides to the reasonable-royalty approach in
17 terms of its adjudication and circumstances where
18 divining a reasonable royalty based on marketplace
19 comparables is difficult.

20 What are the downsides to the cap
21 approach in folks' perspective? What happens -- I
22 mean what will happen that shouldn't -- we shouldn't
23 want to promote happening if we had taken an
24 approach that says it's only \$500 for a use or a
25 hundred dollars for a use?

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1 Christine and then David.

2 MS. SUNDT: The downside is that a
3 hundred dollars for a use that would have come to
4 you for free is a lot of money, again in some
5 communities. So having a set dollar amount is
6 difficult even though I'm here representing College
7 Art and we were the ones who said a hundred dollars
8 would be reasonable and \$500 would be for a group of
9 works, which I think is also -- and we can afford
10 that. But the more that we make it too hard and
11 solid, the more I think we alienate people who have
12 an opportunity to make more than a hundred dollars
13 or \$500.

14 And so, again, I'm looking at what
15 creators in other camps might want this to look at.
16 And I'm saying that the downside is a fixed dollar
17 amount. It's problematic.

18 MR. SIGALL: David was next. Kenny and
19 Joe.

20 MR. EBER: Yeah. I think that having a
21 cap, particularly if it's set too low, I suppose if
22 a cap is high enough maybe some of these issues go
23 away, but having a cap that low, I mean it's just
24 the flipside of the other issue, which is it
25 basically means -- it looks like you're getting

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1 something, but you're getting nothing.

2 At some point -- I mean presumably there
3 will be very few of these cases, to begin with,
4 because a reasonable search means that you actually
5 looked and you didn't find anybody, and there's no
6 one in there. But then in those other cases, you
7 know there's presumptively you -- if someone does
8 show up, you can be negotiated. You handle it in
9 the way that most things that begin as disputes end,
10 without having to go to court.

11 At the end I suppose you actually have
12 to have judicial enforcement at some point, or else
13 I don't really know how else you get your money. So
14 I just can't see a way to get around that. But the
15 fact is there are going to be a huge number of
16 different potential uses that I would hope would be
17 covered by a provision like this, some of which will
18 -- really should entitle an owner to a lot more than
19 a hundred dollars.

20 Yes, if it gets very expensive, then you
21 build in a little more of the uncertainty, which was
22 the problem we were trying to address when we were
23 dealing with this thing, but to me that strikes a
24 good balance.

25 If things are incredibly valued, if

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1 you're actually only going to make, you know, a
2 major motion picture out of an orphan novel then,
3 you know, there are risks in life even after this
4 provision that will go into effect, I would imagine.
5 And that's just one of those cases I think will have
6 to remain, but I see a low cap as really essentially
7 meaning full immunity. And I don't think that
8 that's actually the right approach.

9 MR. SIGALL: Kenny and then Joe.

10 DR. CREWS: Ironically a low cap might
11 still be too much money. Because if we're talking
12 about -- if we're talking about a few items, a
13 hundred bucks here, a hundred bucks there, we're not
14 talking a whole lot of money in the grand scheme of
15 things.

16 But if we're talking about a database
17 with thousands of items in it, then we're starting
18 to -- especially if you're talking about a nonprofit
19 organization, your local public library, whoever the
20 innovator is of this -- this database, it starts to
21 multiply out to be a lot of money and probably at
22 that point enough to over -- to test the -- to break
23 the budget and shut down the project. So even a low
24 cap can possibly be too much.

25 That said, the bright side of a low cap,

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1 of course for the incidental uses, can work out very
2 nicely for the user and actually can work out nicely
3 for -- for the owner.

4 If a hundred or five hundred dollars is
5 enough to make you squirm as an owner and you're
6 worried that that might be all you get, well, now is
7 your chance to show up, register your work, make it
8 available, and bypass this whole system and collect
9 your money.

10 MR. CARSON: In the situation you just
11 mentioned, where even that low cap might turn out to
12 be that very expensive, they're using a lot of
13 works, might it be that in that kind of circumstance
14 you're better off with a reasonable-competition
15 standard because the nature of your use might well
16 be that the reasonable compensation is much less
17 than the cap otherwise would have been?

18 DR. CREWS: It could very well be. You
19 know even if you have the owner who cares, we talked
20 about the owner who didn't care, even the owner who
21 cares, the compensation -- it may be that this is a
22 fifty-dollar item, and a hundred or five hundred
23 dollars is more than a typical marketplace fee for
24 that kind of use. We may find that situation in
25 many instances as well.

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1 But one thing just as an aside to make
2 sure we've clarified something, remember as we have
3 alluded to, the current Copyright Act has two other
4 big right-left punches: Statutory damages and
5 attorney's fees. But of course in most instances
6 you can't get those unless you've registered that
7 work on a timely basis, so we're back to that again:
8 Register your darn works, bypass the system, collect
9 your full fee, and isn't that a good result for all
10 of us owners and users alike.

11 MR. SIGALL: Joe and then Charlie,
12 Brewster.

13 MR. LISUZZO: Interesting conversation.
14 I guess I'm kind of seeing, Gary, what you were
15 talking about before, and Maureen and Christine,
16 about the costs. It almost seems like this is a
17 time where you get more into the uses discussion
18 than anything else.

19 And it seems like, you know, people
20 create photographs, stories, songs for posterity of
21 our culture. And I think if you got folks that are
22 archiving them, may it be libraries or websites or
23 databases, or whatever. If it's for a cultural -- I
24 guess a cultural savings or some kind of archiving,
25 it almost seems like this is one of those uses

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1 pieces where we decide that it's not a monetary
2 value to it, that it's an acknowledgement piece,
3 like you were talking about earlier because of the
4 not having it.

5 If it's a nonprofit organization, I
6 guess I'm saying go that way. If it's something for
7 a for-profit organization, you know, where you're
8 doing it for selling a book or a movie, or something
9 like that, then I think you go back to become what I
10 said earlier, I mean what would you have negotiated
11 upfront for that amount or for that item to be used.
12 And I think maybe this is where it starts to get
13 into the uses thing a little bit deeper on it.

14 I also think, just to add on that, I
15 also think that if we're enacting something that may
16 become a rule or guideline or a law of being orphan
17 works, we should have enough confidence in it if
18 it's enacted that if it fails, if it hits the
19 failure mechanism that we're saying that it's the
20 very small exception. So I think going back to the
21 statutory piece, it almost seems like statutory
22 needs to come out of it.

23 And going back to what, you know, I keep
24 harping on, and that is what would I have paid in
25 the first place, I didn't -- I didn't use this or do

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1 it purposefully. And I didn't do it inadvertently.
2 I did it -- you know, I went through all the steps.
3 I went through the law that said if I find it to be
4 checklist one, two, and three, and it's orphan
5 works, then I used it. If it comes up later, well,
6 then I guess I got to step forward and pay on it.

7 So I think the statutory piece is almost
8 one of those things where, you know, I didn't --
9 didn't mean to do it. I didn't purposefully do it.
10 So how can you enter statutorily because it's
11 something I didn't act with malice.

12 MR. PETIT: Well, something that I think
13 goes along with the 'I didn't act with malice' and
14 also with the large database issues would be perhaps
15 just for this limited purpose only, to adopt a
16 structure something like the Truth in Lending Act
17 uses on class actions where there's a cap on the cap
18 based on the size of the organization. That might
19 be a compromise position that can allow caps to be
20 in the system for small, low level uses, but when
21 the uses get truly extensive, that there's
22 nonetheless some insulation for a nonprofit
23 organization that despite its best efforts did not
24 discover this one particular, truly extensive
25 instance where it should not have been treated as an

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1 orphan.

2 Under the Truth in Lending Act there is
3 the equivalent of statutory damages, but in a class
4 action you're limited to a percentage of the assets
5 as the cap on the total amount of statutory damages.

6 Now that's probably the way we would
7 want to measure it in this kind of a situation, but
8 I think that concept can be useful in trying to
9 create a just and appropriate and balanced system if
10 we are going to adopt caps.

11 MR. SIGALL: Brewster.

12 MR. KAHLE: It seems that you're coming
13 around aspects that could give some level of comfort
14 to the organizations I deal with, which are
15 ourselves, libraries, and also others, where usually
16 you get this question of sort of, 'Well, how bad
17 could it be.' Right, if we screw up, what happens.

18 And when the answer comes back even
19 theoretically comparable to the endowment of major
20 universities, it really makes your case much harder
21 on proposing the project.

22 And we have this case happening all the
23 time, 15-year-old kids getting sued by trade
24 associations for millions of dollars. And so these
25 numbers are kind of scorchers to anybody even

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1 probably other than than 15-year-old kids.

2 So the cases that you can get large
3 ratcheting up of these numbers are two, and maybe
4 there are mechanism, maybe these cap to caps or
5 something. The two is when you have a large number
6 of items from one owner. So say every webpage from
7 a website would be an infringement in our particular
8 case. That can be frightening in numbers, you know,
9 of tens of thousands of things come from one place.

10 Another are class actions, which is a
11 really interesting part of law, but they're
12 potentially quite onerous in terms of ratcheting up
13 the number of items.

14 So I think having some form of cap of
15 caps or some way of making it so that organizations
16 can make the decision to go ahead without
17 threatening their whole organization with hundreds-
18 of-years history.

19 MR. SIGALL: Can I ask you a question,
20 Brewster, because earlier -- I don't remember if it
21 was this morning or this afternoon. You described a
22 situation where in your experience of collecting
23 websites for the decade or so that you've been doing
24 it, most -- most owners -- most owners of the
25 information that you've collected haven't come to

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1 you for money and haven't asked for money and --

2 MR. KAHLE: Correct.

3 MR. SIGALL: -- are happy with it. It
4 seems -- that seems to be a pretty good record that
5 you're building on your own of the reasonable
6 royalty that people would pay for the -- that you
7 would pay for the activity that you undertake, in
8 the sense that if someone did come along and said,
9 'I want \$5,000 to be included in the Internet
10 Archive,' you have a relatively good record to show
11 a court or a copyright royalty judge, or whoever is
12 determining this, and saying, 'That is way out of
13 line with what 99 percent' --

14 MR. KAHLE: I better write this down.

15 (Laughter.)

