1 DEPARTMENT OF COMMERCE INTERNET POLICY TASK FORCE
2 GREEN PAPER ROUNDTABLE ON REMIXES,
3 FIRST SALE DOCTRINE, AND STATUTORY DAMAGES
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1 MS. PERLMUTTER: Good morning, everyone.
2 Welcome to the fourth and final one of our series of
3 roundtables on digital copyright policy issues. So we
4 are delighted to be here at Berkeley law school and I
5 particularly wanted to thank the Berkeley Center for
6 Law and Technology for hosting us here today. And
7 welcome to all of you who are joining us by webcast.
8 My name is Shira Perlmutter. I'm the chief
9 policy officer of the US Patent and Trademark Office.
10 And this roundtable is part of the process that was
11 started by the Department of Commerce's internet policy
12 task force through last year's Green Paper on copyright
13 policy, creativity and innovation in the digital
14 economy. And in the Green Paper we identified a number
15 of policy issues on which the task force would
16 identify, would undertake further work, and it is those
17 policy issues, three issues that are the subject of
18 today's roundtable.
19 The Green Paper work for the department's
20 internet policy task force has been led by the Patent
21 and Trademark Office together with the National
22 Telecommunications and Information Administration, the
23 NTIA, and we've also been consulting with the copyright
24 office.
25 So we started in December with a full-day

1 public meeting in Washington which addressed a number
2 of issues including the three we will address today.
3 We received two sets of written comments from a wide
4 range of stakeholders and we had three roundtables so
5 far. And through the roundtables our goal is to really
6 deepen and broaden the discussion.
7 We are traveling to four locations around the
8 country that are particular centers of copyright
9 activity. So our other meetings have been in
10 Nashville, in Cambridge, Massachusetts and in Los
11 Angeles. And our goal is to hear from a wide variety
12 of stakeholders. And of course based on the locations,
13 the input we're hearing is a bit different in each
14 location as we engage stakeholders from different
15 copyright communities and industries.
16 So today we're here at Berkeley, which is, of
17 course, a center for the tech industry in particular,
18 to hear from all of you. And we're very pleased that
19 we were able to accommodate everyone to sit on panels
20 who wanted to participate today.
21 So the goal of these roundtables is to have
22 interactive discussions rather than listen to prepared
23 presentations. So it's not like a congressional
24 hearing. And we ask that you -- we'll throw out a
25 number of questions for discussion and we ask that

1 everyone make their comments responsive to the
2 questions and keep the comments relatively short so
3 that we can have active engagement by everyone. And
4 what we've found is particularly helpful in our
5 experience so far with three other roundtables is to
6 have a lot of back and forth in people responding to
7 each other.
8 So we will start with -- make sure I have this
9 correct. Remixes. We're doing a slightly different
10 orders in different places. So we'll start today with
11 the issue of the legal framework for the creation of
12 remixes or mashups as we were told yesterday we should
13 call them. And in the Green Paper we asked whether or
14 not the creation of these types of works is being
15 unacceptably impeded by legal uncertainty, and if so,
16 if there is a need for any new approaches.
17 We will then have a coffee break and the next
18 topic will be -- doublecheck -- the First Sale
19 Doctrine. That issue is really the relevance and scope
20 of the First Sale Doctrine in the digital environment.
21 And what we're trying to do is to dig deeper
22 than just having a debate over whether the answer is no
23 or yes, the doctrine should or shouldn't apply to
24 digital transmissions. We asked in the Green Paper
25 whether there's a way to preserve the benefits of that

1 doctrine in the analogue world when we move into the
2 digital world. So what are those benefits. Will the
3 market develop to provide them or has it done so. And
4 if so, how. And if not, what types of solutions might
5 be appropriate.
6 And then after the lunch break we will resume
7 with our final panel, which is the appropriate
8 calibration of statutory damages. And what we're
9 trying to do is look at how statutory damages are
10 calculated in two particular contexts. One is
11 secondary liability claims against mass online services
12 that have perhaps hundred of thousands of different
13 works being made available to the public. And second,
14 the situation of private individuals who are engaged in
15 file sharing.
16 So what we would ask is that you focus on
17 these specifics issues rather than have a discussion of
18 the value or application of statutory damages in
19 general. So those are our topics.
20 In terms of some logistics, we want to make
21 sure everyone has an opportunity to make comments
22 whether they're in the room or online. And so there
23 will be time allotted for comments from the audience
24 either physically or online after each panel. And so
25 for those of you who are here, if you have a comment,

1 please go to one of the microphones in the aisle and
2 start by identifying yourself. For those of you who
3 are watching the webcast, please call 800-369-3319 and
4 that will get you into our phone bridge. The access
5 code is 1981439. And that number and code are on the
6 agenda posted on the copyright page of our website, the
7 USPTO website if you didn't get that down.
8 One thing that's important when you do call
9 in, if you want to speak, you need to press star one
10 for the operator. I gathered yesterday some people
11 missed that step. And then once the operator announces
12 you, you'll be able to state your comment.
13 So we had what I have to say were really
14 terrific discussions at the Nashville and Cambridge and
15 Los Angeles roundtables with very helpful ideas and
16 constructive dialogues.
17 Someone asked me who had been involved in an
18 earlier stage of writing the Green Paper whether we
19 were hearing different things at each roundtable or it
20 was just very repetitive and I said no, actually we've
21 learned new and different things at each one. I think
22 we've made progress in understanding the full range of
23 perspectives on these issues. And I think we all look
24 forward to learning more from today's conversation.
25 So I now would like to give the floor to John

1 Morris, associate administrator and director of
2 internet policy at NTIA.
3 MR. MORRIS: Great. Thanks very much, Shira,
4 and I just want to join Shira and PTO in welcoming you
5 to the fourth in the series of our copyright
6 roundtables.
7 NTIA, like PTO, is an agency housed within the
8 U.S. Department of Commerce. And just as PTO is the
9 lead agency within the executive branch on intellectual
10 property issues, NTIA is the lead agency in the
11 executive branch on internet and communications policy
12 issues. And we have been very pleased to work with PTO
13 on the Green Paper and then on the efforts and policy
14 initiatives after the Green Paper.
15 And the Green Paper espoused a number of
16 critical goals, and most importantly the goals of
17 ensuring a meaningful copyright system that continues
18 to provide necessary incentives for creative expression
19 and the other goal of preserving technology innovation.
20 And those goals are two goals that we think can and
21 must be achieved in tandem.
22 So the conversations we've had around the
23 country have been extremely helpful and I look forward
24 to another good day of conversation. So I think I'm
25 turning it over to Ann who will lead us through this

1 panel.
2 MS. CHAITOVITZ: Thank you. Thank you for
3 participating in our panel discussion today, the first
4 panel is on remixes. So advances in digital technology
5 have made the creation of remixes or mashups easier and
6 cheaper than ever before, providing greater
7 opportunities for enhanced creativity.
8 The Green Paper defines the term remixes, and
9 I'm going to read this, as creative new works produced
10 through changing and combining portions of existing
11 works. We heard yesterday that some people like to
12 call that mashups, but that's what we're talking about
13 here today.
14 These types of user-generated content are a
15 hallmark of today's internet and particularly on video
16 sharing sites. But because remixes typically rely on
17 copyrighted works as source material, often using
18 portions of multiple different works, they can raise
19 daunting legal and licensing issues. There may be
20 legal uncertainty given the fact-specific balancing
21 required by fair use and the fact that licenses may not
22 always be available or easily available.
23 So I will start with questions, but first I
24 would like you all to introduce yourself and as I ask
25 questions, if you have an answer, to turn your card up

1 this way and I'll try to remember the order but
2 notoriously I'll get the first two and then I'll forget
3 everybody else. So I'll try my best. Oh, and your mic
4 is always live. So if you're whispering something,
5 it's being transcribed on the webcast. So you're on
6 notice.
7 So, Peter, do you want to start introducing
8 yourself.
9 MR. MENELL: Peter Menell. I'm a professor at
10 the University of California at Berkeley and I work on
11 both technology side issues and content side issues.
12 MS. McSHERRY: My name is Corynne McSherry.
13 I'm the intellectual property director for the
14 Electronic Frontier Foundation.
15 MS. RAVAS: I'm Tammy Ravas. I'm the visual
16 and performing arts librarian at the University of
17 Montana. And I'm here today as a chair of the
18 legislation committee of the Music Library Association.
19 MS. DARE: I'm Tiki Dare. I'm a managing
20 counsel in trademark and copyright at Oracle.
21 MR. ENGSTROM: I'm Evan Engstrom, policy
22 director at Engine Advocacy which is a nonprofit
23 research and advocacy organization that supports
24 startups through promoting policies and legislation
25 that foster innovation and entrepreneurship.

1 MR. GIVEN: My name is David Given. I'm an
2 attorney in San Francisco and I have spent most if not
3 all of my career representing clients in the creative
4 arts.
5 MS. CHAITOVITZ: Thank you. So for our first
6 question today, many of our commenters, because we've
7 received comments on this issue, and both owners and
8 users point to the large number of remixes available
9 online and conclude that fair use combined with
10 marketplace mechanisms function. So I was wondering if
11 you agree and if current case law is interpreting fair
12 use handling the issues appropriately. And if the
13 creation of remixes is being unacceptably impeded by
14 legal uncertainty or if fair use and licensing is
15 working.
16 Okay. Again, I saw Peter and then David and
17 then everyone will go in order of where you're sitting.
18 MR. MENELL: There's no question that there's
19 a tremendous amount of energy and passion and new
20 creativity in this space. I would not say, however,
21 that it is at sort of a social optimum in the sense
22 that we have clarity about the rules or we have very
23 effective channeling of the money that comes in to the
24 people who are responsible for creating different
25 aspects of these new works.

1 And so the way I would capture it, and I've
2 listened in on some of the prior hearings and have been
3 reading the materials, I think there's a very sharp
4 divide between what I'll call the traditional music
5 copyright interest and the digerati, the sort of tech
6 user-generated content crowd. On.
7 The traditional crowd, I think there's a view
8 that most mashups require license, that artists,
9 publishers and record labels should have and do have
10 control over how their works are used. That copyright
11 is more in the nature of a property right. And they
12 would look to the Bridgeport case, the 6th Circuit
13 case, as their starting point.
14 On the other side I think there's a view that
15 just about all remix is fair use and that we ought not
16 to be very concerned about what's going on. This helps
17 to promote the works that are being remixed. That the
18 first amendment is the main place to look for trying to
19 resolve these issues. And I would say that the Cariou
20 case out of the 2nd Circuit is a case they would cite.
21 And so it's hard to imagine a more polarized
22 view of this issue. And I would say coming, and
23 hopefully we'll have more time during the panel to look
24 at alternatives or other ideas. I would say that this
25 is a collision course. It's highly dependent on which

1 sort of test cases will get presented and where they
2 are presented. And I don't think that's a good
3 foundation for a copyright system that's trying to
4 promote all aspects of the creativity that we're
5 talking about. We want to have a very, I think, well
6 functioning system across both the people who are
7 creating the underlying works and the people who are
8 remixing.
9 Just to give one example, if a DJ remix artist
10 were coming up today, they would face a stark choice.
11 They could try to license all of the things they are
12 using. And as Peter DiCola and Kembrew McLeod's 2011
13 book, Creative License, talks about, it would be near
14 impossible to do that, to do the kind of very intensive
15 mashing up that's going on.
16 The alternative would be to just do it,
17 release it, earn money in live performance. And that
18 is where I see most of that marketplace going. And one
19 would have to, I think, say that that's not feeding all
20 of the different contributors to that musical genre.
21 MS. CHAITOVITZ: Thank you.
22 MR. GIVEN: I'm reminded of the old saw that
23 what is old is new again. In my experience, and I've
24 been doing legal work in the creative arts for coming
25 up on 25 years now, mashups, remixes, sampling have

1 been around for years. Sampling has been around since
2 at least the early '90s with the advent of and
3 emergence of hip hop music. Mashups go all the way
4 back to a movement in the early '50s, early '60s, if
5 I'm not mistaken.
6 And in answer to your question, I think the
7 system works. I don't perceive in my own practice and
8 in my own experience any disconnect between new and
9 emerging artists who have a wish or a desire to use
10 pre-existing recordings or pre-existing songs to go out
11 and get permission to do so.
12 Furthermore, I'm not aware of any empirical
13 evidence, any academically vetted study or survey that
14 suggests in direct answer to this task force question,
15 is creativity being impinged. That, in fact,
16 creativity is being impinged.
17 Moreover, I would suggest, respectfully, that
18 the notion that we could measure creativity, that is,
19 an increase or decrease in creativity, in any
20 meaningful, empirical manner is highly problematic.
21 It's problematic primarily because there are two
22 significant data points in relation to that. One is
23 quantity, which certainly can be measured. But the
24 other is quality. Okay. And I'd like to believe that
25 people here on this panel and people in the audience

1 and on the web today can tell the difference between an
2 Epic Fail video on YouTube and a movie about Epic Fail,
3 for instance, Blade Runner, which is about dystopia, or
4 more to the point, Chinatown, which is about actual
5 dystopia in the real world.
6 It's very, very difficult, it seems to me, to
7 try to answer this task force question in a meaningful
8 empirically valid way. And I would point out, I
9 actually pulled the Green Paper last night and read it.
10 The section on remixes is rather short, but the answer
11 I think is embodied in the Green Paper because it says,
12 I think it notes that there is today a healthy level of
13 production.
14 So the baseline inquiry begins with the
15 proposition, it seems to me, that we're okay on the
16 issue of creativity, creativity writ large. And that
17 if we're going to make a change to the current business
18 and legal regime, it seems to me the burden is very
19 squarely on those who are advocating that position to
20 come with evidence to suggest that that level of
21 production is at risk, is being impeded, is being
22 lessened in some meaningful way.
23 Now, that portion of the Green Paper goes on
24 to say clear legal options might, might result in even
25 more valuable creativity. Again, there's not a clear

1 suggestion that clear legal options would result in
2 more valuable creativity. Again, it seems to me that
3 the burden is on those who are proposing a change to
4 the current legal and business regime to come forward
5 with a showing that that would, in fact, occur.
6 MS. CHAITOVITZ: Thank you. Corynne, do you
7 want to go and we'll just go down to you.
8 MS. McSHERRY: Our problem just came back to
9 the original question. I think Fair Use is actually
10 doing a pretty decent job in and of itself. I think
11 the Fair Use Doctrine is flexible, robust. Yes, there
12 can be uncertainty, but that's what happens when you
13 have a flexible and robust fair use doctrine and I
14 think on -- on balance, that flexibility is far more
15 valuable than the downside. The benefits far outweigh
16 the costs of that.
17 So I would suggest that the problem for remix,
18 to the extent that there is one, actually lies
19 elsewhere. It is not fair use. Fair use is fine.
20 It's elsewhere in the sort of the legal environment for
21 remix. So I'll just flag two things. One is that the
22 reason that we don't have more case law development I
23 think in fair use with respect to remix is because
24 many, many remix artists, and I know this from my own
25 experience counseling folks, if you talk to them and

1 you say hey, you're suffering a legal threat right now,
2 I will help you fight back, I will, in fact, represent
3 you for free. Not everybody will do that. I'll
4 represent you for free if you're willing to fight back.
5 But I have to tell them of the downside risk.
6 And this gets into what we're going to talk about later
7 today so I will be brief, but the issue for the folks
8 that I've talked to is they are afraid to step out and
9 defend themselves and go to court to defend their
10 remixes if they get a legal threat because they're
11 worried about statutory damages because I have to tell
12 them that I think you will win. I will promise I will
13 represent you, but I have to tell you there is this
14 possibility that you could lose. If you lose, here's
15 your downside risk. Anywhere between $750 up to
16 $150,000 per work. That's very scary for regular
17 people.
18 So I think that that's one problem is that
19 we're actually not getting as much case law development
20 with respect to fair use in remix as we might if a
21 noncommercial -- folks without vast resources were able
22 and willing to go to court and develop the case law.
23 The other aspect of the legal environment that
24 I think we have to acknowledge at least as we talk
25 about the legal environment for remix is the issue of

1 platforms. Remixes go out into the world via
2 platforms, via Vimeo, YouTube, et cetera. All the
3 different web hosts that host that content. So part of
4 the legal environment for remix is what is the legal
5 environment for those hosts.
6 And fortunately I think on balance the case
7 law has gone well with respect to protecting those
8 hosting services. But I think talking about the legal
9 environment for remix and not acknowledging the legal
10 environment for platforms is kind of missing a big part
11 of the point.
12 MS. CHAITOVITZ: Thank you.
13 MS. RAVAS: I'm looking at this particular
14 problem from the standpoint of being a music librarian
15 as well as being -- getting into the head of professors
16 or schoolteachers who teach music. So for me, these
17 mashups, they demonstrate -- they can demonstrate
18 controversies, they can demonstrate social commentary.
19 They have a lot of different purposes. And I can bring
20 up several examples here and I feel that fair use is
21 working in their favor.
22 So, for instance, a few artists here, Lady
23 Gaga, when she -- when her song Born This Way came out,
24 many people were creating mashups comparing that
25 particular work to Madonna's Express Yourself. They're

1 both in the same key, they use very similar chord
2 progressions, and the controversy was that Lady Gaga
3 was perhaps stealing Madonna's music.
4 Another example would be Robin Thicke's
5 Blurred Lines. Many people compared that particular
6 song to Marvin Gaye's Got To Give It Up and Prince's
7 Kiss. And I know that legal action was being thought
8 of by Marvin Gaye's family against Robin Thicke, but
9 I'm not exactly sure how that was resolved.
10 Another one would be Wrecking Ball by Miley
11 Cyrus. There are several mashups comparing Miley
12 Cyrus' Wrecking Ball to Sinead O'Connor's Nothing
13 Compares To You. Again, they're both in the same key,
14 have very, very similar chord progressions, and very
15 skilled DJs have been able to show just how similar
16 they truly are.
17 Also, getting into I believe the two
18 particular artists who have been discussed in previous
19 roundtables, Girl Talk. It's interesting, I've
20 listened to some of Gregg Gillis, that's the name of
21 the artist who goes by the stage name Girl Talk. He
22 cites a Acuff Rose versus Campbell as the justification
23 for his works and he feels that his own mashups are
24 creations of social commentary on pop culture. And
25 there's also the gray album by Danger Mouse where he

1 remixed the Beetles' White Album and Jay-Z's Black
2 Album.
3 So, in essence, how do music libraries handle
4 this particular situation when it comes to their
5 missions of preserving the cultural record. It's a
6 very gray area, I believe, for us. And for one thing,
7 you know, we can try to write to the artist to see if
8 they'd be willing to work with us somehow. And even
9 that gets kind of be a bit of a gray area.
10 I think another, a better way to put this
11 would be into an educational perspective. Let's say
12 that I was teaching a popular music class. These
13 Mashups would be a topic for me to cover, these
14 artists' works. These would be my curricular material
15 and the students' primary resources for their research.
16 And as I'm sure many people on this panel and audience
17 know, YouTube videos and music mashups in downloadable
18 or streaming formats, they can be very ephemeral. And
19 I feel that music libraries are in the best position to
20 be preserving these kinds of materials for the purpose
21 of research and scholarship. But there can be some
22 legal uncertainties.
23 I still feel that fair use is working in our
24 favor. But, you know, how is it that we as librarians
25 and as well as educators keep these kinds of works

1 available for future generations to come.