16 MR. KAHLE: Jule Sigall said... I'm
17 not.

18 MR. SIGALL: It's being transcribed, so
19 you don't have to do that.

20 That seems to be -- and my question is:
21 Does that -- if that's true and if that's the case,
22 is that kind of experience something that can be
23 applied to other folks around the table?

24 Can you -- at the time -- and I asked
25 this question in Washington. At the time you were

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1 doing your reasonable search for -- and clearing
2 rights generally to the works you'd like to use for
3 -- even for owners that you know, can you also at
4 that time build up a record of what the reasonable
5 payments or royalty would be for comparable works or
6 uses that you'd like to make such that it seems like
7 in your case you may be building a record that most
8 people would not seek payment so a reasonable
9 royalty in most cases is very close to zero. Is
10 that something that others in the museum context or
11 other educational contexts could do to help -- to
12 help reduce the uncertainty about a rate that's
13 reasonable royalty that's intended to capture the
14 situation where a commercial entity really makes a
15 very exploitative use of the work and really is
16 earning a lot of royalties of money on their own off
17 it, that's why it seems like you have a reasonable-
18 royalty approach.

19 MR. KAHLE: We hope so. We see one of
20 our roles in life by being not affiliated with a
21 large endowment, is to try things. And we're not
22 going off into areas that are illegal when people
23 say, you know, 'That would be really risky,
24 Brewster.' We don't do that, but if it's gray we'll
25 sometimes go and put up a little flag and see sort

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1 of how, you know, does it work.

2 And one of the things we hope out of
3 these proceedings is either by common practice, sort
4 of informally, or more formally through the sorts of
5 things that you're pulling together, the practices
6 that have been working in the digital world can get
7 more solidified so that the common practices that,
8 for instance, in the web field started with Alta
9 Vista, which was the robot exclusion principle which
10 is sort of obscure, but it was -- it's in there, and
11 it's how our field works. If we can get that kind
12 of thing codified enough such that Stanford, the
13 Library of Congress, other organizations would feel
14 comfortable basically starting to take their
15 cultural heritage role seriously in the digital
16 world and start to do these things a little more
17 boldly.

18 We just find the library world extremely
19 conservative. And unless it's really spelled out by
20 you guys, often they'll just say, 'Uh, I can't do
21 it.' So I guess I hope so.

22 And if there are any examples that we
23 can be in this area, we'd be happy to document it.

24 MR. SIGALL: Christine and then Carl.

25 MS. SUNDT: In our experience working

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1 with museums there is nothing that is reasonable.
2 And -- sorry, Maureen. No, the -- it's unreasonable
3 --

4 MS. WHALEN: I'm sure we don't deal with
5 that.

6 (Laughter.)

7 MS. SUNDT: No. The Getty is the model.

8 But the problem is that there is a wide
9 range, the range is too wide. All the studies that
10 I've ever seen done on what are rights and
11 reproductions fees show it to be the full gamut. So
12 if it could be done in such a way that reasonable is
13 the low end, not the high end, then I think that we
14 -- we might be able to agree on that.

15 But it's -- and also what's going on in
16 the world of museums these days is this notion that
17 anything that's done on the web has to be cleared
18 for international rights and have many other layers
19 of stuff added. And so I don't know what's
20 reasonable anymore.

21 I know my experience in clearing rights
22 is that it's a total nightmare and there is no
23 standard out there.

24 MR. SIGALL: I think it was Carl and
25 then Ken.

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1 MR. JOHNSON: To the question of do
2 others of us in the industry have a range and have
3 some benchmarks, and those kinds of things, while it
4 is a moving target and, as Christine explains, it's
5 kind of all over the place, there's not a day that
6 goes by or at least a week that goes by that we will
7 have a copyright owner that will pose the question
8 to us, 'What are others paying for this kind of
9 work.' That's a very dicey, very tricky question to
10 answer straightforward.

11 And so if I answer the question or I
12 instruct my staff on how to answer that question,
13 take the zero and multiply it by some factor and
14 you'll still get -- no.

15 (Laughter.)

16 MR. JOHNSON: Take the high and throw it
17 out because it's probably way out. Don't use the
18 \$5,000 figure. But take the cluster and give that
19 and give that range and say now in giving that to
20 you it's really up to you, because it's really a
21 difficult position to be asking for something and
22 telling them what to charge for it at the same --
23 but, as a practical matter, the question comes all
24 the time. And I've determined that it's better --
25 ultimately in the spirit of service, it's better to

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1 give them some kind of information to base their
2 judgment on without making the decision yourself,
3 because that's kind of conflict of interest, that
4 kind of thing. And you don't want to get into it.

5 So, anyway, the short answer: Yes, I
6 think there are some reasonable standards that exist
7 in each of our culture of work that we can help
8 guide the copyright owner with.

9 MR. SIGALL: Kenneth.

10 MR. HAMMA: I think for -- when you --
11 Christine was talking about museums and you're
12 talking about -- I think the model you're talking
13 about is print publication. We're limited to print
14 publication here because that's the model that
15 results in a product that is then sold and
16 distributed and so it's comparable to other
17 businesses. And in that Christine's right, it's all
18 over the map, from free to 500 pounds a pop -- the
19 Queen's collection in London has the highest
20 reproduction fees of any art collection in the world
21 as far as I know.

22 But the -- it's a moving target here.
23 And if you look at what museums and archives and
24 libraries are doing, one of the -- I don't think any
25 of them would describe making a publication and

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1 selling it as being their business. Their business
2 is stewardship of collections and that stewardship
3 of collections is resulting in the kinds of things
4 that Gary has talked about, where there may not be a
5 print publication of the paintings collection at the
6 Getty. There may never be another one. It's all
7 online access.

8 And there we're talking about
9 potentially very large collections and the product-
10 for-sale model doesn't exist at all. There's no
11 product. There's no sale. There's commercial
12 value. It is the responsibility of a public
13 nonprofit to pay attention to collection
14 stewardship.

15 If that's going to cost us even fifty
16 dollars, a hundred dollars a pop, if there's some
17 cap like that, that's going to eat into that
18 business of collection stewardship that has nothing
19 to do with publication, creating a product, and
20 having a commercial revenue stream. It doesn't even
21 exist.

22 MR. SIGALL: Jerry, then Bruce.

23 MR. MCBRIDE: I go back to something
24 Brewster said. I think there is this sort of
25 chilling effect that happens particularly with

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1 regard to litigation on what certain nonprofits can
2 and cannot do. The fact that there could be
3 penalties and substantially large penalties is a
4 serious problem.

5 And what we're looking at here in
6 looking at orphan works is that -- I can't remember
7 the exact percentages and maybe somebody else does
8 -- we're talking about a lot of works that -- a high
9 percentage of works that basically have been
10 abandoned and they've been abandoned because
11 presumably there's no commercial interest in them.
12 And the only possible financial interest might be
13 that you could litigate them rather than try and
14 sell them.

15 (Laughter.)

16 MR. MCBRIDE: And these are not -- we're
17 not looking at, you know, trying to deal with things
18 of obvious commercial value here. And there are
19 many sort of operational decisions that you make in
20 a day-to-day in terms of library work, and copyright
21 is just one tiny portion of it. I mean we don't do
22 that. That's not our expertise. So we need
23 something simple that will, you know, allow us to
24 make those decisions on a day-to-day basis and not
25 have to deal with the, you know, the fear that we're

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1 going to have our entire endowment soaked up or if
2 the cost of projects will escalate beyond what we
3 could afford for works that basically the vast
4 majority of those works have no commercial value and
5 people aren't interested in.

6 Some of these works have been out of
7 print for decades and decades. And even if we do
8 know the copyright owners, they're not interested in
9 making them available again.

10 MR. SIGALL: Bruce.

11 MR. FUNKHOUSER: Yeah. This is to the
12 point of trying to set some kind of common fee. As
13 an organization that both licenses not-for-profit
14 educational institutions as well as for-profit
15 commercial institutions, we get approached by that
16 same question, which is by the rightsholders, the
17 actual rightsholders out there, 'How much is this
18 worth? What should I charge?' And we are enjoined
19 by law from even answering that question. We can't
20 even come close to that question.

21 The challenge I think is going to be in
22 trying to hit upon an appropriate fee is who is
23 going to set that fee. If it's being set by all the
24 people who are saying, 'Well, I've been getting all
25 this stuff for free for years and years and years,

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1 and the price should keep going down to zero and
2 zero and zero,' that's not really going to satisfy
3 the actual rightsholders for that.

4 If you try and force that on the
5 Copyright Office, I'm sure they'd be delighted to
6 have 6,000 tribunals a week to try and figure out
7 all the different uses and all the different users
8 and all the different fees that are going to come
9 up. And if you don't have either of those two
10 options, then I don't know who ends up setting that
11 particular price. I don't know how you can get
12 there from here.

13 MR. CARSON: There is perhaps, there is
14 perhaps some mechanism, administrative mechanism.
15 We have a new entity called the Copyright Royalty
16 Board: Three copyright royalty judges in the
17 Library of Congress whose job is to set the rates
18 and terms for the statutory licenses. Some of us
19 think they're going to be very under utilized.

20 We've heard a lot of talk about how
21 expensive it is to litigate in federal court, and it
22 certainly is. And I suspect that for the vast
23 majority of cases we're talking about here, where
24 the copyright owner does turn up, it would make
25 sense for either party to go to federal court.

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1 What if you had an administrative
2 mechanism where you have these three Copyright
3 Royalties Judges whose job it already is to make
4 similar kinds of evaluations, not the same but
5 similar, who will rule in a fairly quick, fairly
6 informal proceeding as to what the value is?

7 MR. FUNKHOUSER: From my previous
8 experience in a previous lifetime, which is when I
9 worked on the music side of this equation and we
10 were trying to figure out with the Copyright Office
11 what the fees for satellite radio should be --

12 (Laughter.)

13 MR. FUNKHOUSER: I'll let the laughs
14 speak for themselves. I'm not sure that was ever
15 resolved. I left the music business in 1998, and
16 they hadn't resolved it then. I'm not sure whether
17 it's resolved yet.

18 Letting three -- giving three
19 administrative judges the authority to make these
20 kind of decisions I think will end up with a parade
21 of rightsholder groups coming down to the Copyright
22 Office and taking you out with tar and feathers.

23 MR. SIGALL: Chris had his hand up and
24 then Kenny. Okay.

25 DR. CREWS: Yeah, tar and feathers. I

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1 agree. I think the only party that can make this
2 decision is in any kind of meaningful and efficient
3 and enforceable manner is Congress. And Congress
4 just would have to pick a number, and that's it.
5 And that's where we're talking about a hundred
6 dollars, five hundred dollars, whatever.

7 And you know the more I think about,
8 David, the point you were alluding to earlier in the
9 conversation, that remember we're talking about a
10 system where if you're an owner and you don't like
11 it, you can get out of this system entirely.

12 So it almost doesn't matter what the
13 rules are: If you don't like it, register your
14 work. Your work is now claimed and exploited and
15 registered by you. It's not an orphan work probably
16 by any definition we're really going to end up with
17 under those circumstances, and you're out of the
18 system. And if the system says it's 39.95 as your
19 fixed price, you don't like it, you've avoided it.
20 Congratulations. So pick a number.

21 MR. SIGALL: Dwayne and then Maureen.

22 DR. BUTTLER: And I also think just to
23 go back to preservation and archiving, I think it
24 has to be a meaningful, sort of predictable kind of
25 scenario to facilitate that activity. And I think

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1 there's an important social purpose in preserving
2 and archiving things. And we're trying to at some
3 point put this number on people that have not been
4 born yet. What is it worth to them. I don't know,
5 because we're just providing the means to make sure
6 that they have it in the future to say, well, what
7 is it -- a question was raised this morning, what's
8 it worth to the user. I don't know what it's worth
9 to them, but I think that we fared very well by
10 having the things that came before us. So -- and I
11 don't know how to square those two interests.

12 MR. SIGALL: Maureen was next.

13 MS. WHALEN: I'm concerned about the
14 reasonable-market test, because it seems -- somebody
15 said earlier it's cheaper to pay than it is to
16 search.

17 But flipping that over into this
18 context, if you're going to go with a reasonable-
19 market payment and it clicks in when it's used; you
20 know, there's no grace period, there's no safe
21 harbor; person comes forward, they can make the
22 claim for the money; even if you've done your due
23 diligence, you've met all of that; it seems to me
24 then there is no -- you've taken away any incentive
25 on the part of the copyright owner or the

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1 copyright holder to do any of those things to manage,
2 make themselves identifiable. Even if they don't
3 want to register with the Copyright Office but they
4 may want to register with a trade association or a
5 professional association, if you keep it at a
6 reasonable market that goes back to the point when
7 that work first went public in this use, you know,
8 it seems to me we've done nothing to correct what
9 many perceive to be an imbalance in copyright today.
10 You're just giving -- you're putting more little
11 weights into the side of the scales that favors the
12 owner.

13 And I think that to the extent you use
14 an orphan work and you bring it out there and you
15 put it out into the public, some value needs to
16 attach to that. I do think and I think we've
17 written extensively in our comments that there's a
18 difference between a limited scholarly work,
19 something used only for a certain period of time,
20 you take it off the market; versus something where,
21 you know, it has a much more greater commercial
22 purpose. The -- and it generates a lot more in
23 profits.

24 So I think we need to -- I think
25 anything that goes just with like market is unfair,

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1 because it puts the copyright owner in the same
2 position, there is no incentive. Yes, I'm sure we
3 can come up with, you know, you can look at a
4 budget. You can look at this, you can look at that.
5 You can come up with a hundred different formulas.
6 It is numbers. But I think there's no incentive
7 there to value the work of the person who brought
8 the orphan work out. I think there is no incentive
9 for the copyright owner to do anything to get out
10 there and do it. And I think it just doesn't work.

11 MR. SIGALL: I had Christine, Gail.

12 MS. SUNDT: How about something that's
13 really off the wall? Maybe it's because it's late
14 in the day and it's a little hot in here. A tax
15 write-off rather than a payment. A tax write-off
16 for the owner. I mean something that, you know,
17 again -- let's be creative. Let's think outside the
18 box.

19 MR. CARSON: They're donating into the
20 public.

21 MS. SUNDT: Right, yeah.

22 MS. LEE: They're taking a loss.

23 MS. SUNDT: They're taking a loss.

24 They're donating it to the public.

25 MR. CARSON: How would you decide what

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1 the value of that is?

2 MS. SUNDT: Well, you know, again --
3 your tribunal can come in.

4 (Laughter.)

5 MR. SIGALL: People have complained that
6 the Copyright Act is looking more and more like the
7 Tax Code every day. I don't know if I want to
8 hasten that process, willfully, anyway.

9 And I think the question is -- you know,
10 again the question comes up: What is the value of
11 it. And I just -- this may get into what we'll talk
12 about in the international topic, but in reacting a
13 little bit to what Kenny and Maureen have said, it
14 seems like, though, if you have a system where the
15 payment is nothing or very low, and here we're
16 talking about sort of a failsafe, as Joe had
17 mentioned, a failsafe circumstance where you thought
18 you had an orphan work. It turns out it's not an
19 orphan work and the owner is back and alive and
20 well.

21 If the system says that at that point
22 they get nothing or a very low amount, do we run
23 into problems where although Kenny says you can
24 avoid that whole system by registering, are we
25 really creating a de facto formality at that point

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1 for the owner, that they -- I mean really to avoid
2 -- if enjoyment and exercise means nothing -- means
3 anything, it means more than just -- enjoyment and
4 exercise of my copyright means more than just not
5 getting paid at all or not having an injunction
6 available or getting a very low amount in my eyes as
7 a copyright owner, then aren't we saying that -- and
8 to avoid that I have to register, you're sort of
9 creating a de facto registration formality that
10 might run into some international problems.

11 I'll just throw that out now. We can
12 talk more about that in the international section,
13 but I think that's -- at least I think what a lot of
14 people have proposed a reasonable-royalty approach,
15 they use that to buttress their international
16 argument; to say that by allowing a reasonable
17 royalty in the failsafe circumstance, you're not
18 really depriving the copyright owner of much of what
19 most people consider enjoyment and exercise of their
20 copyright because they so still be getting paid some
21 royalty that would approximate what they would have
22 gotten had they actually been around when the person
23 found it. So -- or was searching for the owner at
24 that point.

25 Kenny, you can...

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1 DR. CREWS: Yeah. Without getting too
2 far into the international issue, just speaking to
3 the mechanics of the concept here, realistically in
4 most scenarios that we could make up I suspect that
5 we're really also talking about a one-time event in
6 the life of that copyrighted work.

7 So whether I show up as the elusive
8 copyright owner, claiming this so-called orphan
9 work, and I show up by means of making myself very
10 noisy or show up by means of registering the work,
11 these are two different avenues of putting the
12 information out in the marketplace to declare that
13 I'm around and that I am the copyright owner. And
14 maybe I only get a hundred bucks from person A, but
15 persons B, C, D, and E, whoever they may be, the
16 future users are not all on notice that I exist.
17 And when you do a reasonable search you're now more
18 than certainly going to find me.

19 And so we are probably talking about a
20 one-time event in the life of each work. After that
21 I'm going to be smart enough to -- or have created
22 the information in the place to defeat this work
23 from being declared orphan by the next user.

24 And actually maybe I should be paying
25 that user because that user has actually done me an

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1 enormous favor, by reminding me that I've got
2 something and I've got something of value, and that
3 I should do something about that simple fact. So
4 put it low.

5 MR. SIGALL: Charlie.

6 MR. PETIT: I'm afraid I can't agree
7 that it's going to be one time in the life of a work
8 because at least in my experience dealing with works
9 even under the older limits of the 1909 Act, the
10 reality is that most works go through between three
11 and five changes in ownership during that time
12 period. And every time you have a change in
13 ownership, you've got another opportunity to create
14 an orphan, whether that change in ownership is
15 through a simple copyright transfer, through
16 bankruptcy, through probate, through a nonprobated
17 heirship really doesn't matter.

18 I don't -- I do not at least in my
19 experience think that saying it's going to be once
20 in the life of a work is really realistic. Maybe in
21 the majority of the cases it will be, but it's not
22 going to be rare to have multiple instances.

23 MR. SIGALL: Chris.

24 DR. SPRIGMAN: Again I mean you can make
25 this simple. You can say if it's on a registry even

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1 though it's been transferred, the signal is hands
2 off, okay. And the reason typically it's been
3 transferred, unless it's by devise, the reason it's
4 been transferred is because someone sees a value in
5 it. So that signal would be correct.

6 Now if it's by devise, okay, that's a
7 little messy. Sometimes things are not valuable,
8 but they're transmitted by devise, by virtue of the
9 law. And, you know, we can accept the signal that
10 this is hands off and just live with it.

11 I think the point about formalities,
12 what Kenny says I think is absolutely right, that
13 we're very far, very far here in our discussions
14 from the kinds of formalities that Berne dealt with
15 and that TRIPs by virtue of incorporating Berne's
16 standards deals with.

17 And the notion of exercise and enjoyment
18 kind of cuts both ways, so we already in the law
19 have
20 features of the law, like our registry which if not
21 complied with deprives copyright owners of the bulk
22 of what the economic exercise and enjoyment of their
23 copyright would be, okay.

24 The detraction, the further detraction
25 that would, if there's any, that would emanate from

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1 an orphan works provision is in comparison minute.
2 And there is the dynamic which I think is absolutely
3 plausible in a lot of cases that by virtue of some
4 second person's exploitation of work, whether
5 offering it for distribution or performing it or
6 using it in a derivative work, if you have a well
7 crafted reclamation provision, the original creator
8 can come along and can then basically free ride on
9 that second person's, you know, abilities, that
10 second person's vision for what that work could be
11 and how it could serve a market.

12 And so, you know, how in any particular
13 case such a provision would effect exercise and
14 enjoyment is actually difficult to say. It
15 certainly as a category wouldn't always detract from
16 it; it would often add to it. So I mean we'll get
17 there, but I think we're very far away from the
18 heartland of Berne is about.

19 MR. SIGALL: Let's turn to the question
20 of injunctive relief. It seems it's been mentioned
21 before that when the owner resurfaces there should
22 be significant limitation on the injunctive relief
23 that might be available to that owner, to protect
24 the reliance interests of the user in their reliance
25 on the designation of it being orphaned and the

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1 books that they're selling or the use that they're
2 currently making.