2 MS. CHAITOVITZ: Thank you.

3 MS. DARE: I'm Tiki Dare from Oracle, but my
4 comments today in the remix field are not
5 representative of Oracle, we're not in the artistic
6 realm. So these are my impressions as a copyright
7 attorney and having followed this area a bit.

8 I have some concerns about the Cariou case
9 specifically and how is fair use working because my
10 concern is in certain areas, a fair use analysis will
11 return either -- it's sort of all or nothing. And
12 one -- if you get nothing, if you are found that
13 work -- use of your work is fair, you immediately go to
14 a non zero value -- or I mean you immediately go to a
15 zero value for the work. I'm very concerned that all
16 of the work that the artist, you know, Cariou put in
17 was zero valued if the use of his work was found to be
18 fair.

19 And it seems like there is some room for some
20 licensing there. I do not think this area cries out
21 for a legislative solution, but I do have some concerns
22 about it. I think the market mechanisms for the most
23 part will generate a good result. There are certainly
24 some inefficiencies. There are some uncertainties
25 obviously that impact libraries and others, the types

1 of uncertainties.
2 So, for example, it would be delightful to me
3 if every song ever recorded were available through
4 either iTunes or the Amazon library and you could get a
5 sync license for just a dollar more because that
6 would -- you know, that would actually make all of this
7 use that we're making -- no one understands a sync
8 license unless they're probably in this room or a
9 copyright attorney or very dedicated to music.
10 But it seems like there are some market
11 mechanisms that need to evolve, but I think they will
12 evolve on their own. And again, I don't think a
13 legislative solution is what we need. But those are
14 some areas where there are gaps and that's where
15 uncertainty is created.
16 I do see a tremendous amount of creativity
17 going on and I certainly acknowledge that it would be
18 very difficult to measure. But I am occasionally
19 tempted to want more licensing in this area because of
20 the zero value problem that fair use generates instead
21 of looking for a license.
22 And one of the problems that I think, you
23 know, the market mechanisms and where we evolutionarily
24 need to get to is if you did a compulsory license, for
25 example, and you charge 9 cents or 18 cents for things,

1 what if you're the creator of this amazing mashup or
2 remix and you have works of 50 different artists in
3 your three-minute YouTube video, and you would like in
4 some way to compensate or credit the artist who
5 contributed to your work, and you suddenly get five
6 million hits. If you charged per hit, you would be
7 dead in the water. There's no way.
8 It seems like we can only create a licensing
9 fee or something like that. A compulsory license
10 scenario would only work if you can track the license
11 to the value that was being generated. I mean,
12 certainly when someone makes commercial, you know, when
13 someone has commercial success or makes money, it seems
14 that's the only time you would start paying licensing
15 fees probably.
16 But that's one of those problems that, again,
17 the platforms that we use to distribute these creative
18 works would need to be considered. That's why I think
19 the market should do it. And I don't think we're ripe
20 at this point for a legislative solution to come in.
21 Obviously when we created compulsory license in the
22 music industry, all of those structures and the social
23 and contractual relationships around them had been
24 developed for a while and, you know, I don't feel that
25 this is -- this scenario is ripe yet for a very obvious

1 solution.
2 I think we're innovating so fast and our
3 market responses and our platforms, we haven't had
4 YouTube all that long. We've only really had the
5 internet since 1995. And we have had YouTube for a
6 much shorter time than that. But these -- you know,
7 and, again, as David pointed out, these are old
8 instincts to put things together, to put your own stamp
9 on it, to, you know, to be inspired by others and then
10 turn that inspiration around.
11 But I do see -- the zero value problem is the
12 one that tugs at me a little bit when you have a fair
13 use scenario. But where obviously value is contributed
14 and where a commercial success is occurring on the
15 other end.
16 MS. CHAITOVITZ: Thank you.
17 Evan.
18 MR. ENGSTROM: I think it's important to note
19 from the outset that the definition provided of a
20 remix, which I'm not going to be able to quote from
21 memory, but the creative combination of existing
22 materials is really a broad definition of innovation
23 and creativity writ large, it's not just remixes. This
24 is what creativity is. So it's hugely important
25 culturally and as I'll get into economically to

1 preserve this attitude towards creation.
2 While there is a great fair use framework in
3 this country that provides a lot of flexibility, which
4 is necessary, particularly in the technology space
5 where I'm speaking from because, of course, technology
6 is going to always evolve faster than any bright line
7 rule you're going to ever put down. But the
8 uncertainty does cause other problems. It's a
9 double-edged sword. Anytime you have uncertainty,
10 you're disincentivizing risk taking.
11 And I think Corynne's point about platforms
12 being just as important in this world is well taken.
13 While the proliferation of remixes shows that it is
14 popular, it does represent in a lot of people's minds a
15 creative expression that we need to encourage.
16 There had been relatively few platforms for
17 distributing this material when you think about kind of
18 the history of content distribution. And while there
19 is a dearth of case law really flushing out fair use,
20 and as Peter pointed out, there have been some pretty
21 high profile cases dealing with content distribution
22 systems, some of which have been good, some of which
23 have been bad.
24 But pretty much any content distribution
25 system you can imagine for pushing this content out has

1 come under some legal challenge. And I think it's
2 important that, we're going to get into later about the
3 damages point of it, that when you're dealing with how
4 to get this stuff out to the market, the uncertainty
5 inherent in the system isn’t amplified by crazy damages
6 that will sink even the most well-funded startup.
7 It's great that YouTube has been this platform
8 distribution, but if they didn't have the resources to
9 fight the infringement dispute, we may not have YouTube
10 as a content distribution system and we'd have a lot
11 fewer remixes as a result.
12 And then taking a step back, we really need to
13 bear in mind here that the culture that remix
14 represents, this idea of repurposing and repackaging
15 creative materials in new innovative ways is important
16 for innovation throughout our economy. This is what
17 startups do, it's this risk-taking enterprise, that
18 yeah, there might be a distinction between a derivative
19 use and a transformative use and whether that's legal
20 or not.
21 It's blurry, but we want people to be going
22 out and taking risks and pushing up to that line
23 because that's where we get innovation. However you
24 feel about Napster, peer-to-peer technologies are
25 important. And it's walking up to that line and

1 creating peer-to-peer technologies that has created a
2 huge number of jobs and driven innovation in the
3 economy.
4 So it's really important that, and we'll talk
5 about later, that we maintain a sensible framework for
6 statutory damages when we're keeping this in mind just so
7 we have the resources and framework to distribute this
8 important creative material.
9 MS. CHAITOVITZ: Thank you. I saw Peter and
10 then Corynne and then David.
11 MR. MENELL: I think I'm going to be alone in
12 this view, but I will say that I think that a
13 legislative solution has a lot to offer as we look out
14 into the crystal ball and think about how copyright can
15 deal with these evolving technologies and creative
16 opportunities. So how do I get to that position.
17 Well, I see the copyright system as very much
18 in turmoil right now. This is one of the
19 manifestations, but there are many others, enforcement
20 issues and uncertainties abound. We live in incredible
21 uncertainty. Lawyers have a hard time advising
22 clients. As Corynne has suggested, clients are not
23 willing to take risks. And so we can look out there
24 and see a tremendous amount of activity, but it's all
25 done in a way that I think is contrary to an organized

1 market setting. It's done with tremendous I would say
2 just risk taking by all parts of the ecosystem.
3 Now, if I were to step back from this and say
4 how might we look at a longer term perspective, I think
5 the goal should be to make copyright work for the
6 internet slash post Napster generations. That's both
7 the users and the creators. That kids growing up today
8 ought to look at the copyright system and say that has
9 appeal to me. I'd like to participate in that system
10 as both a user and a creator.
11 And for the DJ I talked about earlier, I think
12 they would feel the copyright system is something to be
13 avoided at all costs. And that's unhealthy. I think
14 that legislation can provide an infrastructure that
15 could be very productive in certain areas.
16 So although this panel is talking about remix
17 generally, at least the title is, I see remix as
18 extending from appropriation art, to fan fiction, to
19 music mashups. I'm only talking about the music mashup
20 piece and I think that's pretty much what we've all
21 been talking about.
22 But focusing only on that piece, imagine a
23 system building on what our colleague from Oracle
24 mentioned a compulsory license. What could that look
25 like.

1 Well, the proposal that I have made in an
2 article, and it's only at a very rough stage, would be
3 to take the framework of the compulsory license we have
4 now, which is 9.1 cents for a standard length song for
5 copy, and to double that, to do 9.1 cents to the
6 musical composition owners, all included, and 9.1 cents
7 to the recording artist. And to use some technology,
8 I'll use Shazam as an example, and create an algorithm
9 that could, you feed a song in, and it would spit out.
10 We would need the universal database, which is another
11 issue on your list, but I would like to have that as
12 well. You feed this in and it would spit out based on
13 the algorithm. Now, the algorithm might say if it's
14 less than so many seconds, then we wouldn't count that,
15 we might deal with loops a little differently.
16 These are all details to be worked out. I
17 realize devils are in details, but imagine the system,
18 so now a new creative artist comes along and they want
19 to do remix. They now could do it, wouldn't have to
20 spend a lot on lawyers. And then you could create a
21 legal regime that would enable money to flow to all of
22 those people who have contributed pieces of the remix.
23 And as a fan of remix or mashup art, I would like money
24 to flow to the artist who remixes as well as the
25 underlying artist. I think fans would embrace the

1 system.

2 The other thing is in tomorrow's music world,

3 music is not going to come through sale of records.

4 And so this kind of system would create a tracking

5 system. So as those works get onto the Spotify

6 services and they're not on there very much and we want

7 to channel people into those services, then money could

8 flow seamlessly among all of those different players.

9 We could also as part of this put in an

10 exclusion of statutory damages for people who take this

11 path. I don't expect Gregg Gillis to take this path.

12 I think he's made it clear he thinks everything he does

13 is fair use, but I'll note that in one of the work that

14 I enjoy of his, he has pretty much about one minute of

15 a Beyonce song without really very much else going on.

16 And I find that a little surprising, in fact, I was

17 shocked when I heard it because it just kept going,

18 going, going. Most of his work is much shorter clips.

19 But the thing is we could create a mechanism,

20 it would not undermine the current rap and hip hop

21 marketplaces because mashups are different. They are

22 intensively mashed up works. In which we would say

23 here's this new area for people who want to do it.

24 Now, if no one shows up, well, we've wasted

25 legislative effort. But if people show up in droves

1 and it can work its way into the system, we've created
2 an entry ramp for a lot of new artists. We've
3 created a way for old artists to be compensated when
4 their works are part of this new culture. We create
5 the potential for safe harbors for a lot of these
6 intermediaries that would like to host this stuff. And
7 I think we could create a very interesting onramp into
8 this new world.
9 MS. McSHERRY: Okay. So two points. One
10 is -- so here's my problem with that idea and actually
11 sort of generally with the idea of trying to create
12 some sort of licensing solution, even just taking this
13 example of music mashup. The whole point of fair use
14 is if it's fair use, you don't need a license. You
15 don't need permission. You don't need to seek
16 permission. You don't have to sign up for a license.
17 You don't have to do any of that. And I worry very
18 much that if we create a licensing regime, then we
19 create also an expectation that everybody will
20 participate in that regime even if what they are doing
21 actually they don't need a license for in the first
22 place. So that's one problem.
23 And then there's a related problem which is
24 that, you know, when I think about a remix community, I
25 don't think primarily actually of commercial creators.

1 Remix artists range from 13-year-old girls in their
2 bedrooms creating works, creating works of fiction, fan
3 fiction and so on, to commercial artists. They
4 include, you know, moms, dads, ordinary people who are
5 just engaging in noncommercial creativity. Those
6 people are not going to be interested in participating
7 in a licensing regime and they shouldn't have to
8 participate in a licensing regime when all they're
9 doing is engaging in purely noncommercial uses creating
10 works that they're just sharing with their friends and
11 their fans and maybe audiences. They probably are
12 going to have a hard time being able to afford
13 participating in the licensing regime. It will just be
14 very, very difficult for them to engage in it.
15 And again, if we're talking about works that
16 are in many, many, many, many cases fair uses, we don't
17 need a licensing regime in the first place because what
18 they are doing is perfectly lawful already.
19 So I worry very much about going down this
20 path and I feel a little bit like it's a sort of a
21 solution in search of a problem. It's not at all clear
22 to me that we actually have some big problem in some,
23 you know, that all of these artists are somehow being
24 deprived of revenues that they would otherwise get if
25 somehow we had some licensing regime in place. So I

1 worry very, very much about this whole idea and I think
2 it could be quite dangerous for future creativity.
3 MR. GIVEN: I'm finding myself in the unusual
4 position of agreeing with my colleague from the EFF.
5 And I think what's reflected in our opening statements
6 to the task force is that there is a large consensus
7 among us here, with one notable and very brilliant
8 exception for ditching the idea of compulsory license
9 regime in this particular context.
10 Now, I acknowledge, as I must, that there are
11 other compulsory license regimes that are extant today
12 that are out there, but the history of those, if you go
13 back and look, is that they were a response to
14 documented and very serious antitrust concerns, which I
15 don't think you have anywhere near this particular
16 issue.
17 The only thing I would add to what Peter said,
18 I was talking about dystopia before and he's talking
19 about utopia, Peter, what you've described sounds like
20 something that already exists. You're talking about
21 very sophisticated algorithms, for instance, and you're
22 talking about large impressive if not universal
23 databases. Well, you know, that's already there. I
24 mean, those platforms exist in the marketplace. And,
25 in fact, those platforms have engaged in licensing

1 activity and have gained what rights they need to
2 promote their platforms and to promote this creative
3 activity on their platforms.
4 So, again, just coming full circle, I think
5 that, you know, the idea that there's a serious problem
6 here that needs to be addressed by a legislative
7 solution is just, you know, in the absence of very
8 compelling evidence to the contrary, it's just not
9 there.
10 MS. CHAITOVITZ: Okay. Yeah, I think --
11 MS. DARE: Tiki.
12 MS. CHAITOVITZ: Tiki and then Tammy.
13 MS. DARE: My concern, Peter, if we spun this
14 forward, this doesn't account for the video part. And
15 the visual is so intimately engaged now. There's
16 really not music separate. So much of what I see is
17 video plus the music. And I think we have this
18 structure in music, so it's very tempting to use that,
19 but how would you figure in the video when you can have
20 so many different photographers who are authors for
21 copyright purposes of the video contributions.
22 How would you do that. How would you measure
23 copies. Because part of the thing is if you're just
24 making a record like we could all do in 1971, it was
25 really easy to track the number of copies. And even

1 with an amazing database, the numbers get so high so
2 fast. So if you're multiplying 18 cents times every
3 single artist who contributed to your mashup or remix
4 times the number of hits you get on YouTube, you're in
5 trouble fast. And again, that does swamp the small
6 artist.
7 Would you do a fan fiction exclusion and then
8 we'd have to define that obviously. But, you know, is
9 there some sort of noncommercial exclusion that you get
10 to very quickly because I think it's one thing to be a
11 Harry Potter fan and, you know, write a different book
12 seven as a friend of mine did before seven came out and
13 it's a very different thing to start a theme park. And
14 right now you only have the resources to start a theme
15 park if you have some licensing going on.
16 But there's -- somewhere in there there's a
17 line that needs to be drawn so I'm curious about that.
18 Those are just, you know, three of the sort of
19 problem-solving things I think you'd have to court
20 before you put forth a legislative problem -- or a
21 legislative solution. Again, I'm not sure we've framed
22 the problem. So I want to see more evolution, I'm very
23 much on that side. Those are some of, you know, kind
24 of details I'd be interested in seeing spun out.
25 MS. CHAITOVITZ: Okay, Tammy. And I will give

1 you a chance to answer.

2 MS. RAVAS: So I see a few different things
3 going on here. First of all, I would say that in terms
4 of music remixes, mashups, however you want to call
5 them, they have been around for several hundred years.
6 You can go back to medieval renaissance times to see
7 examples of that. I won't go into that any further,
8 though.

9 But some problems that I see with respect to
10 the licensing regime and the expectation that one would
11 need a license in order to create a mashup or a remix,
12 I agree with Corynne here in that fair use, it's -- it
13 is part of copyright law. It's the safety valve for
14 first amendment rights. And I feel that the examples
15 that I brought up in terms of making comparisons
16 between different songs, those are -- I feel, you know,
17 would stand up against -- would stand up in a court,
18 but then again I'm not a lawyer. So I can't really be
19 totally certain about that.