3 Although in the written comments there
4 was, there did seem to be some support among varied
5 interests for not cutting off a resurfacing owner's
6 ability to prevent different uses in the future of a
7 work. And everyone seemed to acknowledge,
8 especially last week, that the line-drawing there
9 might be difficult, but there did seem to be some
10 consensus for room to allow some injunctive relief
11 against different uses than what was being made.

12 One interesting suggestion from last
13 week that I want to throw out there is the thought
14 that when an owner resurfaces the user then has a
15 choice to continue their ongoing use with a payment
16 of a reasonable royalty in this proponent's view or
17 stop the use all together and not pay anything for
18 the ongoing use.

19 What are folks' thoughts on that whether
20 there would be some -- you know, whether that kind
21 of approach that gives the user a choice that -- and
22 I think the proposal also included the concept that
23 for the time up to the time the owner resurfaced
24 they would be paying some sort of royalty,
25 reasonable royalty or something for the past

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1 retroactive -- retrospective use that they were
2 making. But for going forward they have a choice:
3 Stop all use and essentially consent to an
4 injunction of that use and not pay anything or
5 continue to make use and make some payments with
6 parameters which if they go beyond they can only
7 stay within a certain -- the scope of their
8 continuing use?

9 What are folks' thoughts on that
10 approach or the actual scope of what ongoing use
11 should be in this -- in a system like this?

12 Brewster and then Gary.

13 MR. KAHLE: In the library and archives'
14 use and sort of the noncommercial use I would
15 strongly argue for free access to orphan works up
16 until the point where it's known to not be an
17 orphan. So basically a notice and take-down
18 provision, a kind of approach as opposed to a
19 retroactive reasonable royalty.

20 MR. STRONG: I would also suggest that
21 there might be something other than a payment of
22 royalty and that might be attribution, which is
23 reasonable and which a number of individuals might
24 be just as happy in public, particularly public
25 archives nonprofit arenas where they or their family

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1 are acknowledged so that at least introduce the
2 concept that there might be nonmonetary royalties or
3 recognition or attribution or whatever it might be
4 so that it always isn't money. It might be, but
5 there are then other acceptable contexts for
6 noncommercial.

7 MR. SIGALL: Gail.

8 MS. SILVA: I should say I agree with
9 most of this last discussion. I'm just going to
10 pick up a couple threads. And I keep going back to
11 this, you know, upside down pyramid or a funnel.
12 There's the copyright. Then we have the situation
13 where orphan works is adapted, is a concept, and
14 then we get down to how many people left are there
15 that could pop up.

16 I think that Maureen said it and someone
17 else said it too, in many cases I think in the film
18 community they have exercised, most have exercised
19 due diligence. Most are not there to pull a scam.
20 They're like scholars. They do the work.

21 The creation that comes from all the
22 things they collect and is put on a screen or seen
23 in a theater oftentimes, and this is my reference
24 with Maureen, brings back -- and someone over here,
25 too -- brings back, may bring back something that no

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1 one has seen or didn't know about or illuminates it
2 in a different way. I mean I think this is
3 particularly true with stills and moving picture and
4 music in some films.

5 On the slight chance that someone does
6 pop up, I would think it would -- without some kind
7 of modest arrangement, you know, I think you'd be in
8 trouble. Being sued is not fun, an injunction to
9 cease.

10 I think the attribution idea is a very
11 good one. I've seen that happen on films that when
12 they're -- or tapes that when they're next one is
13 brought out, there is an attribution that they
14 couldn't find the first time. I don't think we have
15 to assume that every -- there is that sort of
16 intention to defraud by using something.

17 I like -- actually like the three-judge
18 idea if it really was quick and efficient. And I
19 don't --

20 MR. CARSON: This is the U.S.
21 government.

22 MS. SILVA: Yeah, I know. That's why I
23 said that. I mean it's not a bad idea if there was
24 an arbiter. But deciding on the value of any of
25 this is so arbitrary. I mean who decides.

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1 MR. SIGALL: David and then Christine.

2 MR. EBER: I think that you do your
3 reasonably diligent search and you're done with it
4 and it satisfies that. What you have is basically a
5 constructive license to make the particular use but
6 only that use that you had in mind that you were
7 trying to clear the permissions for, subject to
8 actually paying the license fee, whatever that
9 constructive license fee is.

10 So what that means is that there is not
11 going to be a take-down in the middle of that use
12 because that's not what you anticipated as the
13 licensee. There is going to be payment for -- so
14 when someone shows up, you basically will be paying
15 whatever that fee is for that particular use. Now
16 you may not know at that particular time how long
17 that use is going to continue, so there may be
18 difficulties of sort of figuring out at that moment
19 in time what's going to be paid for, but it seems to
20 me that it should be payment that covers that
21 particular use and then shuts off for a new use.

22 In a sense you can kind of think about
23 -- if you're thinking about it as a constructive
24 license, as a fictional, counter-factual license,
25 the -- that helps you, although by no means actually

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1 does answer the next question which is what is a new
2 use and what is the same use, well, you sort of
3 think: Well, what kinds of -- what is the scope of
4 a permission in that kind of situation.

5 In my industry it's not all that hard to
6 figure out what is customary for a particular
7 permission and what kinds of things need to be
8 clearances. I realize in other areas it's harder to
9 do that, but I think -- I like to keep that whole
10 way of looking at it in mind and that helps me go
11 through those questions for what -- you know, what
12 that constructive license gives you and what you
13 have to do but what they can't make you stop doing.
14 And then when you have to go to your search again.

15 MR. SIGALL: Christine was on my list,
16 but let me follow up with that because that raised a
17 question in my mind.

18 Could it be the case that could the test
19 for what the ongoing use is versus a new use,
20 ongoing use being permitted, but the new use not
21 being permitted, could the test be the scope of the
22 user's reliance on the Orphan Works Provision?
23 They'd have to sort of show what they rely -- what
24 reliance they've placed on something being
25 designated an orphan work. Based on the orphan work

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1 they were going to publish this book or do this
2 collection or, you know, exhibit this collection or
3 put up this website for this period of time.

4 And a new use, the test of a new use is:
5 Did you rely on the orphan works in anticipation of
6 making that kind of use or not. And that could be
7 potentially an area, a way to draw the line, sort of
8 what reliance did you place on this, the scope of
9 the reliance you placed on the orphan works
10 designation. Meaning that the plans you took, the
11 things you undertook to proceed based on that
12 designation.

13 MR. EBER: I mean I think that could be
14 a fruitful way of looking at it, because when you do
15 -- when you do your initial search and you're trying
16 to clear the permissions, you -- you have something
17 in mind. You may not know exactly how long, but if
18 you actually find the person they're going to ask
19 you. So, yes, I mean that's does get us some way
20 towards -- I think it's somewhat similar to what I
21 was trying to say which is the idea that you -- you
22 know, it is pretending you actually got the license
23 that you were seeking in the first place, which you
24 -- and then you can rely on that -- on that -- what
25 you would have gotten.

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1 MR. SIGALL: Let's go to Christine first
2 because she's on the list, then Steve and then
3 Kenny.

4 MS. SUNDT: The point that I wanted to
5 make has to do with being flexible in what the
6 outcome is. In other words, it might be an
7 attribution that would satisfy, it might be a
8 payment, it might be a negotiation.

9 I think the bottom line here is
10 negotiation and what fits the scenario rather than a
11 set outcome that I think we're trying to come to.
12 We're trying to figure out one, but it may actually
13 be three or it may be four or it may be more than
14 that.

15 So is there a way that we could maybe
16 not be specific in the outcome and solve the problem
17 again among different communities that have
18 different needs and different requirements.

19 MR. SIGALL: Steve and then Kenny.

20 MR. GOTTLIEB: Just to answer your
21 question, rather than look at it from an individual
22 standpoint again, and not to belabor the point, but
23 it might behoove us to look at it from a sectoral
24 point of view. There are steps that industries
25 take, for instance the publishing industry at some

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1 point they determined that a book is ready for
2 publication. For every industry, they have steps at
3 which point you determine that it's impractical and
4 inequitable to allow for an injunction.

5 MR. SIGALL: Kenny is next.

6 DR. CREWS: In this conversation and in
7 the written comments there have been some other
8 pieces of remedies, attribution, et cetera, but I
9 keep seeing us drifting back to two remedies: The
10 take-down concept, you know, gotcha, remove it; and
11 the licensing concept, whether it's a calculation or
12 a fixed amount, but still some dollars for -- that's
13 supposed to reflect something of the value of the
14 work. I see those two keep coming out of the
15 conversation and maybe the simple solution is if the
16 law offered up those two solutions and that if
17 you've qualified as a user of a qualified orphan
18 work, in the end you're going to face one of these
19 two remedies.

20 It might be your choice, it might be the
21 owner's choice, it might be somewhere in between,
22 but you're going to face one of those two. And as
23 we acknowledged before, when I tossed out the
24 concept of changeable, not changeable, yeah, the
25 world doesn't neatly divide that way. The lines are

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1 very blurry. So -- but you'll know in the end if
2 I've got your photograph, your orphan work
3 photograph on my website, you will know -- we'll all
4 know at that moment if I can take it down and get
5 rid of it. And take-down becomes a viable remedy.

6 We'll all know if I can't get it off the
7 marketplace because I put it in a book and it's out
8 there and it's beyond recall. And then we'll know
9 that take-down doesn't work and, therefore, we've
10 got to talk about dollars.

11 And so we'll know when that time comes
12 in each individual case, but I keep seeing us drift
13 to these two. And until -- unless we've got other
14 ideas that crop up, you know, maybe we need to
15 identify a finite set of possible solutions and then
16 reserve them for application as appropriate when
17 that time comes.

18 MR. SIGALL: Jerry and then Charlie.

19 MR. MCBRIDE: I'm kind of wondering
20 about how we deal with sort of the factor of
21 uncertainty here. If I were to create a project
22 that may have x number of orphan works in it and I
23 don't know what the possible penalties would be,
24 would I have to then budget for each one of my
25 projects a certain amount of money that would be

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1 sitting out there that I could then use if somebody
2 shows up. And I think that's problematic in terms
3 of at least noncommercial uses of these items.