20 And then thinking about universal databases
21 such as being able to get a simple sync license if you
22 paid a dollar or two extra on Amazon or iTunes, I don't
23 really feel that we're there yet in terms of the world
24 of available content and one of the reasons for that is
25 the pre-1972 sound recordings problem that recorders

1 that were made prior to February 15, 1972, are not
2 covered under federal copyright law so that kind of
3 opens up a really big can of worms in some respects.
4 So and I'm also thinking too of students as
5 well as the 13-year-olds, you know, doing their own
6 remixing and mashups that are not selling this
7 material. I feel very, very strongly that they can be
8 relying on fair use.
9 MS. CHAITOVITZ: Thank you.
10 MR. ENGSTROM: I think I would like to just
11 join the chorus of Corynne and Tammy expressing the
12 idea that while a licensing regime would certainly go a
13 long ways or at least some ways in diminishing
14 uncertainty in the remix realm, it would be difficult
15 to imagine an environment in which a licensing regime
16 could exist without diminishing fair use and the legal
17 regime around fair use.
18 So if we're talking about the best way to
19 create the certainty that people can engage in this
20 type of behavior, it seems like the cheapest and most
21 effective way would be to have a robust fair use
22 presumption for transformation, for transformative
23 works along with, as we'll talk about later, diminish
24 statutory damages.
25 I think it's instructive to note that maybe

1 part of the reason why we don't have a lot of
2 litigation on this fair use point is to the extent it's
3 a solution in search of a problem, it may be because
4 open source, open access doesn't necessarily
5 cannibalize the type of incentives and market for
6 licensed work.
7 A good example is just look at the nature of
8 open source development in the software community.
9 Open source has created Linux, all sorts of great
10 programs that don't cannibalize on commercial programs,
11 but, in fact, increase the market for commercial
12 programs. So you can see through things like Google
13 Sketch Up which is open community, it allows people to
14 contribute to a platform and has driven more interest
15 in 3D modeling.
16 You can see it broadly in the remix community
17 that these -- I haven't seen any studies that suggest
18 that remixes diminish the market for the remixed
19 content. If anything, they drive interest in the
20 remixed content. And you can see this through an
21 innovative start-up that I've been working with, Indaba Music in
22 New York which runs remix contests where labels
23 sanction this type of behavior, but encourage
24 independent artists to create remixes, upload them, and
25 it gives content to these labels that drive more

1 interest in the underlying song.

2 So we just need to make sure that -- it's not

3 necessarily a strict dichotomy. Having open frameworks

4 for innovation. Having a presumption for fair use and

5 allowing the creative adaptation of existing material

6 doesn't necessarily diminish people's incentives to

7 create commercial works.

8 MR. MENELL: If you were listening to

9 yesterday's event, I think you would have heard a much

10 stronger pushback on a presumption. And I just think

11 that part of the challenge here is dealing with the

12 reality of coming-of-age artists and trying to think

13 about whether to be in the copyright system or out.

14 And if we had the legacy of open source or creative

15 commons, there would be perhaps enough. But there are

16 going to be people who want to work with catalogs that

17 are not going to be licensable.

18 And in some ways my answer is unacceptable to

19 both sides because I don't want to see the control

20 exercised either. I would like any compromise to say

21 we live in a reverent culture and people will do their

22 creative work. We want to create or maintain the

23 plumbing to allow the value to flow more fairly among

24 the different players.

25 So let me specifically respond. So I would

1 like to hear after I finish how David would advise the
2 next Gregg Gillis. I don't think he has a good
3 solution. I don't think he could take on that case
4 because Corynne has already talked about the challenge
5 of representing people who want to go out into a
6 marketplace with that kind of work. You would have to
7 give them a lot of -- you would either say it's going
8 to cost a lot of money for me to try to get these
9 licenses, but the DiCola-McLeod book points out that
10 you could not have licensed any of the mashup works
11 that have attained a lot of success.
12 So licensing wouldn't work for a lot of these
13 works and to say it's all fair use I think is in some
14 ways taking away from the reality that these works are
15 successful in part because they build on other works
16 and we want to create a more healthy relationship
17 between the old and the new.
18 Now, Tiki makes some very good points, and as
19 I said, I'm not going to solve all of the problems
20 here. But let me respond very quickly. The video
21 piece is a separate piece involved. So a whole larger
22 range. And I think the music piece can be isolated
23 because when I listen to it over headphones, that's the
24 piece I'm getting.
25 So how do we commoditize this. Your point is,

1 well, 18.2 cents isn't going to make a lot of sense in
2 a world in which most people aren't buying product. I
3 agree. We don't really need to pay the 18.2 cents.
4 That would apply to an ITunes. What you get by using
5 this system is that when it streams over YouTube and
6 there's some ad revenue that comes in, you could use
7 the same formula for dividing that value.
8 When it streams over Spotify, now, I see the
9 future of streaming and I think most people out there
10 in the marketplace see the future is not ownership but
11 it is streaming, and so this creates a platform by
12 which you can have the data to reallocate. So fan
13 fiction, I don't really see this as solving that
14 problem at all and I think we should isolate.
15 In terms of noncommercial uses, well, it's
16 fine if, you know, a son or a daughter decides to make
17 something for their friends and it's distributed in a
18 very small circle, I don't think that's going track.
19 But it's not very hard for them to press the YouTube
20 upload button. Well, now it's on YouTube, but it could
21 work well within the content ID system once we get this
22 kind of background in place because now, you know, some
23 high school student or even younger person could put
24 something up, it could go viral, and money would be
25 flowing and that person could see money. But also, you

1 know, all of the tracks that are included. So it's in
2 some ways just creating a way to tie into a database.
3 Now, the point was made by Tammy we don't have
4 universal databases. We need to have universal
5 databases. And I would say we could help that process
6 through this kind of legislation because you say if you
7 want to participate in this new commercial, this new
8 compulsory license system, you better opt in. You
9 better tell us who you are and how we pay you. And if
10 you don't do that, this is a great orphan work kind of
11 resolution. You are an orphan work and you're not
12 going to get paid.
13 I think people would come out of the woodwork,
14 register, get onto the databases because now, all
15 musical compositions and all recorded music have
16 another revenue stream. And overtime as we shift more
17 and more to these streaming-type services, this would
18 provide, I think, a new foundation for people to
19 embrace the copyright system.
20 As far as fair use and song comparisons, I
21 would agree with Tammy and I would say that I think
22 that is something that could be fair use and people
23 would have the choice. They don't have to go the
24 compulsory license route. They could say I'm willing
25 to do this on my own and there's nothing to prevent

1 that.

2 Corynne's concern that we are not -- that this
3 will change the world of fair use, that no one --
4 nothing will be fair use anymore because there's a
5 market, that's always been out there. Frankly, if we
6 get the pricing right, I don't think it's that big of
7 an issue. But I do think that people who, like Gregg
8 Gillis, in the future may say, you know, I don't mind
9 doing this.

10 In fact, I've spoken to a lot of mashup
11 artists and they say me, you know, I would love there
12 to be a convenient way for me to share this revenue. I
13 don't want it all. But I want to do what I want to do
14 and right now the only way I can do it is at the zero
15 price point. And that I think is not the right price
16 point. And that's what I would say to the people who
17 were on the panel yesterday. People arguing that they
18 should control everything. You can't control it.
19 We're past that point. Napster taught us that. Now
20 we're in a world in which we can commoditize it. We
21 can create a compensatory mechanism and that's where I
22 think the policy should go.

23 MS. CHAITOVITZ: Okay. I would like to jump
24 in with a question that I think might be a little
25 between your compulsory license and your no legislative

1 changes. And this was something that was brought up in
2 previous panels and suggested as a possible solution,
3 which would be a licensing collective similarly and
4 again like here, there the focus was primarily on
5 music.
6 A licensing collective is by voluntary opt-in
7 society like PRO, like ASCAP, BMI, SESAC, or like Harry Fox,
8 to eliminate the transaction costs and make it easier
9 to get licenses for remix works. And they would
10 obviously have a robust database too.
11 So what do you think of this idea. And I saw
12 Corynne, you were first.
13 MS. McSHERRY: I guess I have a couple of
14 concerns. I'm still not convinced that we -- that
15 there's a need for this in -- for the majority of remix
16 works.
17 The other concern that I have is that when I
18 talk to musicians in particular, I don't hear a lot of
19 people who are loving their collective licensing
20 schemes that they're already involved in. So I think
21 that that would require some pretty serious
22 investigation to see if we could improve on the
23 situation that we already have.
24 So those are kind of two big, big worries
25 about that. And then I guess for that idea the

1 concerns that I've already expressed apply there as
2 well. I think that if we create a sort of licensing
3 scheme, then we create a situation where people feel
4 like they all have to participate in that licensing
5 scheme, when in many cases they really don't have to
6 because they don't need license in the first place.
7 So I think that any time we're going to think
8 about any version of a licensing scheme, we have to
9 make sure that we're thinking very hard about how to
10 organize it in such a way that it is not unduly
11 influencing folks who don't need to get a license to
12 feel that they, in fact, do have to do that.
13 MS. CHAITOVITZ: Thank you. And I can't
14 remember if Tammy or Tiki was next.
15 MS. RAVAS: So I have a couple of concerns with
16 this particular question. Again, I'll return to the
17 pre-1972 sound recordings problem, you know, how does
18 that -- how would that enter into a licensing scheme
19 and considering the fact that many archives, they're
20 trying to digitize such recordings, it's kind of
21 difficult. That's kind of going away from remixes and
22 mashups, but that's a really big concern that music
23 libraries have right now.
24 And also in terms of orphan works, you know,
25 if -- in an ideal world if we had this wonderful global

1 database that put out by the copyright office and we
2 were able to look up every single thing out there that
3 was copyrighted, that would be beautiful. But reality
4 dictates otherwise. So I'm just kind of curious, you
5 know, how would orphan works, you know, be incorporated
6 into this. And I know there have been discussions and
7 comments being put out on orphan works right now and
8 that's another really big concern with -- that I would
9 have with a licensing regime.
10 MS. CHAITOVITZ: Thank you. Tiki.
11 MS. DARE: What I see is, going back to my
12 concern about the video problem, because when I look at
13 the way my children interact with content, they mostly
14 listen to music with some kind of video on top of it.
15 They're on a iPod. As we stream more and as there
16 isn't the -- you know, the footprint and the bandwidth
17 restriction of the visual, they are very often
18 experiencing audio with video. And that's how they
19 interact and they communicate with Snap Chat and
20 Instagram. They do not sit on one platform. They are
21 absolutely platform agnostic. They go to all of them.
22 And so I'm concerned that we don't have a
23 mature market. I'm very concerned about clearly
24 identifying the problem and scoping the problem that a
25 licensing regime would solve. And, you know, very

1 consistent with Corynne, I think there are people
2 who -- we need to be very clear about who doesn't have
3 to participate in that. And I'm a little concerned
4 again that this is a solution that is in search of a
5 problem that we have today that is well articulated and
6 well scoped.
7 Would it reduce the risk enough for a certain
8 group of players to participate in this, because I
9 just -- I'm concerned it's more narrow than some of the
10 behavior, the copyright interactions that I see.
11 MS. CHAITOVITZ: Yes. Okay. Peter then
12 David.
13 MR. MENELL: I generally support private
14 solutions to problems and I think if this type of
15 mechanism were to develop, I don't see any serious
16 downside because it's not going to cover very much in
17 my sense of this marketplace. I don't think that a lot
18 of the legacy catalog of music is going to get into
19 that kind of regime very easily. But just as major
20 record labels today are seeding works into the mashup
21 culture, it's not something that people talk about in
22 an overt way, but we know that a lot of songs are being
23 put out into these channels as a way of trying to get
24 promotion in advance or in conjunction with release,
25 that there would be some interest in doing it.

1 But my concern is to really open up the
2 culture. I think that, you know, people ought to be
3 able to mash up everything. And if I rely on fair use,
4 I see that as really shifting people outside of an
5 organized marketplace and I see it happening largely
6 outside of any good, you know, plumbing. If it happens
7 through licenses, that would be great. But I don't
8 think many of the people we want to invite into the
9 copyright system, the new generations, the people who
10 we want to be excited about the copyright system and
11 about a system where they could potentially have a
12 career doing this, I don't think they are going to have
13 any clout to work in even these kinds of channels.
14 And I think what's going on right now is if
15 you've already got a little credibility as a DJ, then
16 you might have a connection and they might seed you
17 things that other DJs won't get seeded.
18 So, you know, we ought to, I think, face up
19 to, you know, do we want to really open this up and I
20 don't think you can do it through a voluntarily system
21 based on what I heard yesterday.
22 MR. GIVEN: In direct answer to the question,
23 I think all the same concerns that I I've previously
24 articulated are true again in respect to the question
25 posed about voluntarily systems. Again, in my personal

1 legal practice, I'm intimately involved with collective
2 organizations like the PROs that represent large bodies
3 of songwriters and seek out collective solutions. And
4 I think to the extent that can develop in the
5 marketplace sui generis, that would be a preferred
6 solution.
7 So at least insofar as Peter is suggesting
8 that could happen and that's a good thing, I agree with
9 him as far as that goes.
10 I -- you know, I just want to say just one
11 word about consent and the ability to control one's
12 creative work. For the people that I represent day in
13 and day out, be they song writers or recording artists,
14 performers, what have you, the ability to control one's
15 creative work is paramount. I'll say that again. The
16 ability to control one's creative work is paramount.
17 In fact, it's a major deal point that we spend a lot of time
18 on with publishers, like record labels and music
19 publishers and the like, in negotiating those
20 provisions to assure that our artists have meaningful
21 control over their creative legacy.
22 It's very, very important, I think, just as a
23 moral and ethical proposition to protect that right in
24 the law as best we possibly can because in order to
25 advance and progress the arts, which is fundamentally

1 what this is all about constitutionality speaking.
2 People have to believe that they are going
3 have control over their destiny, over their legacy.
4 And to put that in play cavalierly and to say, for
5 instance, well, you know, the horse is out of the barn,
6 it's too late. You can't control it. That's just a
7 wrong-headed statement. And if that's so, we have to
8 work diligently to make sure that that's not the case.
9 We shouldn't embrace that.
10 MS. CHAITOVITZ: Thank you. I see Peter and
11 Corynne. And I ask you if you could make it brief so
12 that we'll have -- because we're running out of time
13 and I do have one more question.
14 MR. MENELL: David, that ship has sailed.
15 It's gone. You're not going to get it back. Sound
16 Cloud will show you that no one has control. And
17 YouTube, perhaps to a lesser extent because of content
18 ID. But control is not really something that the
19 American copyright system has embraced. I think going
20 back to the original mechanical license, you know, when
21 we open things up for people to rerecord, this is, I
22 would agree, a much more open invitation. I would not
23 as part of a system like this allow people to say I
24 have the endorsement or I am in some way speaking for
25 the people I’m remixing.

1 I think the important thing is to say that
2 remix is part of our culture. It is happening. It
3 will happen. Whether it happens within a copyright
4 system or not, it is the reality, it will continue to
5 be reality. Can we channel it into a more organized
6 system and we could put into the law that the remix of
7 works under this provision in no way endorse or agree
8 with. But that is something that we have long lived
9 with. That's the first amendment.
10 MS. McSHERRY: Just quickly, here's a place
11 where I think I can at least partly agree with Peter,
12 that horse has left the barn, but it's not that the
13 horse has left the barn, it's built into the system.
14 Fair use means you can't control every use of your
15 work. You have rights under copyright law to, you
16 know, certain enumerated rights and that's fine and to
17 that extent an artist can make choices and make
18 decisions about how his or her work is used.
19 But ultimately, again, remember, we're talking
20 about remix. Okay. We're not talking about, say,
21 copying entire works or any of that kind of thing.
22 We're talking about creating the kinds of works that
23 are likely to be fair uses. And I think it's actually
24 really important that remix artists not to have to go
25 and ask for permission from an artist in order to use

1 his or her work, again, in a way that is otherwise
2 lawful because part of remix is commentary, criticism,
3 talking back. And often an artist who is being spoken
4 to, who is being responded to, might not want to give
5 permission.
6 So I actually think it's a very, very valuable
7 thing that's built into our culture that artists just
8 don't have that kind of control. That's not a bad
9 thing. It is a good thing.
10 MS. CHAITOVITZ: Okay.
11 MS. RAVAS: I would happen to agree with both
12 Peter and Corynne about artists and other creators not
13 having complete control over their works. For
14 instance, I have written a book, I've written several
15 scholarly articles, and I feel that it is, you know,
16 people's in this country's right to be able to
17 criticize or say it stinks or whatever or whatnot
18 because of our first amendment rights and fair use.
19 MS. CHAITOVITZ: Okay. Well, we'll see how
20 much time I have. So what I wanted to ask is
21 especially a lot of you brought up first amendment
22 rights. What about artists whose music is used to
23 endorse a political viewpoint that they disagree with
24 or to sell a commercial product that they disagree
25 with, would you -- what do you think about -- okay. I

1 did see Tammy was first and then Corynne and then
2 Peter.
3 MS. RAVAS: Okay. For me that's a pretty easy
4 question to answer. I'm thinking in terms of Yoko Ono
5 suing Premise Media for the use of John Lennon's
6 Imagine in a documentary that criticizes the theory of
7 evolution. Now, Imagine was written before 1972 and
8 the New York court system decided that that was indeed
9 a fair use.
10 So, again, I'm going back to what I said
11 earlier in that it's a first amendment right and I
12 believe strongly in that fair use is a safety valve
13 within the copyright system to allow for creative
14 speech.
15 MS. McSHERRY: So I'm going to give a lawyerly
16 answer and say it depends. Okay. I think that an
17 artist doesn't have a veto right on all the ways in
18 which her work is used. That's why we have fair use.
19 However, if, you know, if one's work is used in a way
20 that goes over the line, that, for example, is used in
21 a commercial to endorse Fritos or something like that
22 and a great deal of the work is taken and so on and so
23 forth, then, you know, that's probably not going to be
24 a strong fair use argument, right.
25 So we already have built-in protections I

1 think in the law against, you know, folks that go over
2 the line and suggest, you know, level of endorsement
3 that isn't appropriate. So it's sort of just making
4 sure again the artist doesn't have the veto right on
5 all uses of her work.
6 But if someone is abusing her work, say, you
7 know, using all of a song that she did in a way that's
8 not appropriate that's purely commercial and not at all
9 transformative, well, then there's a copyright problem,
10 right. And so we already -- I think this question is
11 answered in the law already.
12 MS. CHAITOVITZ: Thank you.
13 MR. MENELL: I'll make this small point that
14 the proposal that I've made would not extend to
15 commercial -- the remixing for commercial endorsement.
16 I don't think it would be difficult to carve that out.
17 I think that's a whole separate issue. I'm talking
18 about just kind of music that we would listen to in the
19 sort of conventional ways of entertainment.
20 On the broader issue, I think this is a very,
21 very complex area. I see Ben Sheffner in the audience
22 and I remember him writing about these really complex
23 political fair use cases where you have political
24 candidates who use songs as part of their, you know,
25 their opening and it's their trademark, so to speak,

1 and that's a very sort of dicey area. I think that is
2 something that the law, you know, that we will struggle
3 with because that is very important to how people sell
4 themselves and it really goes to, you know, music is
5 such an important part of how our culture understands
6 itself, you know.
7 And so I want to just say I think we can
8 resolve some of the issues without getting into that
9 topic. And I would say that that's, you know, that's a
10 whole can of worms even well beyond what we've taken on
11 today.
12 MR. GIVEN: Just to conclude by saying I find
13 myself again agreeing with my colleague from the EFF.
14 Corynne, you're really messing me up today.
15 I think the answer's to Ann's question is in
16 the law. I mean, I've written these cease and desist
17 letters before, I've engaged in these negotiations.
18 They resolve themselves. The law has a pretty good
19 framework already in place to answer the inherent
20 tension between first amendment rights and copyrighted
21 works.
22 MS. CHAITOVITZ: Thank you. I do have time
23 for one more. Okay. So I know some commenters and
24 some people here today have made the distinctions
25 between noncommercial versus commercial works. And

1 some suggested a noncommercial safe harbor or
2 noncommercial -- permission automatically for
3 noncommercial uses. Others have noted that
4 commercial -- that noncommercial works are often
5 disseminated through commercial sites. And so I
6 wonder, how should the element of commerciality be
7 defined and what should be its relevance and how would
8 you propose treating a noncommercial work that did
9 cause commercial harm.
10 Peter's first.
11 MR. MENELL: I'll just say part of the beauty
12 of a system where even people who are outside of the
13 system can easily register a work, put it on YouTube,
14 have a system like YouTube or other sites that may
15 compete with YouTube. It really sort of gets around
16 the question because you have in place a way to
17 allocate whatever revenue is coming in. And so I think
18 that we've lost the distinction between commercial and
19 noncommercial in our culture in the sense that things
20 that are done perhaps without a conventional commercial
21 goal can have effects on the market for some of those
22 works.
23 If you go back in the 1976 act legislative
24 process, you'll see that even there in discussing
25 similars issues, fair use and others, there was, you

1 know, recognition that it's hard to draw that line.
2 And I just think that what we want to do is just create
3 easy ways for people to get their works out there and
4 to have that sort of work seamlessly. If we need
5 lawyers to get anything out, we are seriously impinging
6 on the ability to people to communicate.
7 MS. CHAITOVITZ: Thank you.
8 MS. McSHERRY: So I just made two points with
9 respect to that. I think we need to be extremely clear
10 if we're going to talk about the difference between
11 commercial and noncommercial, which I think is going to
12 keep coming up in these discussions that we are having
13 in various fora on copyright. Putting a work onto a
14 commercial platform does not render that work a
15 commercial work.
16 The reason I want to emphasize this is because
17 it comes up in litigation all the time that I'm
18 involved in. And I think it's really important to
19 understand that. The fact that you put something on
20 YouTube does not automatically render your work
21 commercial if it's otherwise an entirely noncommercial
22 thing. People use YouTube, Vimeo, other services all
23 the time to communicate and have no commercial intent
24 whatsoever and it's abundantly clear often from the videos
25 that they don't.