4 And the idea of the retrospective
5 payment is equally problematic because then, once
6 again, there would be a number of cases in which
7 certain projects and certain things would simply not
8 be done. I can't see that if there was
9 retrospective payments I doubt that very many
10 libraries would change their policies. They would
11 continue in the mode that you could come back and
12 have some sort of lawsuit or payments to make on
13 these and they would just not use the orphan works
14 like we're talking here.

15 So I think that what we'd be interested
16 in seeing is that once an orphan work has been used
17 and identified as an orphan work that there would be
18 an acknowledgement of the copyright holder and that
19 information would be made known, but the user could
20 continue but no one else could use that work.
21 They'd have to contact the copyright owner.

22 MR. SIGALL: Charlie and then Christine.

23 MR. PETIT: There are a couple of other
24 circumstances, and I don't know what the solutions
25 to these are that regardless of whether the market

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1 might otherwise wish to impose a license fee, going
2 back to the original question should we be getting
3 rid of injunctions, I don't think we can. And
4 that's the instance in which the orphan work is
5 itself subject to something else, such as an
6 agreement to withdraw from publication due to a
7 defamation suit. That the work that is now being
8 treated as an orphan is itself an infringement on
9 someone else's copyright, for whatever reason.

10 I don't know how to fix that problem,
11 but those problems occur enough that I don't think
12 we can make a blanket statement "No injunctions." I
13 do think that there always needs to be some kind of
14 a method to enforce a take-down even if that's not
15 the preferred alternative in the system.

16 MR. SIGALL: One thought along those
17 lines that was discussed last week in Washington was
18 if you had a provision that would allow some form of
19 injunction beyond even in the case of ongoing use
20 could you sort of instruct a court to adjust their
21 typical analysis of injunctive relief in terms of
22 analyzing the harm to the user, the harm to the
23 owner, getting rid of a presumption of harm that is
24 usually followed from an infringement case, could
25 that be part of such an analysis, could you -- or

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1 would you do that generally?

2 Would you want to instruct the Court
3 somewhat along the lines that Section 512(j) does
4 for internet service providers that there's a
5 different set of factors that you're to look at in
6 these circumstances that recognize the harm that
7 might befall a user, the type of use that's being
8 made and other public interest considerations might
9 be made if an injunction were imposed here? Is that
10 something -- how would people react to something
11 along those lines?

12 MR. PETIT: I was in fact thinking
13 precisely along the lines of Section 512(j) as a
14 model, although I'm not sure that we need to do it
15 in a statute. I think that that's something that
16 needs to be handled probably more within
17 administrative ends just because those factors are
18 going to change so often and so quickly based on
19 changes in technology and use.

20 DR. SPRIGMAN: Again I think I made the
21 same point in Washington, but the solution is a kind
22 of a logical matter. There's nothing wrong with it,
23 but as a matter of practicality I think what it
24 amounts to is kind of twiddling with standards in a
25 way that doesn't create certainty that substantial

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1 investments reasonably undertaken in reliance upon
2 this orphan works scheme will not be enjoined. So,
3 again, we have a gatekeeper problem.

4 And, you know, again I said it the last
5 time, I'll say it again: If we make the system too
6 uncertain, then that will be factored into decisions
7 whether to go ahead and use an orphan work.

8 We have a lot of libraries and archives
9 here at the table, and they have an interest
10 essentially in preserving and offering access to
11 orphan works. But there's a lot of our culture
12 obviously that's created outside of the library and
13 outside of the archive. So there are people in the
14 digital age all over the country and all over the
15 world who are using works that, you know, under any
16 properly constructed system would be deemed orphans
17 to do new things. And we have to worry about these
18 people even though they're not really here in any
19 large numbers, okay, which is a kind of structural
20 problem with this.

21 But these people need certainty because
22 they -- take-down is usually not an option. It's
23 often not an option. And any substantial
24 investments made that there's any substantial chance
25 they'd have to eat are not going to be made under a

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1 system where we resort to the kind of common law of
2 injunctions rather than the special copyright law of
3 injunctions. To a lawyer there's a difference
4 there, but in the real world, I doubt it.

5 MR. SIGALL: Okay. We're approaching
6 four o'clock so let's close this topic out. Let's
7 take a very short break, five minutes, come back and
8 go to topic 4 on International Considerations and
9 hopefully wrap up before five o'clock. I think we
10 should be able to do that, discuss the international
11 issues. So be back here at five minutes after 4:00.

12 (Recess taken from 4:00 p.m. to 4:15
13 p.m.)

14 MR. SIGALL: Okay. The last topic here
15 is International Considerations. And in Washington
16 -- the general point of this topic is that there are
17 rules in the international copyright system that all
18 countries must follow in terms of creating --
19 recognizing certain rights and limits on the
20 exceptions and limitations they can make to those
21 rights and conditioning the enjoyment and exercise
22 of rights on formalities, like registration or
23 notice.

24 And so whatever solution we would devise
25 or come up with in this proceeding, it has to live

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1 within those rules in some way.

2 And in Washington we spent a fair amount
3 of time discussing, had some good arguments, on the
4 specifics of the Berne Formalities Prohibition and
5 the Article 13 in the TRIPs agreement which confines
6 the ability to make limitations and exceptions along
7 the lines that we would be considering in this
8 proceeding.

9 And I think we got a fair analysis of
10 the sort of two sides of those -- of that debate on
11 those who think that certain systems wouldn't be
12 violative of those provisions and others who think
13 they might be.

14 What I'd like to do -- but I think a lot
15 of us recognized in that that this isn't really the
16 best use of this forum to go into those details in
17 terms of the application of those provisions to the
18 circumstances. It's more like a law school exam
19 question and it doesn't really lend itself.

20 What I'd like to do in this session is
21 focus on two sort of generalized questions about the
22 international aspect to this solution. The first
23 one being, you know: What are the downsides?

24 Most people seem to suggest, seem to
25 agree with the position that foreign works, works of

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1 foreign authors and of countries of origin outside
2 the United States should be included in any system
3 because that's -- in fact they may be the ones where
4 trying to identify and locate the owner may be most
5 difficult, where that circumstance presents the most
6 problems.

7 The first question is: What are the
8 downsides to that sort of generally? I mean what
9 kinds of problems will that raise? And what kinds
10 of reactions in your experience do you think we
11 would have from foreign copyright owners to that
12 kind of approach?

13 I expect that many of you in dealing
14 with the works that you deal with do run into works
15 that are owned by nonU.S. copyright owners. And
16 it's generally the case in our experience and from
17 last week that especially European Continental
18 copyright owners have a different concept of
19 copyright in certain aspects to the U.S. approach
20 and react differently to different kinds of
21 suggestions on how their works may or may not be
22 used.

23 So I'd like to just get reactions from
24 the group here as to: What are the downsides to
25 including foreign works there and what kinds of

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1 reactions should we anticipate receiving from
2 foreign copyright owners or countries who have a
3 very vested interest in copyright law and protecting
4 their owners, to implementing the sorts of systems
5 that we have been talking about today?

6 That's the first major question that
7 I'll open up the floor to.

8 Kenny.

9 DR. CREWS: I'm going to approach that
10 question of the downside perhaps in a way that you
11 weren't anticipating. I'll find out.

12 The downside of saying anything at all
13 in trying to delineate that this does or doesn't
14 apply to foreign works is that the point is we don't
15 know. We're talking about orphan works. We just
16 don't know.

17 The key point is we don't know in most
18 instances who the copyright owner is. So to try to
19 define the statute by saying it does or doesn't
20 apply to foreign works is to set a parameter that is
21 unprovable and irrelevant at the search stage,
22 because we're doing our search and we don't know
23 where this work came from and we can't decide if
24 it's foreign or not, so what good do those few words
25 in the statute do us? None. So leave it out.

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1 MR. SIGALL: Well, let me react to
2 something you said earlier, about if people want to
3 avoid -- if copyright owners want to avoid this
4 system they can just register. What do we about the
5 situation of a foreign owner who has no experience
6 with any registration and comes from a much longer
7 tradition of not having to register or undertake any
8 formalities to enjoy their copyright?

9 DR. CREWS: Sure. Yeah, let's pause to
10 clarify that. Again, I believe I said it, and let's
11 make sure we say it again, that registration in a
12 formal sense is -- my guess is where we're headed
13 from the discussion will probably be the easiest,
14 clearest way to bypass the orphan work designation.
15 But let's make sure we're all -- that I'm saying
16 what I mean and that is that there's nothing that
17 would require registration or that registration
18 would be -- necessarily create a given result.

19 So -- but as a practical matter
20 registration may be the clearest way to bypass the
21 system. So, again, to the foreign owner I would say
22 that the system of registration is open to you. You
23 have other means that you could employ to prevent
24 your work from being designated an orphan. You
25 could sign it up with the Copyright Clearance

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1 Center. You could make it available in different
2 method, systems of publicly declaring who you are
3 and where to find you. And -- but this is an avenue
4 that's an option available to you and it's open to
5 you as a foreign owner as well as open to the
6 domestic owners, and that there's nothing requiring
7 that you do this.

8 MR. SIGALL: Chris.

9 DR. SPRIGMAN: So that's one approach.
10 And you might in fact even imagine a hybrid approach
11 where, you know, the registry is the categorical
12 trigger for orphan work status for U.S., the works
13 of U.S. nationals, but the registry is an element of
14 a reasonable search for the works of foreign
15 nationals. Okay. So that runs into the same
16 problem that Kenny identified before, which is often
17 you don't know. Sometimes you do. Sometimes you
18 know that this is not an U.S. work, but often you
19 don't. So, again, that's a possible approach that's
20 got some problems.

21 All right. So the alternative that
22 Creative Commons and Save the Music proposed is that
23 we wait for a registration requirement until some
24 significant time has passed. And that is basically
25 going to lead the owners of quite valuable works,

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1 works of significant and enduring value who want
2 copyright to last beyond, say, a quarter century,
3 full copyright to last beyond a quarter century,
4 it's going to lead them to investigate what they
5 need to do to protect their works in this huge
6 market. And that, you know, most U.S. nationals
7 would be properly incentivized to educate themselves
8 about and comply with registry. Most foreign
9 nationals who are owners of such works would as
10 well. And you could make it accessible to foreign
11 nationals again by letting loose, you know,
12 competition to provide these registry services in
13 ways that will be accessible. So I think that's an
14 alternative that softens the requirement for
15 foreigners.