1 The second issue that I want to speak to you
2 is you asked well, what do we do when we have a
3 situation where a noncommercial work causes a
4 commercial harm, and my recommendation with respect to
5 that is that we make sure that we are very clear when
6 we are talking about a harm, that we are talking about
7 a copyright harm, right, because we know, the case law
8 is very clear, that harms that are not copyright harms
9 don't count for purposes of copyright law.
10 So are you harming a licensing market for a
11 work? Okay. That might be a copyright harm. But if
12 you're just criticizing a work or making fun of it or
13 making people not want to buy it because you're making
14 fun of it or whatever, those kinds of harms, while they
15 may be upsetting for the artist and feel very harmful,
16 they are not copyright harms. And any harm that isn't
17 a copyright harm just shouldn't be part of this
18 discussion.
19 MS. CHAITOVITZ: Thank you.
20 MS. RAVAS: Okay. Just really quickly, I'm
21 thinking with respect to a commercial versus
22 noncommercial, I think back to the case of the Bill
23 Graham Archives versus Dorling Kindersley, where
24 Dorling Kindersley won on the -- won their fair use
25 defense. And I know that we're running out of time, so

1 I won't go into that any further.
2 And number two, I think that from a
3 librarian's perspective who has some experience with
4 copyright work, there are some really wonderful sources
5 out there written by copyright experts that can assist
6 users with these specific kinds of questions such as
7 Kenny Crews' fair use checklist. I'll also refer to
8 the various best practices and fair use for different
9 disciplines that have been spearheaded by American
10 University.
11 MS. CHAITOVITZ: Thank you. Now it's time for
12 comments. So if you are in our live audience and have
13 comments, if you could walk to the two mics, and I do
14 know we have callers online right now. So if we would
15 put the first caller -- right, you have to -- if you're
16 calling, you have to hit star one to get through. And
17 we'll start with our questioner here.
18 MS. KATTWINKELL: Hi. My name a Linda Joy
19 Kattwinkel. I'm a visual artist and a copyright
20 attorney for artists. And I would like to bring the
21 visual art mashups into this discussion. We have been
22 talking quite a bit about the musical works, but I
23 represent artists on both sides of the line of mashups
24 in the visual field. I have people who have done
25 classic appropriation art in the fine art world,

1 collage work. I have a client who did a wonderful
2 mashup video about the history of San Francisco which
3 has become a classic tour here. And I represent Hello
4 Kitty and in that realm I'm on the other side of trying
5 to understand where is the division between fair use
6 and commercial exploitation that harms a licensing
7 market.
8 It's a very, very popular thing now to mash up
9 Hello Kitty with a bunch of other pop icons, and I
10 applaud that kind of creativity. I appreciate it. And
11 at the same time my client has actual co-branding
12 licensing schemes in place with some of the other
13 intellectual property owners, and we struggle very much
14 with this question. I do not think that it helps to just
15 say there is fair use and it's working because I think
16 where we are now is we're on the edge of trying to
17 understand where is a fair use and where is just a
18 derivative work and how do we understand that.
19 I also want to say I don't think it's useful
20 to talk about the noncommercial aspect of this work as
21 if that's a solution because I think younger people are
22 using this, are becoming creators in this kind of
23 mashup world with cultural commentary, and this is
24 their art form. Just because they're young and they
25 haven't figured out how they're going to make a living

1 at it yet doesn't mean it should be relegated to a
2 realm of never being commercial and I don't think that
3 whether or not the work is commercial is a particularly
4 good way to figure out if it's fair use.
5 MS. CHAITOVITZ: Thank you.
6 Is there anybody online? Okay. Is that
7 Sandra?
8 MS. AISTARS: Yes. Sandra Aistars from the
9 Copyright Alliance. So I raise two examples in
10 response to the panel yesterday of mashups that went
11 beyond fair use and that were very troubling to the
12 artists involved in the mashup use and that were made
13 by noncommercial speakers, both of which I think would
14 be permissible under the regime that Peter proposes,
15 and both of which I know would be incredibly, you know,
16 opposed by the artists involved. And I wonder, you
17 know, what Peter's comments might be and what, you
18 know, other's comments might be.
19 The two examples are, one, a recently settled
20 case involving a photographer who had taken a
21 photograph of the engagement of a gay couple and that
22 photograph was used by an anti gay marriage group for
23 propaganda against gay marriage and the photographer
24 was able to sue. The court found that it was not a
25 fair use and the case just recently settled a couple

1 weeks ago.
2 And the other example is a recent example
3 where the song Hey, Jude has been rewritten by the
4 Westborough Baptist Church in a very anti Semitic way,
5 Hey, Jews, and is being distributed on YouTube and
6 other channels, I presume. And, you know, that song
7 written, by you, know Paul McCartney is a very -- you
8 know, tribute to his son, I believe, originally, you
9 know, obviously cares very much about, you know, his
10 work, I'm sure.
11 So I wonder, you know, what your comments
12 might be, Peter, on how we would address those sorts of
13 situations because, you know, I'm a very strong
14 believer in the first amendment and I understand, you
15 know, you can't prevent hate speech, but I certainly
16 think we should be able to prevent people making hate
17 speech with my speech if I'm an artist.
18 MR. MENELL: Well, I'll just say the proposal that
19 I've made, and it's in a print form as well so you can
20 read, it's not fully fleshed out because I think that's
21 the point of this kind of discussion is to try to
22 identify, you know, who should be in the room to try to
23 work out such a proposal.
24 My proposal would apply really to the highly
25 intensive mashup works. It would not go to, you know,

1 a single photograph, I'm talking only about music. And
2 secondly, the Hey, Jude example that you give is not
3 something that I would consider a mashup, at least in
4 the very specific proposal.
5 On the first one, I think it depended what
6 court you were in. I just think, you know, we have a
7 lot of uncertainty based on, you know, who's the judge
8 or who's the jury and which circuit you're in, and
9 that's part of my concern about fair use is that I
10 don't think you could easily advise a client on that
11 kind of case. I mean, I would not give you, you know,
12 it's clearly on one side or the other on the line.
13 On the second one, I do think, and although
14 I'm offended by it, both personally and, you know, in a
15 larger sense, I just feel, you know, the United States
16 is a place where we tolerate that. In Europe it's a
17 different question. So, you know, we fight speech with
18 speech. And so I think that's probably how it would
19 get addressed. But, again, depending on the judge and
20 depending on the jury, maybe it's not fair use. I
21 suspect that it would probably fly in our culture.
22 MS. CHAITOVITZ: Is there anybody on the line?
23 Okay, then.
24 EAST BAY RAY: Hi. I'm East Bay Ray, I'm a
25 guitar player for the independent band Dead Kennedys.

1 And we have been an independent business for like 30
2 years. So I don't -- notice there's no one else on the
3 panel that's actually been in the trenches as long as I
4 have.
5 But the thing is I create original speech. I
6 create original ideas. And we have, you know, worked
7 with people and have had, you know, remixes and stuff
8 like that and we work together. I mean, one of the
9 things, you know, technology makes a lot of things
10 possible, but I want to say that technology is not like
11 the weather. It was created by men -- persons, sorry, and
12 can be changed by people.
13 And one of the things that I'm seeing is just
14 because it's easy that principles are changing, one of
15 the principles, you know, like, okay, yes, doing
16 remixes and stuff, but artists do remixes. I mean, I
17 listen to records and stuff and then I process it and
18 then I redo it a new way. And this is something I've
19 seen most of the people, you know, people not being
20 concerned with protecting that. That should be
21 paramount, protecting original speech.
22 I mean, just uploading some -- for example,
23 YouTube, people just upload their songs and they put
24 the DK logo on it and people are calling that free
25 speech. That's plagiarism. And number two, there's a

1 big elephant in the room and that's safe harbor is
2 being abused in the sense that people upload to YouTube
3 and then YouTube puts a commercial on it. They are
4 making money.
5 And the moral human -- the moral human thing is I --
6 you know, as a society we should make sure that I get
7 the benefit of my labor. I actually put blood, sweat
8 and tears into the song. The band has. And at this
9 point I have a band member -- money is being made on
10 our music and I've put it to YouTube a couple times --
11 actually Google. They make more money off our band
12 than we do. Through the search ads. Through YouTube
13 through ads, their ad network that they put on pirate
14 sites.
15 And this devaluation of like, you know, people
16 talk about fair use, yes, it's making it zero. I have
17 a member that's going into foreclosure while money is
18 still being made. And I agree with Peter that we need
19 to be paid. That's what the constitution meant.
20 And the problem -- the -- like the old school
21 compulsory license, like for songs under the vinyl
22 record was set at such a high level that it forced
23 people in the room to negotiate. But right now in all
24 the digital compulsory licenses like Pandora have are
25 sharecropper wages. The guy in Pandora is making --

1 you know, he's selling stock at a million dollars a
2 month, you know, and he's going to cash out to Wall
3 Street.
4 And the fact that, you know, some of you that
5 are advocating fair use that don't even -- you know,
6 first it's -- you know, a noncommercial use on YouTube,
7 I'm sorry, that is a commercial use. Google is a
8 profit-making corporation. They're probably the second
9 biggest corporation in the word and they can afford to
10 pay.
11 I mean, the principles we're talking about
12 here is like, oh, let's encourage remix. Oh, okay,
13 let's solve starvation. Let's just let people walk
14 onto the farmer's land and pick the fruit. Yes, that
15 will help starvation, yeah, for about a year and the
16 farmer says screw this. Because if our whole culture
17 is just based on mashups and there's no original work,
18 there's going to be nothing left to mash up.
19 MR. GIVEN: Can I respond to that? You know,
20 that's a point that Jaron Lanier made in his book You
21 Are Not A Gadget, which I highly recommend to the task
22 force and their staff. It's well worth a read. And
23 the point that Mr. Lanier makes, and just by way of
24 background, Mr. Lanier was a -- one of the architects
25 of the worldwide web and he sort of -- he was one of

1 the guys that was flying the flag of innovation and
2 everything should be uploaded and free access and so
3 forth and he's turned completely 180 degrees in the
4 opposite direction. And he's taken on this
5 proposition.
6 But he has -- he's echoed in many respects
7 what Ray has just said about the flattening of the
8 creative enterprise by the advent of these digital
9 tools that are readily available. And as Ray rightly
10 points out and as Mr. Lanier points out in his book,
11 just because they're available doesn't mean we should
12 encourage their use to the detriment of what he calls
13 first order creative works.
14 And I do -- again, this just doubles back and
15 I'll conclude very quickly. This doubles back to the
16 point I was making before about the Epic Fail video and
17 the movies about Epic Fail. There's just a qualitative
18 difference between first order creativity and second
19 order creativity. And if we don't watch ourselves, we
20 are going to end up in a world where we're just living
21 with mashups.
22 MR. MENELL: Since Ray commented on his
23 interpretation of what I had said, I believe
24 compensation is a part of the system and I think it can
25 be built into an infrastructure. But I guess I don't

1 want to fully endorse the idea that this is the
2 organizing principle. I think copyright is about
3 promoting progress. And the question is, can we put in
4 place some mechanisms to enable the kind of original
5 and cumulative creativity that is what makes our
6 society great.
7 And I -- you know, I think that we could shut
8 down the system in either direction if we go to the
9 polls, if we -- if we are sort of at one end of the
10 spectrum and I'm hopeful that this process, and I think
11 it would take a long time, but the hope I see is that
12 we could develop institutions that would really open up
13 the creativity in such a way that all ships would rise.
14 And I think that's -- that's the message that I'm
15 trying to get out.
16 EAST BAY RAY: But I think the mashup
17 creativity is open. I mean, everybody agrees that it's
18 blossoming. The problem is is that song writers, film
19 makers, the people that actually come up with the
20 ideas, whether they be -- work for a corporation or
21 independent like I am, we are making approximately half
22 of what we were four or five years ago. And the tech
23 companies are making a hundred times more. It's about
24 eyeballs. And we draw eyeball ands they sell
25 advertising.

1 Peter, maybe you could work on a mechanism to
2 get the advertising dollars into the people that draw
3 the eyeballs, not the person that just happens to have
4 the big billboard.
5 MS. PERLMUTTER: So just a word from your
6 sponsor. We're running about ten minutes late. So I
7 see there's a lot of interest in the topic and I think
8 it's a very helpful conversation, so I don't want to
9 cut it off. But if everyone can keep their comment
10 relatively short so we can stay -- we can leave enough
11 time for the other panels. Thank you.
12 MS. CHAITOVITZ: First I want to ask, is there
13 an online question? Okay.
14 MR. SENTER: Good morning, I'm Daniel Senter.
15 I both a lawyer and a musician here in the Bay Area.
16 And I largely agree with the sort of assessment of the
17 culture here by Peter that there really is -- seems to
18 be a bifurcated or polarized sort of understanding of
19 fair use and mashups, at least amongst my peers, folks
20 whom will just go out and make a mashup and have total
21 disregard for the law and folks who are so scared about
22 the risks that they won't go ahead and contribute to
23 the culture in that way.
24 What I'm seeing also just as a lawyer is that
25 there are sort of private companies popping up your

1 Rumblefish or your Audiosocket, these companies that
2 are creating clearinghouses of music, warehousing music
3 and allowing for those rights to exist very easily to
4 decrease the transaction cost.
5 And what I'm curious to know about, what my
6 real question is for the panel is that if it is going
7 to be a private solution, how do we create a system
8 where those companies are in the right way sort of
9 policing the content over Vimeo, over YouTube. And one
10 specific question is, these companies want to sort of
11 crawl and scan YouTube and Vimeo, is that something
12 that we're comfortable with for these companies to
13 independently go on and start trying to figure out
14 whether these mashups or these properly licensed
15 creations are legal or not. And then how do they go
16 about policing this content. So I know it's a broad
17 question, but any thoughts there are welcome. Thank
18 you.
19 MR. GIVEN: I think inevitable, I think it's
20 inevitable that the content owners and the online
21 platforms are going to become meaningful business
22 partners. I mean, it's just a matter of time. It's
23 already happening. And we weren't there ten years ago.
24 I mean, the content providers were -- the content
25 owners were largely trying to sue people out of

1 existence. You don't see as much of that anymore.
2 I mean, there is a realization. We have
3 come -- my constituency has come to the realization
4 that we have to do business with these people. I mean,
5 I think these parties will get together and figure it
6 out.
7 MR. MENELL: I'm a little less confident. I
8 think it will take a long time. I think the Google
9 books case is an example where it just took a very long
10 time to get to what is a sensible or I hope moving in a
11 sensible direction.
12 I thank you for speaking up because in some
13 ways I feel that's a voice that I'm trying to channel.
14 I hear it from my students, from my kids, from that
15 generation and I just think it's hard to get that into
16 this discussion. Most of the people here are
17 professionals related to the copyright system and it's
18 the next generations that I think should be at the
19 forefront of how we think about these issues.
20 MR. ENGSTROM: Just to quickly note that there
21 is already a pretty robust enforcement mechanism where
22 content owners are searching and removing material like
23 this. It is difficult when you're dealing with
24 mashups. Obviously if courts who have a full range of
25 information and time to deal with whether or not these

1 things constitute fair use, you're going to get
2 overzealous content owners removing things that are
3 probably transformative and the law as it's currently
4 set up doesn't really provide significant
5 counter-measurers for folks who disagree with the
6 assessment of whether or not their mashup is
7 sufficiently creative to not violate the underlying
8 copyrights.
9 And obviously that's a question for -- a much
10 larger question for another panel. But it's important
11 to know that this is an issue that we need to think
12 about.
13 MS. PERLMUTTER: And again let me say in an
14 advertisement for another part of our work on the Green
15 Paper that we do have a multi stakeholder forum which
16 is open to the public which is examining the operation
17 of the notice and takedown system and how to improve
18 it. And I know a number of people in the room are
19 involved. If you're not involved and you want to
20 become involved, you can find information on our
21 website. And the next meeting of that forum is going
22 to be September 10th in Alexandria in our offices.
23 MS. CHAITOVITZ: Anybody online?
24 Okay. So I think Fred was there first and
25 then you go. And then that's it unless it's somebody

1 online.