16 MR. SIGALL: Bruce is next.

17 MR. FUNKHOUSER: I think I have the
18 flipside of what Ken was just talking about and that
19 is the concern for most foreign rightsholders whose
20 works are already either through statute already
21 embedded in the copyright systems of their
22 respective countries, the concerns that they have, I
23 think as, Jule, you pointed out originally, are not
24 quite the same as they are in the U.S.

25 In the U.S. the rightsholders, by and

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1 large, and excuse me if I paint you with all the
2 same brush, are concerned about the economic rights
3 that they have. In most of the European and other
4 countries the concerns often revolve more around the
5 moral rights that we don't even really deal with
6 except we did talk about a little bit about
7 attribution here.

8 The concern that I would have if we were
9 to kind of take the stance that there is some kind
10 of difference between U.S. works and foreign works
11 is that it would get most of us in the collecting
12 societies into a whole ball of trouble with all of
13 our sister and brother societies around the world.
14 Almost all of us based our relationships with other
15 countries on the principle of national treatment,
16 which says if I run into a foreign work I'm going to
17 treat it the same way I would a domestic work, be
18 that in our case a U.S. domestic work; in their
19 case, whatever country they're from.

20 So I'm very apprehensive about a
21 discussion that would someone distinguish,
22 especially as Kenneth points out, before you even
23 know whether the work is a foreign work or not, but
24 even after the fact that would start to distinguish
25 between a remedy available to a U.S. rightsholder

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1 and a remedy available to a foreign rightsholder.

2 MS. WHALEN: I agree, that I think the
3 moral rights issue, it certainly gets heightened for
4 foreign copyright owners. It's just something that
5 we don't really deal with a lot here.

6 I think there are two pieces, though,
7 that from our perspective come up quite frequently.
8 The first is the issue of translations. I mean you
9 can know of tell it's a German work if it's written
10 in German and somebody's coming to you and saying,
11 'I really think we need an English translation of
12 this because it helps scientists understand
13 whatever.'

14 So I think in that sense whether the
15 translation is a foreign language into English or
16 some other kind of combination of that, that's
17 pretty immediate, and that is something that we get
18 requested for frequently.

19 So I would certainly want to be sure
20 that whether we do it by specifically saying that
21 foreign -- works of foreign origin are covered or
22 we're just silent and just say words are --
23 copyrighted works are covered. That I think we can,
24 you know, put a pin in, but I do think there's a lot
25 of works you can tell. You know that they're not of

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1 U.S. origin.

2 Secondly, the issue of copyright
3 ownership, even though we all understand national
4 treatment for use in the United States, the issue of
5 -- the rules of copyright ownership are treated by
6 the foreign country.

7 So in many cases we have a number of
8 works in our various collections. We know that they
9 are from a foreign author, a foreign artist. You
10 may not know where they were when they made it. You
11 may not know which country they were in when they,
12 you know, -- which they were claiming, but you have
13 to look to the foreign country to find out who owns
14 the copyright. And that just makes everything that
15 we've talked about as far as identifying the
16 copyright owner with some level of comfort that much
17 more difficult when you're dealing with foreign
18 owners. So I think we certainly -- we need foreign
19 works covered, whether by omission or commission,
20 they have to be covered.

21 And I think we can finesse the TRIPs and
22 Berne issues at least in the world that I live in
23 and we live in, which is the scholarly world,
24 limited time, limited purpose.

25 MR. SIGALL: Before we get to Gary and

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1 Alex, let me just ask you, Maureen and others, a
2 question. In your experience in dealing with trying
3 to clear rights or just research information about a
4 work that is probably of foreign origin, how helpful
5 are foreign collecting societies? There seem to be
6 many more foreign collecting societies, especially
7 in Europe, than there are in the U.S.

8 Are there resource -- do they serve as a
9 resource for trying to determine, you know, what the
10 status of a work is or where a work is? Is that
11 something where they are useful in some respects?

12 Do you have much interaction with them,
13 at all?

14 MS. WHALEN: We do. We do. Certainly
15 countries more than others, just based on our
16 collections. We have a person who works with all of
17 the -- and she -- the different societies that
18 represent artists. Some of them she deals with
19 regularly, and so she knows who to deal with and she
20 can send that information.

21 I think those groups are very helpful
22 because at least you have an organized point of
23 contact that they understand what you're talking
24 about.

25 I think the bigger problem is when

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1 you're dealing with the individual artist who, you
2 know, had a number of works, the artist is now dead.
3 It's not really clear who owns the copyright, but
4 somebody in that country has stepped forward, a
5 friend, a student, a partner of some sort, and
6 they're making the claim of copyright and you're
7 dealing with them. And, yes, there you're dealing
8 with them in the sense that they will give you
9 permission, but you're not sure that they actually
10 own it because you don't really know the law.

11 But I would say overall from what I have
12 been told, those societies are helpful. But they
13 represent artists as opposed to individual work, so
14 you still have to drill a little down.

15 MR. SIGALL: Okay. Gary and then Alex,
16 Brewster, and then Charlie.

17 MR. STRONG: The downside of not
18 including them is that it would significantly hamper
19 some of the relationships that a number of us as
20 research universities have with research
21 universities in foreign countries, in other
22 countries, and with national libraries in building a
23 broader base of resource access.

24 And the Europe issue is easier to deal
25 with than the Middle East, Africa, Latin America,

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1 and Asia. And those are areas that we actively
2 collect in and build digital, increasingly are
3 building digital collections in. And each of those
4 requires for us a different set of protocols whether
5 we're working, say, with China, where the National
6 Library is very involved and some of the societies
7 are involved, different from areas of Africa or
8 Latin America.

9 MR. SIGALL: Can I ask you a follow-up
10 question on that? From your experience, or for
11 anyone who wants to chime in on this, what
12 mechanisms are those other national libraries or
13 other institutions in places like China or Europe or
14 Latin America, are they experiencing a similar
15 orphan works problem or are they -- how are they
16 dealing with the preservation uses they'd like to
17 make in some respect?

18 I mean how are they tackling the
19 copyright problem that we've been describing in the
20 past for the fourth day in this issue?

21 MR. STRONG: I have some firsthand
22 knowledge in China where the National Library and
23 several of the other libraries within the China
24 Digital Library are actually being sued within the
25 Chinese courts. And they are bringing those issues

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1 up. And they are far more interested after their
2 entry into the WTO in having some discussions with
3 research universities here in the United States,
4 looking at how they can access our university press
5 and some other things as well.

6 I think it just differs country to
7 country.

8 MR. SIGALL: Megan's on the list. Did
9 you respond to that, do you want to respond to that
10 question?

11 MS. LEE: Well, just the specific
12 question --

13 MR. SIGALL: Yeah.

14 MS. LEE: -- about these foreign
15 clearance companies. Recently we've come in contact
16 with some -- an entity called the Chinese Copyright
17 Clearance Company, who are pretty much for a very
18 low fee offering to sell us just about anything and
19 then try -- and then see if an owner will step
20 forward. So we've been communicating with them a
21 lot and yet we're still very wary because they're so
22 -- they're so helpful that we wonder are they just
23 collecting fees or are they really trying to find
24 owners.

25 MR. STRONG: There are multiple

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1 competitors within that area.

2 MS. LEE: Yes.

3 MR. STRONG: Some associated with
4 universities and some associated with governments.

5 MS. LEE: Uh-huh.

6 MR. SIGALL: Okay. Let's go back to our
7 list. Alex.

8 MR. MACGILLVRAY: So another one of the
9 downsides that we have some personal experience with
10 is many of these governments have the same view that
11 we do, that there's a tremendous benefit here to the
12 public of more broad dissemination and preservation
13 of national culture. And certainly to the extent
14 that we exclude national cultures from what we do
15 here, we will get feedback that we are excluding
16 cultures unfairly.

17 MR. SIGALL: Brewster was next on my
18 list.

19 MR. KAHLE: Sort of personal experience
20 which is not within the law frame but sort of common
21 practice. The web seems to be innately
22 international. It's -- up till now it still sort of
23 operates as if it's its own country with its own
24 laws. The web is sort of different.

25 The books-scanning work that we're

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1 involved in is different from that. And we're
2 involved with book scanning that's going on in
3 India, Egypt, somewhat with China but I'm not sure
4 exactly what the situation is there.

5 Communication's a little harder. And we're doing --
6 in contact with the people that are doing
7 longplaying record digitization in Europe.

8 Interestingly, the idea of 50 years, to
9 sort of think of it as kind of done, is common. So
10 in India they're sort of, 'Well, what should we do,'
11 because they can all read the rules. It's life plus
12 50 or 70, or something. But that's just longer than
13 practical. So some of the universities that are
14 involved in this book digitization project are just
15 saying, 'Well, why don't we try 50 and then do sort
16 of a notice and take-down beyond that.'

17 It's getting gummed up a bit inside the
18 Indian government as it percolates up and around,
19 but it's interesting to see that 50 years sort of
20 just pass as sort of an idea of sort of 'That's
21 probably long enough.'

22 Egypt is sort of trying the same kind of
23 thing, because they haven't been publishing life
24 plus 70 -- I mean there -- or there haven't been
25 that many publishers that were really up and

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1 running, you know, since -- well, there were a lot
2 in 1200 and 1300.

3 (Laughter.)

4 MR. KAHLE: So -- but this sort of 50-
5 year thing is working really kind of -- it's
6 interesting. Take it as anecdotal.

7 And in the longplaying record arena in
8 Europe there's digitization of 50 years because they
9 have a different law there, and that seems to also
10 work fairly well for almost all the works. And so
11 this sort of notice and take-down are sort of, you
12 know, 'Except for that and that and that and that,
13 go for it.' Or, 'So basically take all the 78s and
14 even early longplaying records and go for it except
15 for the things we're commercially exploiting.' And
16 it's along the lines of more where this whole orphan
17 work kind of thing is going.

18 This is just anecdotal of sort of what
19 we find going on in mindsets in digitization
20 projects. It all revolves around digitization. The
21 opportunity is digitization. And that's the reason
22 I think these sorts of hearings are happening, is
23 because without digitization we can't make any of
24 the stuff available. It's not like we can just make
25 out-of-print materials available anymore given the

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1 DMCA, as I hear it. So how do we make out-of-print
2 materials available to digitization. That's some
3 from of complying, hence these hearings.

4 MR. SIGALL: Charlie's next.

5 MR. PETIT: In answering the smaller
6 question first on the rights societies, this is all
7 my personal experience, not related necessarily to
8 Science Fiction and Fantasy Writers of America, I've
9 had very mixed results with that.

10 Some of the organizations are
11 tremendously helpful. Some of them even immediately
12 north of the border here, because of one particular
13 language barrier, are not. They are actually
14 impediments to the issue.

15 The real problem that I've seen with the
16 rights societies is that most of them don't keep
17 very good records concerning the actual origin of
18 where something was exploited, as opposed to keeping
19 records of on whose behalf they're receiving the
20 payments. And sometimes that can make a difference,
21 particularly to some of my clients who may have
22 particular political agendas behind whom they want
23 exploiting things and whom they do not.

24 On the larger question of including
25 foreign authors, I don't see that we have a choice

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1 over including foreign authors. I think the real
2 problem is going to become what we do when the
3 foreign author domestically to the foreign author
4 tries to assert that's what's been done in the
5 United States is improper, and that does happen.
6 And as a particular example, some translations in
7 Russia that I've had to deal with over the last few
8 years.

9 It's a difficult question and I think
10 the way I'd have to -- I'd have out agree that
11 silence is probably our best policy here because I
12 suspect it's going to end up being decided on a
13 case-by-case matter, whether that's case-by-case on
14 instance-by-instance or nation-by-nation is well
15 above my pay grade.

16 MR. SIGALL: Can you just expound on
17 that, the last problem you just identified? What
18 exactly happens in -- what is the issue that came up
19 with, I think you mentioned, translations in Russia?
20 What is the problem that happens?

21 MR. PETIT: The problem that happens is
22 the question of whether the translation is something
23 that was initiated there or initiated over here.
24 When it's an authorized translation that's been
25 initiated by a U.S.-based rightsholder, the records

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1 are there. You can follow through. You can get
2 information and by building that relationship, the
3 information tends to flow the other way, too.

4 When it's a translation that was not
5 authorized, particularly something that was very
6 common. In the late 1980s an awful lot of United
7 States originally printed short science fiction,
8 ended up being translated into Russian and published
9 on the Moscow State University website. And the
10 difficulty with that is that because of the ill will
11 that that generated both directions, nobody
12 exchanges information. So Moscow State University
13 is a black hole for us. We can't get information
14 in, we can't get information out.

15 And that I think is going to be
16 something, and that is a good example of why I think
17 being silent at the policy level is the only option
18 we have because it is going to be something that
19 particular relationships are going to end up
20 deciding.

21 DR. SPRIGMAN: I'm worried about
22 collective rights organizations. So there's a
23 problem of course that certain classes of works are
24 never going to be the subject of a collective rights
25 organization. But there's also the problem that

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1 even U.S. collective rights organizations often lose
2 track of to whom they're supposed to pay royalties,
3 right. They collect stuff, but they don't know who
4 to send it to.

5 So you go to the website at Harry Fox
6 Agency, right, which is said the collective rights
7 agency of the music publishing industry, there's
8 hundreds of publishers that at one time, you know,
9 made arrangements with them to be a clearing house
10 for their royalties and then, for one reason or
11 another, disappeared. So if you want another lens
12 into the problem of orphan works and how properties
13 become abandoned, just go to the Harry Fox website.
14 And that's an excellent record of how the music
15 publishing industry has a big orphans issue even
16 though they have a pretty well functioning
17 collective rights organization. So that's a narrow
18 point.

19 So the broader question you asked,
20 though, was what are our European friends going to
21 think of this. And that's an incredibly difficult
22 question to answer because of course there is no
23 European mind, right. There's a few hundred million
24 people who have opinions. Some don't, but lots do.

25 And, you know, the only thing I can

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1 think of is that among the things Moses came down
2 from Mount Sinai with, the copyright law was not
3 there, right. And, in particular, what we decide
4 about the ultimate intent of our copyright laws can
5 differ in emphasis among jurisdictions.

6 One thing that struck me just when I
7 began looking at this issue is how impure all of our
8 systems are, the U.S. system and all of our
9 industrialized partners. We have elements of our
10 system that look pretty utilitarian. You know our
11 history of formalities are truncated copyright
12 terms. And we have elements that look kind of
13 authors' rights respecting, like the scope of
14 injunctions and the special rules for injunctions.
15 And the Europeans do as well. And the only
16 difference I think is a difference of emphasis like
17 where on the kind of spectrum does the needle
18 exactly fall.

19 You know this is something we can argue
20 about. And I think as technology changes, the
21 needle's going to move along the spectrum. And what
22 Brewster mentioned about digitization, it used to be
23 that all these uses we wanted to make of works were
24 just impossible, right. No matter how much we
25 thought they would add to the culture, they were

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1 just too expensive to make. And so there were
2 limits, there were economic limits on how we could
3 grow our culture and how we could bring knowledge.

4 And, you know, that's kind of too bad,
5 but now we're living in a different world where a
6 lot of those limits have been removed. And the
7 ultimate question here that these hearings I think
8 will address is how does the copyright law change to
9 take account of the fact that the world has become a
10 happier place in this way, right. The law should
11 facilitate that. In a way that respects authors'
12 rights, but that recognizes the opportunity.

13 MR. SIGALL: Kenny.

14 DR. CREWS: Yeah. I think on this
15 subject of international issues we've got three sets
16 of big but three discrete sets of issues. One is --
17 that you've alluded to is the consistency with Berne
18 and TRIPs and the need to adhere to that.

19 Second is the fact that we're talking
20 about everybody here is acting internationally,
21 specially when we deal with the internet. We're
22 crossing borders all the time and we're encountering
23 differences in the law from one country to the
24 other.

25 And third is that ultimately we're

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1 talking here about possible proposal of changes in
2 American law, and that's really all that's within
3 our grasp and that we can decide or Congress can
4 ultimately decide is really only going to be
5 applicable inside this country.

6 And that's a reality that we have to
7 face up to; that the law can be x here, but everyone
8 of us that moves into the world of publishing,
9 whether it means having a website or being a book
10 publisher or anything else, you are acting
11 internationally. And it's inevitable that you're
12 going to be dealing with the laws of other
13 countries. And we have to reckon with that reality.

14 And one footnote in the way that that
15 shows up is in Brewster's comments, there -- what
16 happens in the marketplace of ideas and practice may
17 differ from the law, but you talked about a 50-year
18 rule. And this is a good example of all of these
19 categories of international issues coming together,
20 because one reason why somebody in another country
21 may be referring to a 50-year duration rule in some
22 of these specific examples you mentioned, sound
23 recordings and films, is because that's all Berne
24 requires.

25 We in granting 95 years and granting

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1 life plus 70 for cinematic graphic works and sound
2 recordings are actually going way beyond what Berne
3 allows. So if we cut back on some of that by one
4 definition or another, we can still look at many of
5 these other countries and say, 'But we're giving you
6 more than we were ever obliged to give you anyway on
7 some categories of works that are out there.'

8 So we're never going to find a perfect
9 fit and we need to just forge ahead with what we
10 think is the right thing to do.

11 MR. SIGALL: Let me ask the question
12 related to an argument made by, I believe, the
13 recording industry in their comments and I think the
14 Motion Picture Association has raised this point
15 which is whatever we choose to do here may be taken
16 as an excuse by another country to do something that
17 purportedly is the same thing as an orphan works
18 system, but might be very different.

19 And example would be that one country
20 says, 'We're going to deal with orphan works this
21 way. If you can't find the copyright owner, you get
22 to use the work.' They make a free use of the work,
23 complete exemption. And one condition to, let's say
24 finding the copyright owner, is that 'They have to
25 have a local office in our country,' or something

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1 like that. And 'All they have to do is send one
2 letter and if that's not responded to, then that's
3 an orphan work.'

4 And the concern is that that would
5 foster those kinds of one might say protectionist
6 approaches in countries to essentially evade their
7 obligations under international law to provide
8 meaningful protection for copyright for U.S.
9 copyright owners entering that country.

10 The question I have is: Should we be
11 concerned about that? Is that something we can do
12 anything about? Is it just something that could
13 happen and we just have to deal with that if it does
14 happen, but how should that inform what we do at
15 this stage before anything has really been done if
16 that's a possibility?

17 So I open that up.

18 DR. SPRIGMAN: The specific example you
19 gave, I know your comments aren't meant to be
20 limited necessarily to that specific example, but
21 you know there's a national treatment principle that
22 lies at the heart of Berne and you know the office
23 in the country is kind of like the manufacturing
24 requirement, right. It's not the same, but it's of
25 the same genre. And I think that strikes at the

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1 heart of the national treatment principle.

2 So we have a WTO action. Well, the
3 broader question is, you know, is -- in the
4 international stage on which we now play, is
5 protection a kind of one-way ratchet, right. In
6 order to have an international trading system that
7 we think is effective, is it always the case that
8 only accretions to copyright are acceptable and, you
9 know, small detractions from it, like the creation
10 of an orphan works regime that would create a lot of
11 social welfare while affecting authors' rights
12 around the margin are never possible because it kind
13 of reopens the bargain.

14 If we're so insecure about the social
15 welfare merits of the bargain, then speaking as
16 someone who doesn't have a particular axe to grind
17 in kind of international trade terms, that's
18 worrisome. But I don't think we're -- I don't think
19 the bargain is that fragile, at least I hope not.

20 MR. SIGALL: Any thoughts on that
21 question?

22 Let me ask a follow-up on an earlier
23 question. One of the commentators suggested that we
24 could benefit from experience in other countries,
25 maybe particularly developed countries with a

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1 copyright history that does not include formalities.

2 From whether and to the extent to which
3 these issues might have arisen in those countries
4 where there isn't a registration system, they
5 suggest that we go out and get information from
6 those countries to figure out if this problem has
7 arisen, why it hasn't if it hasn't, and what we
8 should do and what we could learn from that.

9 This follows up the question about what
10 other national libraries are doing. Does anyone
11 here have any expertise or experience that indicates
12 that there is a real problem with orphan works or
13 that it's -- that we could benefit -- that we could
14 learn from in dealing with the problem, if there is
15 one, here in the United States?