2 MS. PERLMUTTER: These last two comments from

3 the audience and then we'll break.

4 MR. VON LOHMANN: Great. I'm Fred von

5 Lohmann from Google. I just wanted to correct some

6 factual misconceptions that I'm afraid -- you know,

7 we've heard a lot today about YouTube. We've heard a

8 lot today about a number of online platforms. I just

9 want to emphasize, I know that many of you are aware of

10 this, but just for the benefit of everyone, you know,

11 YouTube does represent the kind of private ordering

12 solution that many members of this panel have been

13 encouraging, unlike Professor Menell's suggestion that

14 somehow the older catalog material is not effectively

15 licensed on YouTube, that's just not the case.

16 We have done licensing agreements with an

17 enormous number of music publishers, the major labels,

18 a number of independent labels, motion picture studios,

19 television networks, not just in the U.S. but around

20 the world. And all of that has been done in a private

21 ordering mechanism.

22 So today, many people may not realize, but

23 today if you watch a video on YouTube and on that watch

24 page you see advertising and that content includes

25 content, pre-existing content, second order creativity

1 as David Given suggests. I disagree with him strongly
2 about the notion that that creativity is somehow
3 inferior to other kinds of creativity.
4 But when you see ads against that kind of
5 creativity, it's because content ID has a match and the
6 so-called original creators, to use David's phrase, are
7 being compensated, or at least the original rights
8 holders. Whether or not the original creators are the
9 ones who still own those rights is a very separate
10 problem which has plagued copyright for a long time.
11 But a lot of private ordering has been going
12 on and YouTube I think is quite proud of the fact that
13 we have paid more than a billion dollars to the music
14 industry alone in the last several years as a result of
15 those private ordering mechanisms. Not only has it
16 gotten rights holders compensated, but it has also
17 enabled an enormous amount of this new creativity that
18 we've seen online.
19 So I just want to make a sure we're all clear
20 that, you know, players, internet players, including
21 folks that it seems East Bay Ray thinks are part of the
22 problem, we have, in fact, been part of the solution
23 here and we'll continue to do that and continue to try
24 to grow that. Now, it's not to say there aren't
25 problems. That's not to say there aren't problems, but

1 there's a lot we've already done.
2 MS. PERLMUTTER: Let's let the speakers at the
3 mic do the speaking.
4 MR. VON LOHMANN: I just want to emphasize
5 one final point that I think is important here. I
6 think we have a real challenge going on online today as
7 amateur creators often starting on sites like Sound
8 Cloud or YouTube or other sites want to become
9 professionals. There is today a very difficult divide
10 for those creators.
11 I think copyright, the copyright system should
12 be encouraging that transition. That's the whole point
13 is to encourage creators, create the possibility for
14 creators to make a living in their creativity. What
15 we've seen frequently for YouTube creators is that
16 transition is made much harder by copyright law because
17 things they have done that they have been familiar
18 doing in their amateur life, as soon as they want to
19 step into the professional word, they confront a very
20 different clearance culture that is very difficult for
21 them to navigate consistent with the community and the
22 fans and the art they've already built.
23 So that's a challenge and, you know, of course
24 we at YouTube are working hard to try to solve that as
25 well, but I just want to make sure in this discussion

1 of remixing we don't forget that we not only -- you
2 know, we want to protect professional creators, we want
3 to protect amateur creators. But we also want to make
4 it as easy as possible for people to cross that line so
5 that they can get paid professionally for their work.
6 MR. MENELL: If I can just clarify, I was in
7 no way suggesting that YouTube was not getting
8 licenses. My comments were just saying that we could
9 have more works coming into that environment. If I
10 want to look for a lot of remix works today, I have to
11 go outside of YouTube because apparently that hasn't
12 opened up the channel widely enough and I think that
13 there would be tremendous opportunity if we created --
14 I'm viewing this proposal I made as a safe harbor that
15 would allow a platform to just accept that work and to
16 not have to worry about those details.
17 MS. PERLMUTTER: Okay. Last have the last
18 speaker and then we'll break.
19 MS. KRAY: Hi. I'm Stacy Kray, I'm a
20 singer/songwriter and an attorney and a graduate of
21 Boalt Hall. It's nice to see you again, Peter, after
22 25 years or so.
23 So I just wanted to say -- to make -- to
24 strongly disagree with the commentators who said it's
25 either early too or too late for a solution on this.

1 As an artist, it's incredibly frustrating not to have
2 clarity on these issues on both sides. And I will say
3 that I'm -- I rely on fair use in my own work. I also
4 want to be paid for my creative work.
5 So I do think that there's a complex network
6 here of copyright protection and the first amendment
7 which needs to be address. I'm really interested in
8 the idea of a sort of collective solution, either
9 through the PROs or through some sort of compulsory
10 license. And I feel like we have enough data at this
11 point to understand how something like that might work
12 and I'm really happy to hear that people are talking
13 about it and bringing out the solutions, including the
14 technology companies.
15 My question is about, you mentioned fair
16 use -- or sorry, this compulsory license as sort of a
17 safe harbor, and I'm wondering how they interplay
18 with -- if there would be an interplay with fair use
19 kind of judicial doctrine and/or compulsory license,
20 would there be a situation in which you go and you pay
21 the compulsory license, but it's not enough or it
22 violates fair use in some way so that it throws you
23 back outside of this statutory scheme.
24 MR. MENELL: Well, I'm trying to open up the
25 debate and I think that we could come up with a whole

1 bunch of characteristics that could be, you know,
2 discussed hypothetically to come up with what is sort
3 of an optimal mix for a unique form of art that has
4 emerged thanks to technology, and I think it very much
5 does have a history going all the way back. We as
6 humans want to engage with the art and this technology
7 has enabled us to do that in a very distinctive way.
8 So, you know, we can go narrow, we can go
9 broad. I'm proposing a somewhat narrow approach. I
10 think Corynne's concern is a serious concern, that, you
11 know, courts would say now everything would have to go
12 through this mechanism. On the other hand, congress
13 writes things into fair use, for example, we added
14 saying the unpublished nature of a work does not change
15 how this works out.
16 And so I see it as kind of a step-by-step
17 process. But I will say that if my vision were to go
18 into effect, it may be that the fair use issue fades
19 away for a lot of this part of the market, people who
20 were just saying, hey, I don't mind giving up a share
21 what I do. Essentially you're buying into a system
22 where you're saying, I want to borrow, I can borrow.
23 There are some sort of -- some pricing, we're
24 essentially resolving some of negotiation.
25 I realize that almost everyone on the

1 traditional music side doesn't like this idea because
2 they're fighting compulsories in all kinds of ways and
3 trying to withdraw from PRO, you know, consent. I just
4 think that's a backwards system because the people who
5 are growing up post internet, post Napster are not part
6 of that culture and won't participate in that culture.
7 We need to build a copyright system for them.
8 MS. PERLMUTTER: All right. I'm going to cut
9 off the conversation. I think we probably could go on
10 for another half hour or so, but -- so that we can
11 reach the other important issues too.
12 So what we'll do is we'll take a ten-minute
13 instead of a 15-minute coffee break and resume at
14 10:35.
15 (Recess taken from 10:24 a.m. to 10:37
16 a.m.)
17 MR. GOLANT: Hello, everyone. Thanks for
18 being here. We have a great panel ahead of us. The
19 same rules apply. If you have a question or a comment,
20 please put your placard up on the side. And what I'll
21 do first is read a little bit about what we're talking
22 about today and then we'll have each of you from my
23 side onward to the end introduce yourselves and let
24 everyone know where you're from and who you are.
25 So we're talking about the First Sale Doctrine

1 today. And the First Sale Doctrine as codified in the
2 Copyright Act allows the owner of a physical copy of a
3 work to resell or otherwise dispose of that copy
4 without the copyright owner's consent by limiting the
5 scope of the distribution. But the copyright owner's
6 remaining exclusive rights, notably the right of
7 reproduction, are not affected. As a result, the First
8 Sale Doctrine in its current form does not apply to the
9 distribution of a work through digital transmission
10 where copies are created, and the Copyright Office
11 conclude so in 2001 when they said the doctrine should
12 not be extended that way.
13 So, please, we'll start with Courtney and
14 going all the way down.
15 MS. KLOSSNER: Hi, I'm Courtney Klossner, I'm
16 a librarian and a digital media consultant. So I care
17 about this both from a librarian's perspective and also
18 for advocating for artists and fans in the music realm.
19 MS. McSHERRY: My name's Corynne McSherry, I'm
20 the intellectual property director for the Electronic
21 Frontier Foundation.
22 MS. RAVAS: Hi, I'm Tammy Ravas. I'm the
23 visual and performing arts librarian at the University
24 of Montana and I'm here as the chair of the legislation
25 committee of the Music Library Association.

1 MS. DARE: Hi, I'm Tiki Dare. I'm managing
2 counsel of trademark and copyright at Oracle
3 Corporation.
4 MR. EVANS: Hi, I'm J. Scott Evans. I'm
5 associate general counsel of copyright trademark and
6 marketing and at Adobe Systems Incorporated.
7 MS. SAMUELSON: Hi, I'm Pam Samuelson. I
8 teach here at Berkeley law school and I've been
9 thinking and writing about copyright for 30 years.
10 MS. MOORE: Hi, I'm Stephanie Moore with the
11 Entertainment Software Association and we represent
12 publishers of video games.
13 MR. GOLANT: Terrific. Thank you, all. And I
14 apologize, you might have heard some of these questions
15 if you viewed our online webcast from the past three
16 roundtables, but we have a new crowd, so we might have
17 different answers.
18 I'll start off with the first and it goes like
19 this. From a practical perspective, is there a need
20 for a secondary market for online music, video and
21 video games analogous to a secondary market for
22 physical media.
23 Who would like to take first crack at that
24 question?
25 MS. SAMUELSON: So I'll start by saying that I

1 think that exhaustion doctrine, first sale, whatever
2 you call it, is a doctrine that's had many functions
3 and many functions for hundreds of years. So I think
4 that secondary markets have increased access and
5 lowered price and meant that more people are able to
6 get access to things. And so while I see that markets
7 are changing and not everyone is going to agree to
8 allow their thing to be resold, I think that we have to
9 have an important conversation about not just the
10 importance of secondary markets but also other
11 functions that first sale has performed such as helping
12 to preserve prior works, avoiding censorship,
13 protecting consumer privacy, supporting consumer-driven
14 innovation, and enabling some personal uses that
15 actually are important too.
16 So I think that when we're thinking about
17 digital for sale, let's not just think about secondary
18 markets. Let's try to have a broader conversation
19 because this exhaustion doctrine has deep roots in our
20 law and our legal tradition and even if we can't carry
21 it over quite as easily today in today's environment as
22 in the past, I think it would be a mistake to say, oh,
23 there's no need for any digital first sale at all.
24 MR. GOLANT: Thanks. I think next is Corynne.
25 MS. McSHERRY: So mostly I'm just going to

1 agree with everything that Pam just said, not that
2 surprisingly. Because I think that's right. I mean,
3 as lawyers we're not supposed to fight the hypo, but I
4 do think that it is crucial that when we talk about
5 first sale we not just focus on secondary markets but
6 rather all of the other benefits that first sale
7 provides, particularly things like preservation, reuse,
8 tinkering, repair, those sorts of things that
9 people's -- basically people's ability to do with
10 digital goods what they are used to doing with physical
11 goods in ways that don't cause any commercial harm but
12 are simply, you know -- I think one of the goals here
13 should be trying to make sure that the rights and
14 expectations that we have had with respect to
15 copyrighted works in the 20 century can make it intact
16 to the 21st century and first sale encapsulates a lot
17 of that. So I think those things are crucial.
18 I also, though, do think that, you know, a
19 secondary market for copyrighted works, digital works,
20 would be extremely valuable. I mean, think about just
21 your classic first sale kind of situation, maybe
22 there's some music I might like to try on, maybe I'd
23 like to listen to, but I'm not -- I'm going to feel a
24 lot more comfortable buying that CD, again, taking us
25 back to the 20th century, if I know that if I don't

1 like it, I can resale it and get some of my money back.
2 Same thing for books, games and so on.
3 It would be, I think, valuable for creators
4 for such markets to exist because people will then be
5 more likely to experiment if they feel they can sort of
6 get some compensation back if it turns out that they
7 don't like the creative work that they have purchased.
8 You know, they're going to be a lot more comfortable
9 doing that.
10 One other thing I would say, by the way, I
11 just said purchased and probably part of the
12 conversation that we're going to need to have here
13 today is, you know, most of the time these days a lot
14 of the digital works that we acquire, we think we're
15 purchasing them but, in fact, we are only licensing
16 them. So that's another can of worms we can touch on
17 later.
18 MR. GOLANT: We'll talk about that soon.
19 MS. McSHERRY: We have to.
20 MR. GOLANT: Tammy, you're next.
21 MS. RAVAS: And I think I'll start to open up
22 that can of worms right now. As a music librarian, I want
23 to be able to add digital music files, whether they be
24 available via download or streaming, to my collections
25 so that it can be preserved for generations to come for

1 the reasons of research and scholarship. And the thing
2 is is that what Corynne just touched upon is the fact
3 that end-user license agreements govern these
4 particular purchases, if you will, rather than I think
5 a more correct term is purchasing a license and they
6 are worded in such a way that libraries cannot buy them
7 for collections or preserve them.
8 Recently Kevin Smith at Duke University on his
9 Scholarly Communications blog, he wrote a little bit
10 about this particular problem for music libraries. The
11 main example that music libraries have been using in
12 this particular scenario is a Los Angeles Philharmonic
13 performance of Symphonie Fantastique by Hector Berlioz
14 and that performance was conducted by Gustavo Dudamel
15 and that recording is only available via iTunes and
16 we -- we just have a real problem with breaking a
17 license agreement or breaking the law in order to get
18 materials into our collections. We want to be good
19 actors. We want to follow the law. We want to be
20 ethical when we are bringing in materials into our
21 collections.
22 There were a couple of librarians at
23 University of Washington who tried to negotiate with
24 Deutsche Gramophone and Universal Music Group to try
25 and get a copy of this particular recording into their

1 collections for preservation and negotiations kind of
2 broke down at the point where the licensing terms just
3 became untenable for the library. And, furthermore,
4 Universal Music Group said that they could only have a
5 two-year license to hold on to that particular
6 recording, which really defeats the purpose of being
7 able to preserve that item for generations to come.
8 So I'll just kind of end my summary at that.
9 Thanks.
10 MR. GOLANT: Thanks. Now, in terms of order,
11 we'll have Tiki, Stephanie and Courtney.
12 MS. DARE: Great. Thank you.
13 I am very sympathetic to Tammy's comments.
14 Since I'm not in the music world, it is really useful
15 to hear that there are some areas of licensing that are
16 just not working and that there are some gaps, and I'm
17 curious as to why those things would be. Like, for
18 example, did, you know, the music company not license
19 in enough rights to license them back out again in a
20 library scenario. So clearly there are some things to
21 solve.
22 But I really want to talk first principles and
23 why we have a doctrine of exhaustion or first sale in
24 the first place and I want to say that the verb I like
25 to use really is licensing. We are -- we are working

1 significantly to really try to tell people, no, it's
2 not a purchase when you interact with us about your
3 software, it's really a license. We try to be clear
4 because one of the things I've already heard this
5 morning is expectations, you know, Corynne is very
6 clear. We need expectations to be set and we need to
7 be able to act based on our expectations.
8 So licensing to, you know, to a software
9 company is very important because that's what allows us
10 to deliver innovation and choice. And we want to be
11 able to deliver innovation and choice. And a right
12 sized, a correctly sized bundle of rights to a library,
13 to a university so that we can offer a lower price
14 point, we want to be in a situation where maybe some
15 people can sample.
16 They might get a try and buy so you pay
17 something or you pay nothing to try it for 30 days,
18 then you pay your commercial fee. Your commercial fee
19 can be based on how many seats, it can be based on how
20 many uses. That really delivers, the license delivers
21 a tremendous amount of choice and flexibility and
22 innovation because what we are all about in software is
23 driving that innovation.
24 And when I was looking, when I was doing some
25 research for this about what are the first principles,

1 why do we have a doctrine of exhaustion or first sale,
2 a lot of it was about letting consumers have
3 expectations or expectations realized about their
4 tangible property. And so let's liken that, if you
5 have tangible property that has no copyright or IP
6 associated with it, it's a lamp. When you're done with
7 a lamp, you can sell it at the thrift store, you can
8 sell it at a garage sale, you can pass it on to someone
9 else who's going to use it. And maybe that makes sense
10 for a book or CD.
11 But when you start talking about software,
12 that doesn't make sense pretty quickly. So, for
13 example, if I -- a lot of the software that Oracle
14 provides is really mission critical. What you do with
15 software is -- it supports your telephone calls. It
16 supports your bank transactions. It protects your
17 personal data. It protects all kinds of functions that
18 are absolutely critical for our society. And to do
19 that, I need to have a more nuanced relationship with
20 you.
21 I need to make sure you get patches and
22 updates from me. So your expectations are met and you
23 can continue to run these mission critical functions
24 safely and securely and effectively. And for all of
25 those reasons, we're very passionate about license and

1 not purchase and think that there's really not a place
2 for digital first sale in that environment with those
3 contingencies.
4 MR. GOLANT: Okay. Stephanie.
5 MS. MOORE: Yes, I agree with almost
6 everything that's been said. Starting out with
7 Professor Samuelson, I do -- I agree that secondary
8 market alone should not be the focus of what we examine
9 for copyright policy moving forward. But I associate
10 more with what Tiki has just said in terms of the
11 licensing model which certainly we have been pioneers
12 in the video game industry working with licensing.
13 I would also go back to kind of the first
14 principles. I think that what copyright law and policy
15 is designed to look at is whether or not the dual goals
16 of incentivizing copyright owners and serving the
17 public interest ate met. And I -- licensing, I
18 believe, does meet those -- meet those goes goals and
19 looking at whether, you know, some of the benefits that
20 first sale offered in the physical environment is not
21 necessarily -- there are benefits that we are creating
22 in the digital market that weren't available for first
23 sale for physical products, like greater access for the
24 consumers. Just this morning EA announced that they're
25 launching an online access gaming that will be at $30 a

1 year. So price points are different. We're just able
2 to give the consumer a much broader experience in the
3 digital environment that does not necessitate a change
4 to the First Sale Doctrine.
5 MR. GOLANT: Thanks for your comment.
6 Courtney, you're up.
7 MS. KLOSSNER: I want to address both what
8 Tammy and Tiki were talking about. I sort of disagree
9 with some of the things Tiki was saying. It applies to
10 software and databases in the library where things --
11 people -- they are licensed and we expect those things
12 to be updated. We expect patches. We expect that, you
13 know, online encyclopedias will be updated with new
14 information and current events and that sort of thing.
15 I don't think the same expectations exist for
16 media such as audio, e-books, videos, those things,
17 once they're made, they are concrete, it's a finished
18 product. And that's where I see libraries running into
19 a lot of problems with ownership. We don't own
20 e-books. We don't own some of the videos that we're
21 having access to. And we're unable to buy them and
22 we're unable to buy them lawfully and add them to our
23 collections, as Tammy said. And I think that's a real
24 problem. With licenses there's lot of surveillance,
25 there's a lot of tracking that goes on with who owns

1 what and where it goes. Public libraries have always
2 tried to preserve patron privacy. Some of that was
3 taken away under the Patriot Act, but I think that we
4 still need to hold that, you know, as part of the
5 profession and incorporate into the digital realm that
6 users have the right to privacy when they use
7 materials. And licensing takes away that privacy and
8 ownership allows us to have a little bit more privacy
9 in that area.
10 MR. GOLANT: Thanks. So next we'll have Pam,
11 then Corynne, then Scott.
12 MS. SAMUELSON: So I wanted to do my opening
13 remarks to say, don't just think about secondary
14 markets because first sale is really much more
15 important and much broader. And one of the things that
16 it does is that it lowers transaction costs, and that's
17 a pretty important function that it plays because if
18 I'm up in Napa Valley, as I was this morning, and I
19 decide I want to give an old computer to one of the
20 local schools, that's a transfer of ownership. It's
21 going to have some software on it. I will have bought
22 a new copy of the software when I get my new machine.
23 But that's an example of something where there is, in
24 fact, from my standpoint, I'm a copyright person, but I
25 think from the standpoint of most people to be able to

1 give away an old computer, to give away my iPod to my
2 sick grandmother is something that actually also is
3 important. And I'm not going to get in touch with
4 every single one of the software companies that might
5 have licensed software for that machine.
6 Also think about the internet of things, all
7 right. So if you -- if our refrigerators, our
8 toasters, our -- every device in our household is going
9 to be software, are we really going to have a thing
10 that if there's software in it, it can't be resold, it
11 has to -- you have to go back to the original
12 manufacturer and get a license to transfer it or you
13 have to just destroy it because, you know, there's no
14 digital first sale.
15 So I think as you're trying to think about
16 this, I understand the point about the enterprise
17 software is not exactly the kind of thing that we're --
18 that we're -- is part of a digital first sale
19 conversation. There are going to be different parts of
20 the market where a digital first sale issue will arise.
21 But I think if we just sort of say, well, the video
22 game people are doing this and the enterprise software
23 people are doing that, therefore, there isn't any need
24 for digital first sale, I think that's a mistake.
25 MR. GOLANT: Thanks for your comments.

1 Corynne.
2 MS. McSHERRY: I got to stop following Pam
3 because she always says what I want to say right before
4 I plan to say it. So at that -- I don't want to be
5 repetitive, though, so I will just agree with her that
6 part of the conversation needs to be a recognition that
7 more and more goods come with software in them. Our
8 cars come with software in them. Everything comes with
9 software. And that is going to increasingly be true
10 and software is copyrighted and that means that you may
11 buy a car, but you're actually licensing the software
12 that helps run that car. And that's a problem.
13 It's a place where -- what I would like to
14 emphasize is an additional problem is that can mean
15 that copyright can create a competition problem. So,
16 for example, if an independent repair person needs to
17 be able to access the software in your car in order to
18 fix your car, there might be a problem if, for
19 example, the license agreement that's attached to that
20 software says that you can't go to an independent
21 repair person, that, in fact, you need to only go to
22 the authorized dealer, right. So suddenly you have a
23 situation where you think what does copyright have to
24 do with repair, that seems wrong. But, nonetheless
25 that is a problem that can emerge.

1 Just to give you a specific example, someone
2 just sent me an e-mail this morning pointing out that
3 the Nook, the e-book reader the Nook comes with a
4 license agreement that forbids the purchaser, in quotes,
5 from servicing their own device. So that means that if
6 your Nook breaks, you can't fix it yourself according
7 to the terms of the license agreement. That just seems
8 wrong.
9 And so related to that I want to -- speaking
10 back to Tiki's point, not just Tiki, but something I
11 hear a lot in these conversations from content owners
12 is they will say, look, we have more and more flexible
13 licensing regimes to help people have access to
14 creative works. You can access it on six different
15 devices according to X license or whatever. It's
16 really crucial that we keep in mind that people want
17 more than access to works, right. A license that only
18 gives you access under a whole set of conditions
19 doesn't really give you much except for just that.
20 I represent people who want to tinker with the
21 works that they purchase. They want to tinker with
22 their stuff. They want to modify it. They want to
23 improve it. They want to innovate. And we need to make
24 sure that those rights and expectations are preserved
25 and right now in the digital context it's very

1 uncertain.

2 MR. GOLANT: Thanks for that.

3 Scott.

4 MR. EVANS: You know, I'm speaking for a

5 company that's going through an evolution and changing

6 its business model. We no longer sell off-the-shelf

7 software. Everything now is downloadable and will

8 hopefully morph from there as the innovation grows.

9 And I think that, you know, one of the reasons

10 we went to a business model like this, we've always licensed

11 our software, even our software that was in a box that

12 you bought, was to lower the price point and make it

13 more accessible to users of the software, but also to

14 be able to bring as much spontaneous innovation to the

15 products as possible so that users weren't always

16 having to re up to buy software in a different version

17 and make another huge investment in a large boxed

18 system.

19 And we are amazed that what we see now is

20 there's also been a robust secondary market and there's

21 always been a robust licensing regime. And what I

22 think we're most concerned with is because there are

23 new issues coming up with how licensed software is

24 being embedded into other products, somehow that

25 justifies the destruction or the deconstruction of

1 licensing models that have been in place for years with
2 various and sundry types of things, music, with regard
3 to software. And.
4 I think that's where we're most concerned is
5 rather than parsing the problem dealing with the new
6 issues that come about and are challenging in a
7 refrigerator that has licensed software or a car that
8 has licensed software or a Nook that has licensed
9 software, how does a user who purchased this deal with
10 those issues and has a license gone too far most.
11 But I think what I'm most concerned with is
12 when then you have lobbying efforts to throw everything
13 into that basket and say now let's begin to destruct
14 every licensing model that we're uncomfortable with or
15 we don't like. And I'm not sure that's necessarily
16 solving the new issues. I think it's just
17 deconstructing models that people seem to not like.
18 And there is an economic benefit to allowing a software
19 owner be able to get some economic benefit from the
20 innovation that they put out into the market. And the
21 most efficient system in the software industry for
22 many, many years has been the licensing model.
23 And I think that's what we're most concerned
24 with is, you know, we do make in Adobe's system we have
25 different pricing models. We have some limited

1 transfer rights within that as long as they are not
2 being abusive. So I think it is imperative that also
3 the industry recognize that it has some sort of
4 obligation in this debate to build systems and licenses
5 that take into account archival needs and libraries.
6 That's some responsibility.
7 But I'm not so sure we need a legislative fix
8 for that. I think we need industry-led innovation into
9 the contractual relationships to do that. And I think
10 those models already exist from people who realize that
11 there has to be some sort of reasonableness in the
12 business models that they construct.
13 MR. GOLANT: Thanks for your comment. So
14 we'll go with Tammy, then Tiki and then go on to a
15 separate question.
16 MS. RAVAS: So to get back to some of what
17 Scott was saying, I think ultimately what we really
18 want in terms of libraries is we would like to have
19 some sort of an exception where -- that would immunize
20 a library from liability when pursuing their normal
21 collection-building activities and lending activities
22 when it comes to streamed or downloaded works. It
23 would allow us to basically complete our missions. And
24 also honor the rights of rights holders too.
25 So that's really what we're looking for. I

1 know that these roundtables aren't really meant to
2 discuss solutions so much as it is to describe the
3 problem, but I just wanted to throw that out there.
4 One other thing that I've noticed myself as a
5 practicing music librarian is although I know that my
6 two colleagues at University of Washington did not have
7 any real success negotiating with UMG over the Dudamel
8 recording, it has been possible for me to reach out to
9 some independent artists, specifically alumni of the
10 institution for which I work, and to actually purchase
11 CD versions of their music that is only available via
12 download. And that has been somewhat of a successful
13 model, but it's kind of like finding needles in
14 haystacks, so to speak.
15 So that's one area where I've had some
16 success, but it would be so much better if libraries
17 were able to have the ability to be able to get access
18 to these files and to be able to preserve them and to
19 advance their mission as cultural institutions.
20 MR. GOLANT: Thanks. Tiki.
21 MS. DARE: So I want to go back to the
22 internet of things, examples, and all of these do go
23 back to the, you know, the what do you do with your
24 personal property and how can you -- how can you
25 dispose of it and transfer it without exceptional

1 transaction costs and in a way that administerable. I
2 think a lot of it again is about setting up
3 expectations in the beginning and I can certainly see,
4 you know, the Nook example where you have something
5 that your license says that you can't repair it, you
6 can't do it yourself, you can't take it to an
7 independent, those are certainly, you know, frustrating
8 things in the road. So I think there's a lot of
9 evolution of licensing.
10 And the questions asked here are good. I'm
11 very interested in what kinds of -- what kinds of core
12 principle, first principles we can articulate around
13 the internet of things. Because that really is the
14 thing that's coming next, we're not there. Most of us
15 don't have refrigerators that talk to us. I don't want
16 one, actually. I'm very comfortable going on record
17 that I am often frustrated that my car is not
18 mechanical and I have replace expensive computers every
19 couple of years within the car instead of just, you
20 know, being able to manipulate mechanical things.
21 But so what are the first principles that we
22 can articulate around making sense of software that is
23 embedded in a they think in the internet of things.
24 MR. GOLANT: Thanks. I know, Corynne, you
25 have your card up. Let me ask this because it might be

1 on the topic you might want to talk about. And that is
2 consumer expectations.
3 So what are consumer expectations when they
4 buy a movie or a television show or a game online
5 through iTunes or Amazon and how clear are the
6 contractual terms, and do most people think when they
7 buy something, they can resell it when they purchase
8 it?
9 MS. McSHERRY: That actually was something I
10 was going to speak to, which is I think that part of
11 this discussion needs to be a recognition that is now
12 verified by empirical research of what we all know,
13 which is no one reads these licensing agreements.
14 Okay. I mean, but fortunately some very
15 helpful academy researchers a few years ago went out
16 and verified that so we can cite to something for it.
17 But we all know it is true, right. So much of our
18 activity is governed by a complex web of contracts and
19 terms and licensing agreements that no one reads and no
20 one is aware of but nonetheless, unfortunately, the
21 case law suggests, are nonetheless enforceable against
22 us.
23 So it's kind of funny when we even talk about
24 consumer expectations. It's almost hard to have a
25 rational conversation about consumer expectations

1 because when it comes to consumers as opposed to
2 perhaps enterprise -- the enterprise context, their
3 expectations may be based on a whole set of assumptions
4 that have no relationship to the reality of what they
5 have actually been agreeing to.
6 On the flip side, though, we also know from
7 other research that's been done with respect to privacy
8 in particular, that the transaction costs, let's just
9 say we tell consumers, okay, everyone go read those
10 EULAs before you sign them. That is also untenable. I
11 mean, thing about that, the hours that people would
12 spend reading EULAs figuring out and trying to figure
13 them out, you know, I just don't think that's the kind
14 of national investment that we want people to be
15 making, which is why I think Pam's point earlier about
16 first sale and transaction cost is so important.
17 We really need a sort of rational approach
18 that doesn't require complex licensing agreements, at
19 least when it comes to sort of basic things that
20 consumers would expect to do, like be able to innovate
21 and modify their devices or give it to a friend or
22 recycle it and so on, right. Those things should be
23 permitted without someone having to read a contract
24 first.
25 MR. GOLANT: Thanks for that.

1 Courtney.
2 MS. KLOSSNER: I just want to speak about
3 consumer expectations within the library. No patron
4 understands why there's a wait list for an e-book.
5 Consumers understand that these things are easily
6 copyable and that we need to acknowledge that there's a
7 big gap between what people expect within the public
8 library and loaning materials.
9 We may talk about the short term loan problem
10 later, but there is a need to understand that people
11 want to borrow electronic materials and return them to
12 the library in a legal framework and we're prevented
13 from loaning a lot of those materials because of these
14 EULAs.
15 MR. TILL: So can I just jump in and ask,
16 Courtney, what is your solution? As a librarian, are
17 you urging that you can buy a single copy and then loan
18 it out to multiple people at the same time?
19 MS. KLOSSNER: I would love to see libraries
20 be able to buy a single copy and own it and loan it in
21 a digital format. One of the reasons I got really
22 involved with this was because I used to work in
23 inter-library loan, I spent a lot of time mailing CDs
24 and DVDs out to people and the head of the department
25 said we would never see a day we could loan digital

1 copies to other libraries. And I would like to see
2 that happen one day.
3 MR. TILL: But loan multiple copies of the
4 same original? In other words, are you and are
5 libraries okay with the idea that if you buy a single
6 copy, you can only loan it to a single person --
7 MS. KLOSSNER: I'm okay with -- I think
8 libraries are okay with buying a single copy and
9 loaning one, but there's a little bit of education on
10 the patron side of why we only own one digital copy at
11 a time.
12 MR. GOLANT: Tammy.
13 MS. RAVAS: So just to kind of echo what
14 Corynne and Courtney have just said, my average patron
15 who comes up to me and says oh, okay, well, I'm just
16 going to buy this on iTunes and, you know, go and do
17 whatever with it and ask me further questions about it
18 with respect to, you know, how much they can and can't
19 do with it, I said, well, have you read the end-user
20 license agreement and some of them say what's an
21 end-user license agreement. Others say oh, really, I
22 can't do whatever I want with it, and I say nope, you
23 can't you. You mean it's not really mine, nope, it's
24 not really yours.
25 So I just wanted to go on record as saying

1 that. And I also agree with Courtney in a sense that,
2 yes, I think that there is an education aspect to all
3 of this where patrons in the general public I think
4 need to be made more aware of the content that they
5 purchase, they're not really purchasing it.
6 MR. GOLANT: We'll have Tiki and then
7 Stephanie.
8 MS. DARE: So especially because we have two
9 librarians on the panel, I had a couple of questions.
10 One of the examples that I really like in this area is
11 the e-textbook to explain how different that is from
12 the old textbook. One of the points that Courtney made
13 when she was talking about library and library
14 ownership was certainly when I get a digital book, I
15 should just be able to add that to the collection.
16 That's one of the things I need.
17 And she'd made the statement that the digital
18 book is basically finished. There's not more coming.
19 It's not interactive. I mean, basically it is content
20 that someone or multiple people wrote from start to
21 finish and it's done; whereas the e-textbooks now have
22 some real dynamic properties. And examples are it's
23 not just not the content, but you can immediately link
24 to additional resources online. You can get to videos
25 that are streamed. You can get to still photos that

1 help articulate the content. You can get to
2 experiments and instructions. You can get to exams and
3 exam preparatory material. And you can get things
4 scored. So your e-textbook comes a much more rich and
5 dynamic learning tool basically.
6 And so I think we would not -- first of all,
7 it's hard to define where that content ends because
8 there's so much supplemental content and I think it
9 certainly makes sense that instead of an outright sale,
10 you would have a license because what if you're a
11 professor and you want to make the exam materials
12 available to, you know, all 100 students in your, you
13 know, your freshman survey course or, you know, maybe
14 it's a seminar and it's fewer. But you're going to
15 still have -- you're going to have those differences.
16 So I wanted to just point out that there is
17 this example of content that doesn't finish basically.
18 And I'm interested again in more ideas about how you
19 manage that content because licensing seems to be the
20 most flexible way to go, understanding that setting
21 expectations and having a license that is readable
22 where there would be a fair expectation of reading it
23 and understanding it something that the panel is
24 pulling out as a thread.
25 MR. GOLANT: Thanks. Stephanie, you're on.

1 MS. MOORE: Yeah, this is a pretty
2 free-ranging conversation here we're having, but I
3 guess I want to return to something that Corynne said,
4 I guess. And I would note that, I mean, the complexity
5 of EULAs is not, you know, unique to copyright. I
6 mean, we're in a digital era where the complexity of
7 licensing agreements kind of transcend everything that
8 we are dealing with. I mean, tech companies are
9 struggling with and FTC is struggling with trying to
10 figure out how, you know, privacy policies are made
11 more digestible to consumers.
12 But when we talk about consumer expectations
13 and consumer desires, I still think that, you know,
14 while very, very important, and obviously all of us
15 here with businesses that we represent try to develop
16 our business models that are responsive to consumers,
17 that's not always synonymous with what's in the public
18 interest in terms of copyright policy.
19 So, I mean, I think a lot of these questions
20 that are being examined represent kind of an
21 intersection of a lot of positions and competition
22 policy and contract clarity and changing 109, which is
23 the subject of this panel. I just, I don't see an
24 effective legislative solution that has even been
25 offered here that would respond to the questions that

1 everyone has been raising.
2 MR. GOLANT: Thanks for that.
3 Pam.
4 MS. SAMUELSON: What a nice segue to what I
5 was going to say, which is that the Berkeley technology
6 law journal will very soon be publishing a paper in the
7 next great Copyright Act symposium that we hosted here
8 at Berkeley in April, and the title of the paper is
9 Legislating Digital Exhaustion.
10 One of the things that it does is it both
11 gives some examples, if you were going to try to
12 accommodate some digital exhaustion, there's a rules
13 approach that's suggested and a standard spaced format
14 also. I don't know if this is up on the web yet but it
15 will be in the next week or so. And I think it's much
16 worth looking at because it picks apart what sort of
17 the specific issues might be if you were going to try
18 to take digital exhaustion at least some of the way
19 that exhaustion has been over time.
20 And so the fact that consumers bought a
21 particular digital good where it says buy now, click
22 here, that's going to give the consumer an expectation
23 that, in fact, it's a sale, that it's a purchase, and
24 "buy" is a word that in ordinary discourse, maybe not
25 in licensing discourse, but in real discourse among

1 real people means I bought it. I own it. And so there
2 is actually, I think -- so if you say license this now,
3 that's going to set consumer expectations in a somewhat
4 different direction.
5 But what I see is, in fact, that a lot of
6 times digital goods are, in fact, "buy me now" is
7 something that lends -- leads people's thoughts in a
8 particular direction. And so that's one of the factors
9 that Perzanowski and Schultz suggest should be taken
10 into account as consumers -- how did the transaction
11 set up consumer expectations.
12 I think another factor which hasn't been
13 mentioned but which is obvious, at least, again, not
14 with respect to software because licensing models have
15 been in play in that space for a longer period of time,
16 but we're used to buying books. We're used to buying
17 music. We're used to buying movies and other types of
18 copyrighted works. And it's the same music whether I
19 buy a CD or whether I buy it on iTunes. And as an
20 ordinary person, I don't see why the medium should
21 change that so much, at least in terms of way that the
22 general public understands and interacts with things.
23 And so the fact that historically for decades
24 and decades and decades, books and other things have
25 been sold. I also will tell you I don't buy e-books.