16 I mean is it the case that it's -- the
17 litigious nature of copyright owners in the United
18 States versus some other nature of copyright owners
19 in other countries where it doesn't seem to be a
20 problem, do libraries or nonprofit organizations
21 have the same gatekeeper concerns in those countries
22 about using works or not using works for fear of
23 being sued in those other countries, does anyone
24 have any kind of experience where they could -- they
25 share with us some understanding of if this problem

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1 has arisen elsewhere and what the scope of that
2 problem might be.

3 Bruce and Charlie.

4 MR. FUNKHOUSER: It's not so much
5 whether the problem has arisen and been handled
6 differently in other countries. I think the
7 situation that we're in is that the starting point
8 for the discussion is so different in the United
9 States than anywhere else.

10 In the United States the relationship
11 between rightsholders and users is one based on
12 economics, is one based on market, is one based on
13 capitalism. And in most of the other countries in
14 which there has been any recognition of the problem,
15 if you will, any dealing of the problem, it comes
16 straight from the government. It doesn't come from
17 the negotiation of economic value between competing
18 parties. It doesn't come from contractual law. It
19 doesn't come from that kind of basis. It just comes
20 from the government edicting.

21 I mean the classic example here is the
22 difference I think between the way we deal with
23 copyright in the United States and the way they deal
24 with it in Germany. In Germany it's all done on the
25 basis of a levy system. It isn't, 'I'm going out

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1 use your work and therefore I need to find the
2 rightsholder and compensate them' in the case of
3 photocopy, which is what we're experienced with.

4 In the case of photocopy there's a levy
5 on the photocopier that handles all of it: Orphan
6 works, nonorphan works, rightsholder-owned works.
7 It doesn't matter, it's all handled by a levy on the
8 photocopier. And so there's no -- there's no
9 problem there in Germany with orphan works because
10 you paid your levy on your photocopier.

11 MR. SIGALL: I understand that that's
12 limited to private copying. Would that cover like,
13 you know, a new publication or some other
14 distribution?

15 MR. FUNKHOUSER: Well, it doesn't cover
16 anything, but I guess what I'm getting at there is
17 the kind of mentality that you're starting with
18 there is not one of where if I'm looking to use, if
19 I'm looking to archive some particular works, if I'm
20 looking to create a derivative work, gee, I need to
21 go find the rightsholder, it's: Gee, I need to go
22 find what the government has said I have to do about
23 this.

24 And if the government hasn't said what I
25 have to do about this, my next reaction isn't, gee,

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1 should I call my local copyright office or should I
2 call the local clearing house or should I call the
3 rightsholder themselves, it's, okay, cool, I can
4 move on now.

5 MR. SIGALL: Charlie's next.

6 MR. PETIT: It's interesting that you
7 mentioned Germany because that was the same example
8 I had in mind. I've found that there's a huge
9 difference in Germany dealing between book-length
10 works and works that are less than book length. If
11 they are less than book length, the experience I've
12 had is identical to what Bruce has just mentioned.
13 It's all dealt with on the basis of what does the
14 government have to say.

15 For book-length works it's a mindset
16 that I am still attempting to decipher. And the
17 real problem there is that it is not even consistent
18 between the different -- between the different
19 federal states in Germany. One will have a
20 completely different experience with Springafarlog
21 (phonetic) than one will have out of a publisher in
22 Bonn.

23 It's just not uniform and at least as
24 far as that goes for book-length works, I would say
25 that Germany would not be a good place to get

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1 further information from the copyright office. So I
2 guess all I can really say is, well, maybe that's
3 some work you don't need to do.

4 MR. SIGALL: Brewster.

5 MR. KAHLE: The level of obsession in
6 this country with copyright is unbelievable. I've
7 been in -- many conversations have been tanked,
8 business plans -- all sorts of things because like,
9 'Hey, let's stop talking about something useful and
10 let's spend the next couple hours talking about
11 copyright.'

12 I've never seen anything quite like the
13 obsession in this country anywhere else for
14 traditional works. I realize that's not going to
15 help you terribly much in answering your question,
16 but I think we're -- hopefully we're not a leader in
17 that way.

18 And a leader we are happening is in the
19 digital world. So we're a member of the
20 International -- International Internet Preservation
21 Consortium, one of the founding 12 members. There
22 are 12 national -- 11 national libraries and the
23 Internet Archive, which is kind of neat. And we're
24 working with them to try to figure this out. And
25 here we really are leading.

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1 Everyone of these national libraries
2 started by selecting websites and trying to get an
3 agreement, you know, signed in triplicate with
4 blood, right. You know, all the lawyerly sorts of
5 things. And all their projects basically ground to
6 a halt. And then they look back to what the United
7 States had been doing, which is preemptively
8 archiving websites and just not asking permission,
9 just kind of doing it.

10 And now those national libraries are now
11 doing that and they're putting through their
12 parliaments addendums to their national mandatory
13 deposit laws, to make it so that they're allowed to
14 archive websites without asking. So that wave is
15 now going through the parlance of the developed
16 world.

17 The thing that they're not doing yet,
18 which I hope they change, is putting in access
19 orientation into it, which is a lot of what this
20 whole orphan works is about, is access. And they're
21 not doing that yet. I'm hoping they will, but it's
22 more like the ATRA Act or the sorts of things where
23 the national library's allowed to do it. They even
24 talk about a single chained computer in the basement
25 of the Swedish Royal Library, right. You know one

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1 computer is the only place it's ever going to be
2 accessible, so they're sort of -- they're following
3 our lead unfortunately in some of this.

4 MS. PETERS: I was going to ask you, but
5 those laws that are going -- you know, that are
6 really, you can go out and harvest, grab.

7 MR. KAHLE: Yes.

8 MS. PETERS: Like if it's Sweden, for
9 example, aren't they limited to what is Swedish
10 publications or Swedish websites, those that have
11 the "s-e"? Because most --

12 MR. KAHLE: Yes.

13 MS. PETERS: -- of the ones I've seen
14 have not been global go grab.

15 MR. KAHLE: You're absolutely right.
16 And they do talk about things like French websites,
17 exactly whether that does have a dot "f-r" on the
18 end or not, but there are very few libraries that
19 really define themselves globally. Our Library of
20 Congress does and actually the Library of Alexandria
21 in Egypt does. But other than that it's really hard
22 to find others that do.

23 So I wouldn't follow the national
24 libraries' model in what you're talking about. I
25 think in digitization the United States is looked to

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1 as a leader.

2 MS. LEE: Well, just on the basis of
3 practical user, someone who wants to find who owns
4 this work and get permission to use it, I really
5 think the mentalities are different between the
6 United States and other countries. And when we do
7 ask permission we are often greeted with very
8 puzzled -- if we get a response at all -- it's a
9 very puzzled one. You know, again, 'Why are you
10 asking' or 'Sure, go ahead.' It's very casual with
11 the countries that we deal with, mostly which are
12 developing countries.

13 I don't know, I would really appreciate
14 some kind of something in the law that says, you
15 know, this is what you should do for orphaned works
16 and it would also apply to foreign countries. I
17 don't know the ripple effect of putting something
18 like that in throughout all the other industries.
19 It might be a terrible idea, but I just really have
20 no recourse.

21 If we can't find the owner, we just
22 simply don't use it. And that -- I think the value
23 of using authenticate works is enormous, especially
24 in education. I would really like to see something
25 defining nonprofit, education as different than any

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1 sort of commercial use that would give us some solid
2 ground to stand out that we could use both
3 domestically and with international works, because
4 we're losing a great deal by having to, let's say,
5 create our own works of what foreign countries are
6 like or, you know, we really have no idea.

7 The value of using authentic sources is
8 enormous. And I think we should have some means of
9 being able to do that for nonprofit education.

10 MR. SIGALL: Jerry.

11 MR. MCBRIDE: Yeah. I'm just thinking
12 about one project library. The National Library of
13 Canada has a project, Gramophone. And compared to
14 America, I think we're not quite as advanced in that
15 regard simply because their length of copyright is
16 the 50 years. And so a lot of the historical
17 recordings, they are digitizing and making
18 available, whereas in this country because those
19 pre-'72 recordings are either in that gray area or
20 unavailable, it's not an area that's easy for us to
21 deal with.

22 MR. SIGALL: Okay. I think we've
23 finished our questions. And I want to thank
24 everyone for a great day in discussing these issues.
25 It was a different discussion than what we had in

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1 Washington, but that was what we were trying to get.
2 We were trying to get different perspectives on
3 things and more information for us to consider these
4 issues. And it was very productive in our view.
5 And I think everyone made thoughtful and careful
6 contributions to the discussion, which really helped
7 us get a better handle on some of these issues.

8 So, as I said in Washington, we
9 certainly probably stirred up more trouble and
10 issues than resolved troubles or issues that we had,
11 but that's the first step towards actually coming up
12 with something that is robust and useful, I think.
13 So that's why it was a successful first step.

14 And I do want to take this moment to
15 thank the folks here at Boalt Hall and the Berkeley
16 Law and Technology Center for giving us this room,
17 this very nice room and the facilities, especially
18 David Grady who did a long effort to make sure that
19 this all worked out well and I think it worked out
20 smoothly. And the facilities were fantastic for us
21 to carry out this discussion, so I want to thank
22 them.

23 And I want to thank you again for
24 helping us try to resolve this problem.

25 Our next steps are we got to go back and

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1 try to assimilate all this information, both written
2 and oral, and start working on our report. I'm
3 certain that we'll have further discussions with
4 folks over the fall, to try to drill down a little
5 bit more specifically about issues, so you'll be
6 hearing from us on that score because a lot of the
7 issues get pretty complicated pretty quickly. And
8 we'll need more advice and more discussion and more
9 thoughts on those. So that's where we'll go from
10 here.

11 But thanks again and thanks for -- yes,
12 we will have a transcript of this. And as soon as
13 we get it from our reporter, we'll post it on our
14 website. And, as I understand it, the Berkeley
15 folks will be posting the audio of the roundtable on
16 their site as well. And if we get a link we'll link
17 to that if that goes up as well. So be on the look
18 out for that. And keep in touch with that, our
19 Orphan Works website, and that will tell you what
20 the next steps are and what we're working on, so
21 thank you again.

22 MS. PETERS: Thank you very much.

23 (Applause.)

24 (Whereupon, the Roundtable Meeting was
25 adjourned at 5:03 o'clock p.m.)

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