1 I don't like them. But also I'm a really, really great
2 sharer of books with other people. And so, you know,
3 I'm going to be really unhappy if there are books that
4 I want to read that are only available in e-book format
5 because not being able to share things with my friends
6 is really like a violation of my strong desire in this
7 particular space.
8 Can I say one last thing?
9 MR. GOLANT: Go right ahead.
10 MS. SAMUELSON: And that is that there are
11 some e-books that, in fact, are sold outright. Okay.
12 My husband actually is the author of a book and he's
13 making his e-books available for sale to his students
14 at $10 a pop. So it's not the case that everything
15 that's an e-book necessarily is, in fact, a licensed
16 transaction and therefore consumers' expectations have
17 changed entirely. I don't think that's right. I think
18 that we're in a transition period for sure, but I think
19 the consumer expectation issue is a really important
20 one. I'm glad you asked the question.
21 MR. GOLANT: Terrific. Tiki and Tammy.
22 MS. DARE: So I want to go on record saying I
23 have successfully loaned and been loaned Kindle books,
24 it actually -- it works. Maybe not as smoothly as
25 handing your friend your paperback, but it's there.

1 Pam, I was hoping you would spin out for me a
2 little bit the model of selling the used iPod or
3 selling the used computer because I actually, I
4 purchased an iPod off of either Ebay or Craigslist and,
5 you know, what I really wanted to put on it was
6 something different than the young man's music that was
7 present.
8 So I guess the question is, is model that when
9 you go sell it, you know, certainly you have no
10 obligation to strip stuff off at this point, but do you
11 have -- is your model that you would be giving rights
12 to all the songs that are on there? I mean, as soon as
13 you update it with your own playlist, you know,
14 everything then defaults to your bundle of rights that
15 you have as a user essentially. So that's -- I'm
16 curious what your thought is about that.
17 And then separately, just because it's bigger,
18 if you go through the details of the used computer, you
19 know, often because of data theft you want to do
20 something about that drive. But if your primary
21 motivation at sale time isn't privacy, then is the
22 model -- would you think that you could make available,
23 you know, the Microsoft Word and Excel package that's
24 on there, you know, the Adobe Photoshop package that's
25 on there, you know, all of that stuff. I'm sorry to do

1 that, Scott. So I'm curious what your thought is about
2 selling that in a used transaction.
3 MS. SAMUELSON: We don't know the answer to
4 that question in the sense of -- it's not just about
5 me, right. It's about people give away computers all
6 the time. I think they may strip out some things -- I
7 think people give away computers all the time. And I
8 think that they do it in a way that makes them think
9 that I -- you know, there was a purchase of the
10 Microsoft program when I bought this computer, I'm
11 buying a new computer, I'm buying a new copy of that
12 software. That's what ordinary people think.
13 And since computers are given away all the
14 time, I agree that privacy should be one of the things
15 that people should pay attention to. But I'm just
16 telling you as a realistic matter, what I would do is
17 different from what ordinary people would do because
18 I'm a copyright lawyer. So I will at least notice that
19 there is this issue that I would have to grapple with
20 but, you see, I actually believe that -- digital
21 exhaustion has been in the statute since 1980,
22 Section 117 actually allows the transfer of software
23 along as you delete your copy that you're giving away
24 or at least you buy a new one, which is what my
25 reselling the computer or giving the computer to a

1 school might involve.

2 And there has been this lingering question,

3 which I Know is a lot of the source of the anxiety

4 among some of the people on this panel about whether

5 when I bought that software package, was that really

6 and enforceable license that means that nothing can be

7 transferred, or was that, in fact, a sale. And there

8 are a number of indicia of a sale, at least for

9 software that is going into the private possession of

10 individuals.

11 And I just -- you know, it's matter of

12 reality. I think that people have not thought, oh, I

13 can't give this computer to my grandmother, I can't

14 give this to my school because I'm only licensed to use

15 this software individually. I just think that's not

16 the way people think.

17 MR. GOLANT: Thanks. This is how it's going

18 to go because I saw the time was called. We'll have

19 Tammy, because you had your card up first, and then

20 we'll go to the last question and then we'll go to the

21 audience. So please, Tammy, go ahead.

22 MS. RAVAS: Okay. So a few things, going back

23 to what Courtney was saying about privacy and also what

24 Pam was saying about privacy, it also matters an awful

25 lot to academic librarians and music librarians too.

1 A couple of other points that I wanted to
2 make. When I think about licensing and copyright, I'll
3 just go on record here as saying that I'm not a lawyer
4 and I've never played one on TV, but I think that when
5 we're talking about copyright and licensing, they are
6 two definitely different things. They are separated,
7 kind of related, but they are separate.
8 So one other scenario I just wanted to bring
9 up is the notion of -- going back to Pam's point with
10 buying versus licensing. And let's say that, for
11 instance, I was working with a graduate student or a
12 scholar who wanted to critique a recording that was
13 only available online via licensing and he or she
14 wanted to play it during a scholarly presentation,
15 would that violate the end user license agreement?
16 What if they wanted to publish it. Publish, you know,
17 snippets of it just to demonstrate a particular point
18 in scholarship.
19 If they were doing that with a physical CD,
20 they would be able to do that under fair use. The
21 concern that I have is that these licenses are pretty
22 much unilateral. There's really no wiggle room for a
23 consumer to negotiate with the rights holder on them
24 and it's setting up a separate regime to what we
25 already have existing within copyright law.

1 So that's all I got. Thanks.
2 MR. GOLANT: Thank you for that. So I'm going
3 to follow up with this question. Everyone can chime
4 in.
5 Would a voluntary best practices regime
6 establishing standard definitions, terms and conditions
7 for online rentals and purchases be useful. And how
8 could such a regime be constructive so that it takes
9 into account the needs of both creators and consumers.
10 Okay, Tiki, you're first.
11 MS. DARE: We would always prefer voluntarily
12 than having it legislated because I think there is so
13 much understanding in the industries about who our
14 customers are, what innovations we want to deliver to
15 them, what choices we want to give. I mean, certainly
16 there's been some criticism today about end-user
17 license agreements for consumers and is there some work
18 to be done by industry there. I think, you know,
19 that's a fair point.
20 I'm very interested, again, you know, going
21 back to the idea of first principles and what's on the
22 statute. I mean, there's that idea that, you know, you
23 can transfer it as long as you delete your own copy.
24 Just like we don't think anybody reads end-user license
25 agreements, we don't think anybody deletes their copy.

1 So that's -- you know, there are
2 administrability concerns. Again, I think industry has
3 the expertise and thoughtfulness and the raw
4 information to do that, and I think we know also as the
5 industry where we want and need to innovate. Another
6 example is we want to give not just flexibility in
7 terms of what the end product is but also, you know,
8 innovation and flexibility and choice around pricing so
9 that academics can access it and do all of the things
10 they needed to do and libraries can access it.
11 So we could price in more transferability, for
12 example, if more transferability is desired. And
13 again, I think we want to deliver the widest range of
14 choice available so all of those things converge on a
15 voluntary set of principles.
16 MR. GOLANT: Corynne.
17 MS. McSHERRY: So I think one of the tensions
18 that that actually speaks to, also, but I think for the
19 past 45 minutes we keep hitting is tension between
20 different contexts within which software, for example,
21 and digital goods appear. So a set of best practices
22 that might sense for enterprise software I fear
23 wouldn't make a lot of sense for consumer goods. So it
24 may be that we might want to have more than one.
25 But I think a simpler approach might be to

1 just agree that certain rights aren't waivable in a
2 license. And because one of the concerns, and I'll be
3 frank, that I have in all these conversations that
4 we're having about copyright reform is that we will fix
5 copyright law in any number of ways to make it better
6 and more fulfill its purpose of encouraging creative
7 expression.
8 But then all of those changes will go away in
9 the form of end-user license agreements that everything
10 will become attached to. So we will all spend a lot of
11 time and energy on legislative solutions that will
12 simply be waived by consumers entirely unknowingly when
13 they click "I agree" or "buy."
14 So I think that one of the things that should
15 be on the table is a simpler solution, hard perhaps
16 politically but more elegant and more logical, is to
17 simply agree that certain rights just shouldn't be
18 waived.
19 MR. GOLANT: Thank you, Pat.
20 Tammy.
21 MS. RAVAS: I just want to add to what Corynne
22 was saying in that, well, since I've been a librarian,
23 libraries have been negotiating with database
24 distributors on those very things with respect to we
25 will not waive our right to fair use. So if we

1 download an article from a particular database, our
2 users can still make fair uses of that material, for
3 instance, that might be one way to kind of look at it.
4 That's all I had.
5 MR. GOLANT: Thanks. And Courtney.
6 MS. KLOSSNER: I want to build on what Corynne
7 said, but also -- and I feel like this is kind of not a
8 great popular thing maybe to say in front of recording
9 artists, but one of the things that's great about first
10 sale and ownership is that you buy something once and
11 then after that you don't have to worry about tracking
12 payments back to the artist or to the license holder.
13 And I think that's really important if we do
14 come up with a set of standards to acknowledge that
15 with first sale a lot of times the money only flows
16 back to the creator the first time and that in future
17 uses that maybe the money won't be flowing back to the
18 same person and how to account for that, whether
19 through some other kind of residuals or licensing fees
20 or something. Again, I'm concerned about the tracking
21 involved in all of that, but I want to acknowledge that
22 sometimes the artist and the copyright holders don't
23 get money they may deserve because of first sale.
24 MR. GOLANT: Thanks for all your comments.
25 We'll open it up to the floor. Anybody who wants to

1 have comments, questions, please go ahead. As you
2 know, we have mics on both sides. Right, if anyone is
3 online -- thank you.
4 We're going to start with Mr. Sheffner over
5 there to my right.
6 MR. SHEFFNER: Thank you. Ben Sheffner with
7 the Motion Picture Association of America. I first
8 just wanted to talk briefly about this idea of consumer
9 expectations. I find the discussion fascinating.
10 Obviously over the last 15 to 20 years the internet has
11 revolutionized a lot of different industries. We have seen
12 established industries crater. We've seen new
13 industries grow up. We've seen old established
14 businesses fail and new multi billion dollar ones grow
15 up. Which is great. Creative destruction, change, and
16 we all celebrate it.
17 It's really interesting to hear the talk,
18 though, about consumer expectations. There seems to be
19 this almost a consensus that consumer expectations are
20 this static thing that should never change even though
21 the world is changing around us. I think we have to
22 acknowledge that consumer expectations, just like
23 everything else in this world, are changing. One
24 aspect of that is the change in consumer expectations
25 and the consumer desires from ownership to access. And

1 it's not one or the other. I realize there are shades
2 of gray here. But the world is moving in that
3 direction.
4 I used to buy a lot of music. I used to buy
5 lots and lots and lots of CDs. I haven't bought a CD
6 in years. I buy access. I buy it through Pandora. I
7 buy it through Spotify. Same thing even with books. I
8 subscribe to Audible.com. I drive around a lot. And
9 it gives me access to a new book every month, I think
10 it's great. I don't own a thing.
11 And it's happening even in a lot of things
12 that have nothing to do -- in the physical -- that are
13 more based in the physical world. I know there's
14 business models where people, for example, they don't
15 own tools anymore, they have these websites where you
16 can go and rent tools from somebody. Which is great.
17 My point is simply that consumer expectations
18 change. We see that in the media world as well,
19 whereas I once bought CDs, I now have access to them.
20 Whereas I once bought DVDs, I now have access to them
21 through things like Ultraviolet or Disney movies
22 anywhere. So we don't want to try to preserve or
23 change the law in a way that makes -- that sets
24 consumer expectations in stone.
25 Two more really brief points. On end-user

1 license agreements, I understand no one is going to
2 stand up here and say it's great that end-user license
3 agreements are 40 pages long in eight-point type,
4 nobody loves those. But consider what the alterative
5 is, and I'm going to steal an anecdote from Allan
6 Adler from the publishers who spoke at the event in
7 Cambridge.
8 He says, you know what, when you go and rent a
9 car and you're standing there at the airport and you're
10 really frustrated because there's ten people in front
11 of you and they're having you look through this long
12 thing and decide, you know, are you going to take this
13 option or that option or get this kind of insurance,
14 well, consider the alternative. Consider if you had to
15 bring your lawyer and Avis had to bring their lawyer
16 and negotiate that thing from scratch. Talk about
17 lowering transaction costs.
18 End-user license agreements, while imperfect,
19 and they can always be simplified and improved, are a
20 tremendous lowerer of transaction costs.
21 And just lastly and briefly, on the idea of
22 the buy, the buy button on a website and how that
23 misleading, I think it is probably more accurate to say
24 what you're doing is you're not buying a physical item,
25 of course you're buying a license. But that's not

1 strange or unusual or even misleading. I mean, think
2 about all the different kinds of transactions where you
3 might think about in common parlance that you're buying
4 something, but you're obviously not buying a physical
5 item .
6 One example, I flew up here on Southwest
7 Airlines today. All my transaction was online. I went
8 on the website, I bought my ticket, there was a thing
9 that said "buy" or "purchase," I don't remember
10 exactly. I'm not getting a physical thing. I knew I
11 wasn't getting a physical thing. What I was buying was
12 the right to board the airplane and have it take me
13 from Burbank to Oakland this morning.
14 So, yes, can there be improvement in the way
15 that these things are described so the consumer knows
16 exactly what he or she is getting, absolutely. But it
17 doesn't mean that saying that you buy access to a movie
18 or a piece of software or piece of music is necessarily
19 misleading. Thank you.
20 MR. GOLANT: Do you want to say something,
21 Corynne?
22 MS. McSHERRY: Just one quick point. I can't
23 stress enough though that the people I represent want more
24 than access, right. Remix artists, for example, want
25 more than access. They want to be able to take

1 content, remake it, rework it and create something new
2 and exciting. Tinkerers, makers, they want more than
3 access to the goods that they buy, including the
4 software that may be contained within those goods.
5 They want to modify the things they buy. They want to
6 improve them. They want to make them better. They
7 want to repair them. Maybe they want to recycle them.
8 Those are all good things that we should be encouraging
9 and I think that copyright law really shouldn't be in
10 the business of discouraging.
11 MR. GOLANT: Tammy.
12 MS. RAVAS: I would say, indeed, yes, consumer
13 expectations have changed. It's so easy today to
14 purchase a digital file and they are very, very
15 convenient, you can take them anywhere with you. But
16 what I would say has not changed is what a consumer
17 thinks that they can do with that material.
18 And going back to what Corynne said earlier
19 about end-user license agreements with having certain
20 rights not being able to be waived I think might be
21 something to really seriously consider. And to go back
22 to the idea of purchasing an airline ticket, even when
23 you do purchase an airline ticket, there are certain
24 rights that can't be waived and there are those
25 particular -- that particular transaction has certain

1 aspects of it that are governed by federal laws.
2 That's all I got, thanks.
3 MR. GOLANT: Thanks. We have two over here to
4 my left. Please go ahead.
5 MR. STANDFIELD: Hi. My name is Scott
6 Standfield. I'm the CEO of a software company called
7 Vertigo Software. I live here in Berkeley so it's an
8 easy commute for me. He have about 60 employees
9 working out of our Point Richmond office and Portland
10 as well. We build apps. We build apps for big media
11 companies like HBO, Showtime, new media companies like
12 Go Pro. We did the winter Olympics, March Madness. We
13 build these apps for our clients that run on your
14 Windows phone, your iPhone, android, desktop, X-Box,
15 et cetera.
16 So we have some experience in this. We're
17 hired to build the software. But what's really driving
18 this new business in my space and what allows me to
19 hire more people is the apps market. So I want to
20 distinguish the word software from apps. And I want to
21 distinguish both of those from media. I have a music
22 background. I purchase music. I purchase movies. I
23 have no problem with paying for static content even if
24 it's delivered in electronic form.
25 And there's a comment earlier about what do

1 you do when you donate a computer that has bundled
2 software on it. And the idea of boxed software with
3 digital keys, I kind of think it's a thing of the past.
4 I pay a lot of money to Adobe for a Creative Cloud
5 subscription. I don't expect to be able to resell
6 that. So I'm okay with that.
7 What I'm concerned about are the unintended
8 consequences of extending this world into the new apps
9 market. This apps market, as much as I really don't
10 like the word app or app store but it's easier to think
11 about it, didn't exist six years ago. It's a
12 $60 billion market in 2013. Last year, 5 billion.
13 Next year, well, by 2016, should be about $140 billion.
14 This is from Javelin Research. It's a huge, huge
15 space. It allows me to hire more people.
16 So here's what I'm -- I'm worried about two
17 potential consequences. I'm trying to think how this
18 plays out. I'm working with a local book publisher who
19 has a cocktail book called 901 Very Good Cocktails?
20 And I can attest to maybe 100 of them. They are very
21 good. And he literally drank and made 901 cocktails
22 over the course of three years, three cocktails a
23 night.
24 MS. McSHERRY: I don't think copyright is his
25 problem.

1 MR. STANDFIELD: Yeah, copyright is the least
2 of his problem.
3 So we worked with him to have -- I want to
4 make his book digital because I can't be flipping
5 through a big book when I'm trying to make a cocktail
6 for my friends.
7 So we're literally making this thing right
8 now, and the way it's going to go, we're going to sell
9 it on the app store for about four bucks. That's what
10 we're thinking will support this market. And we're
11 going to have it released and ready to go in about two
12 months along with IOS 8.
13 So now I'm thinking fast forward to the
14 ability to -- the secondary market for reselling apps.
15 And I see two really scary problems. Number 1, there
16 is no distinction between used software and new
17 software, especially with an app like this. Almost by
18 its very definition, the used software, if you strip
19 away the state, it's identical. Like if I want to sell
20 my wallet, I'll strip away the state. I'll remove my
21 driver's license, my credit cards, all the things that
22 are personally identifiable about able and the things
23 that are important for my privacy, I can get rid of and
24 sell the wallet.
25 Now, the wallet's definitely not in new

1 condition, and also my market will be Craigslist or
2 Ebay. It's not like I'm going to take it back to the
3 store where I bought it and put it side by side with
4 the new wallet. And if I did that, a consumer would
5 clearly know, oh, is a used one cheaper. It's been
6 beat up. It's been in my back pocket for ten years.
7 So there's a distinction that doesn't exist in
8 an app store and it scares me to death. Because if I
9 could sell 10,000 copies to cocktail enthusiasts, which
10 is a polite way of putting the space of our market.
11 Let's say that my total space is 10,000. If I sold all
12 10,000 on day one, I'd be very happy. If I didn't sell
13 any more, if I forecast 10,000 copies, I'd be fine.
14 But what's more likely to happen, let's say I
15 sell 3,000 in this first month, 3,000 four months later
16 and 3,000 four months later. If those 3,000 people,
17 half of them don't like it, they'll put that app right
18 next to mine in the app store and I'll get nothing, and
19 I'll lose all that future revenue. And, again, it's
20 not like selling a used LP that has scratches and
21 dings. By it's definition, it is mint in box.
22 There's probably some economic study or
23 modeling or simulation that we could do to figure out
24 the impact of this. But I think it's going to be bad.
25 My second point, let's say we solve that.

1 Like maybe Apple is not allowed to resell and put my
2 app next to my used copy of the app which is identical
3 but costs less. Let's say I'm building an app, let's
4 say it's a camera app and the camera stores my -- the
5 camera app is very good, but it also stores my images
6 in the cloud. When I go to sell that app, I have to
7 strip that state away, like taking my ID out of my
8 wallet. I have to take those cloud photos off before I
9 go and resell the application.
10 That's going to create a big burden for me,
11 not for the cocktail because there's no state. There
12 may be a favorite cocktails, big deal. So the
13 consequences are small. But the consequences can be
14 much greater if it's now up to me as the app publisher
15 to service the used copies from clients I'm no longer
16 making revenue on but I'm now responsible for the
17 previous owner's privacy and their cloud storage or
18 subscription.
19 This is not to not to mention the
20 ramifications it would have on in-app purchases. Candy
21 Crush, it's a free game. There's an article -- if you
22 search for Candy Crust in-app purchase, it's the third
23 link, this guy spent $260 on color bombs and extra
24 lives. Do you resell those.
25 What about subscriptions. A lot of apps are

1 ad-supported apps for free, so reselling those don't
2 really make much sense. I'm not so worried about that.
3 It's mostly the in-purchases, the app itself and
4 potential future ad revenue.
5 So there are areas where the business model
6 will survive, but I'm more worried about the fact it's
7 going to kill this innovation in this really important
8 market that's really driving a lot of the jobs in tech
9 sector, especially here in California, but across the
10 U.S.
11 MR. GOLANT: Thanks for that comment.
12 Appreciate it.
13 So Steve Tepp and then the person online.
14 MR. TEPP: Thank you. Steve Tepp representing
15 the Global IP Center at the U.S. Chamber of Commerce.
16 So there was some discussion about cars and
17 refrigerators and whatnot. I want to come back to that
18 for a minute. First to be clear and avoid a conflation
19 of issues, if the topic of this panel is a forward and
20 delete model that's commonly known as, if not
21 accurately known as digital first sale. Refrigerators
22 and cars have absolutely nothing to do with that. No
23 one is texting or e-mailing cars or refrigerators to
24 each other, right.
25 So it's really about hostility to particular

1 licensing terms on the part of certain individuals or
2 entities. And the proposed solution that we have heard
3 from a couple of panelists is an unprecedented
4 hindrance of freedom of contract. So I think it's both
5 a separate issue and a very dangerous one for the free
6 mark to undertake that sort of a drastic solution.
7 Certainly software is in a lot of different
8 things that we use. It makes our cars safer. It makes
9 refrigerators run more efficiently. Those are great
10 things. But I'm not aware that there's a problem
11 reselling cars or refrigerators because of any
12 copyright issue.
13 So one other point I wanted to make with
14 regard to Section 117 that was raised, that is not the
15 same thing as forward and delete, the digital first
16 sale. In fact, the provision of 117 is narrower than
17 the First Sale Doctrine as codified in Section 109(a).
18 So suggestions that that's -- the digital first sale
19 forward and delete has been in the law already I think
20 is not correct. Thank you.
21 MR. GOLANT: Thank you.
22 Can we have the person on the phone, please.
23 MR. KARI: Thank you. This is Douglas Kari
24 from Arbitech. I spoke on yesterday's panel in Los
25 Angeles. And after we were done, the court reporter

1 was chatting with me and she related to me that her
2 stenographer's machine that she used to own had, of
3 course, software in it as stenographers' machines do
4 nowadays. And when she wanted to sell that machine,
5 she couldn't find the instruction manual for it so she
6 called the manufacturer and said I'd like to get
7 another copy of the instruction manual because I'm
8 intending to sell my machine. And the manufacturer at
9 that point tried to hit her, not for a charge for a
10 copy of the book, but what they called a resale fee of
11 $300 because they contented that permission was
12 required in order to transfer the machine. And this
13 was inconsistent with her expectation.
14 So following up on the comment that was just
15 made about no one has heard of intellectual property
16 rights being used as impediments to the movement of
17 tangible goods, it's definitely a problem in certain
18 kinds of technology products. And if an unthoughtful
19 approach is taken to these issues, just as Pam and
20 Corynne indicated, rights holders will use these as
21 mechanisms to attempt to control the movement of
22 tangible goods. Rights holders have not historically
23 shown themselves to be restrained in how they exercise
24 those rights.
25 We've seen that with the Recording Industry

1 Association and others that sometimes they run
2 roughshod until the law puts them in check. And this
3 is -- I believe the Kirtsaeng case was an example of a
4 rights holder running amuck.
5 And following up on something Scott said,
6 we're concerned about licensing being used to
7 deconstruct fundamental consumer expectations and legal
8 principles regarding alienation and ownership of
9 property that extend back hundreds of years.
10 Following up on something that Tiki said, she
11 doesn't want a talking refrigerator. You have a
12 talking refrigerator. Your refrigerator has a mother
13 board in it, I guarantee you. You can't buy a
14 refrigerator that doesn't have embedded software, nor a
15 car, nor a television set, router, or anything with a
16 digital display.
17 Therefore, it's imperative that whatever rules
18 are devised -- someone made the point, I think it might
19 have been Tiki, I wrote it down, said there's no place
20 for the First Sale Doctrine in software. That is
21 fundamentally wrong. There needs to be a First Sale
22 Doctrine in software at a minimum where software is
23 embedded in and becomes an immutable part of tangible
24 items.
25 MR. GOLANT: Thanks for your comment.

1 MS. PERLMUTTER: We are now running seriously
2 behind. So I know there are others who would still
3 like to make more comments about the additional
4 comments, but we are going to end this panel now.
5 We are going to take a lunch break and resume
6 instead of at 12:30 with statutory damages, we'll
7 resume at 12:45. So see you all then. Thank you.
8 MR. GOLANT: Thanks again.
9 (Recess taken from 11:48 a.m. to 12:47
10 p.m.)
11 MS. CHAITOVITZ: Welcome back. I hope
12 everybody had a good lunch. So we're now moving on to
13 our final panel of the day and of all the roundtables
14 actually. So we're going to talk about statutory
15 damages. Statutory damages are available under the
16 copyright Act as an alternative monetary remedy to
17 actual damages and profits. Statutory damages normally
18 range from a minimum of $750 to a maximum of $30,000
19 per work infringed with the potential to be raised to a
20 maximum $150,000 upon a finding of willful infringement
21 or lower to a minimum of $200 upon a finding of
22 innocent infringement.
23 So on here today we're going to talk about two
24 specific contexts. Secondary liability for large scale
25 infringement and second context is for individual file

1 sharers. So with respect to statutory damages for
2 secondary liability, there are competing arguments
3 about the potential negative impact on investment and
4 the need for a proportionate level of deterrence. And
5 there have been calls for further calibration of the
6 levels of statutory damages for individual file sharers
7 in the wake of large jury awards in the two file
8 sharing cases that have gone to trial.
9 So first we're going to start with the
10 secondary liability question for mass online
11 infringement and I'll be asking those questions and
12 then we'll move on to the individual file sharing
13 questions that Ben will be asking.
14 So this question is not new probably, so if
15 you -- oh, yeah I'm sorry. First -- where's my
16 brain -- if you could each go through and introduce yourself and
17 then we're going to follow the same rule that when you
18 want to talk, go like this. And as you all see, I can
19 get the first two and then I'm lost anyway.
20 MR. ENGSTROM: I'm Evan Engstrom, the policy
21 director for Engine Advocacy, a nonprofit group that
22 advocates and performs research for tech startups.
23 MS. HADJIPETROVA: I'm Ganka Hadjipetrova and
24 I'm in private practice and I specialize in
25 representing mostly cloud-based -- cloud companies and

1 internet startups.
2 MR. MENELL: Peter Menell, I'm a law professor
3 at UC Berkeley.
4 MS. SAMUELSON: Pam Samuelson, also a
5 professor at UC Berkeley.
6 MS. SHECKLER: Vicki Sheckler, I'm with
7 Recording Industry Association Of America.
8 MR. SHEFFNER: Ben Sheffner, vice president of
9 legal affairs, Motion Picture Association of America.
10 MR. STOLZ: Mitch Stolz, I'm a staff attorney
11 at Electronic Frontier Foundation.
12 MR. TEPP: Steven Tepp, I'm president and CEO
13 of Sentinel Worldwide. I'm here representing the
14 Global Intellectual Property Center of the U.S. Chamber
15 of Commerce.
16 MS. CHAITOVITZ: Thank you. And I'm going to
17 again ask that people use these because as I look down,
18 I don't see everybody but I can see all those;
19 otherwise, I could miss you.
20 So the first question and we've asked about
21 these topics in our other roundtables as well, so some
22 of you have heard this before. But the comments that
23 we've received have made a range of suggestions about
24 ways to recalibrate statutory damages for secondary
25 liability. Four that were suggested, one was a total

1 damage cap. The second was providing courts with the
2 flexibility to award less than minimum damages per work
3 where there are large numbers of works infringed. The
4 third would be changing the innocent infringement
5 criteria. And the fourth was to limit the range of
6 statutory damages where there's a good faith belief
7 that the use is non-infringing.
8 So what do you think of these four
9 suggestions, anything that you like, anything you don't
10 like?
11 MR. MENELL: I'm going to kick it off, but I'm
12 sure many more will follow as soon as I say a few
13 words. But I would generally favor reopening the
14 entire framework of statutory damages because the
15 framework that we have was originally designed to deal
16 with very different problems. It assumed that judges
17 and not juries would be deciding it. It was then
18 ramped up using the same framework rather than
19 reshaping the framework to address digital viral
20 issues.
21 And so each of the elements that you talk
22 about I think go to tailoring the remedies in light of
23 the experience of the modern copyright age. And I will
24 just pick one of them just because I think it kind of
25 captures several subcomponents. But limiting the range

1 based on various other factors or categories.
2 So, for example, we talked earlier today about
3 mashups, and we don't know the answer on whether it's
4 fair use or not, but it seems to me that that would be
5 a category that would make sense for really tamping it
6 down because a mashup involves, you know, 20, 30 or 40
7 works and you multiply that by, you know, even the $750
8 number, it could get to a very large number quickly.
9 And so I do think that as you look across all
10 of the different reform issues that you are covering,
11 that this provides a vary useful reframing to get
12 statutory damages back to the principles that were set
13 forth in the original Copyright Act or principles that
14 we might want to recreate.
15 MS. CHAITOVITZ: Thank you. I was watching to
16 see who got it up first.
17 Okay. Ben and then Mitch.
18 MR. SHEFFNER: I do think it's important to
19 maintain the availability of statutory damages in the
20 context of large scale commercial infringers on the
21 internet, even those where the numbers can get quite
22 high given the volume of works which they infringed.
23 First of all, let's remember, we're only
24 talking here about imposing damages following a finding
25 of liability. So we're not talking about anyone who is

1 sort of an innocent bystander here. Unfortunately, as
2 many gray things as the internet has produced, it's
3 also produced a lot of people who like to label
4 themselves entrepreneurs and innovators, but what
5 they're really trying to do is basically find ways to
6 run a business based on copyright infringement and not
7 have to pay for it.
8 Statutory damages are an incredibly important
9 way of deterring and in certain cases punishing this
10 behavior. It is true that the numbers can add up to
11 quite large numbers. At the same time we have also
12 seen that these companies achieve great benefits from
13 the large number of works which they touch on and in
14 some cases infringe.
15 You don't hear internet entrepreneurs or
16 people who call themselves that clamoring for a cap on
17 market value. At the same time they should not be --
18 they should not be subject to a cap on statutory
19 damages when they cross the line and build their
20 business by infringing other's works.
21 MS. CHAITOVITZ: Thank you. Mitch.
22 MR. STOLZ: I just wanted to say I'm really
23 glad that the task force is taking on the issue of
24 statutory damages because for a couple of reasons.
25 There's, I think, although I suspect some folks here

1 are going to try to prove me wrong on this, there's
2 really a remarkable amount of consensus around the
3 basic idea that statutory damages and copyright are
4 broken and that some changes are needed. You're really
5 going to hear that from a lot of people in industry, in
6 academia, in the nonprofit and educational. There's a
7 pretty broad consensus that something needs to be done.
8 And the other thing about statutory damages I
9 think is particularly appropriate for this process is I
10 think a fix for damages changes, specific changes that
11 would make it more fair, more rational, more
12 predictable, and more in line with other areas of law
13 and with the law in other countries. All of those
14 things make a lot of the other problems in copyright a
15 lot easier to address, including some of the ones that
16 this task force has taken on.
17 So I think the issues surrounding remix and
18 reuse of work and fair use and in that sense, those
19 actually become a lot easier when the -- getting it
20 wrong doesn't mean a adjustment that will bankrupt.
21 And someone can have the certainty that, you know, from
22 the start that, you know, getting the question wrong is
23 not going to be, you know, life altering. The
24 financial death penalty as some people call it. Which
25 can and does happen.

1 Another is the orphan works issue which I know
2 the Copyright Office has been deeply involved in. That
3 one becomes a whole lot really easier problem to deal
4 with when the consequences at the margin are, if
5 nothing else, predictable.
6 And just quick about this -- this notion that
7 companies, businesses, technologies that touch on
8 copyrighted works should, you know, the -- you know,
9 should be massively liable if they are found to
10 infringe. I think that ignores the point that there
11 are close cases and there are cases on which reasonable
12 minds can disagree. And I dare say there may be cases
13 where courts might get it wrong.
14 And I don't think we want the stakes to be
15 essentially a game of roulette which is what statutory
16 damages can be.
17 So, you know, take -- you know, if you take
18 those accusations, you know, this was -- this is a
19 business built on infringement. This frankly was an
20 accusation leveled against the VCR. It was leveled
21 against the MP3 player, the DVR, various other things
22 that I can name. All things that are staples of the --
23 of creative economy now that have created entire
24 markets. And, you know, some of those were safe from
25 court challenges in very narrow ways.

1 I'd even mention Aereo. I know some folks
2 here are going to obviously going to be of very
3 different opinion as to the -- you know, whether the
4 Supreme Court's decision in Aereo was correct. But
5 let's just face facts, you know, three courts found
6 Aereo to be a lawful business model. This was again an
7 internet TV startup using thousands of small antennas.
8 Three court and three Supreme Court justices found that
9 lawful.
10 The next company like Aereo that comes along,
11 we -- I would -- copyright and the copyright system
12 encourages uses that are lawful. But if the
13 consequences of, you know, having, you know, five
14 instead of four Supreme Court justices rule against you
15 is bankruptcy, then people aren't -- people are going
16 be directed away from that and we are then creating a
17 disincentive for things that copyright is actually
18 really supposed to create an incentive for.
19 It is on those margins, it is in those close
20 cases that the progress is made and markets are
21 created.
22 MS. CHAITOVITZ: Okay. Thank you. I tried to
23 keep track. And so what I have is Evan, Steve, Peter,
24 Victoria, Ganka, Pamela. And I hope I didn't mess that
25 up.

1 So, Evan.
2 MR. ENGSTROM: So to build off some of the
3 stuff that Mitch was saying and to address a point that
4 Ben made briefly, it's not really talking just damages
5 after finding of infringement and it's not just about
6 fining ways to deter large companies that are engaged
7 in the distribution of content. This affects the whole
8 range of innovation, the whole range of the innovation
9 economy, all types of startups.
10 And the reason it does is when you're talking
11 about the multiplier figures that you might face when
12 you're dealing with secondary infringement, this is
13 enough to deter virtually any startup. Most startups I
14 think it said they raise about an average of $80,000.
15 And most startups fail.
16 If we're talking about even a single
17 infringement where potential damages are as high as
18 $150,000, that might be enough to deter them from
19 entering the market and it would certainly be enough to
20 deter investor from trying to put their money in
21 innovative technologies.
22 So it really isn't just about the end result.
23 This is what a jury is going to award. It feeds back
24 all the way through the system to the incubation of
25 these companies. And it is important to bear in mind

1 that this has had a disincentivizing effect. If we
2 look at the technology like how you send big files
3 through the internet, there really haven't been a lot
4 of options until recently. And a lot of that has to do
5 with some of these potential liability problems.
6 And it's great that we have large companies
7 that litigating these issues, but they have the
8 resources to do so. Startups don't necessarily have
9 that. So it's going to really disincentivize activity
10 at the edge at the startup stage and it's delaying the
11 introduction of technologies that do have very great
12 beneficial uses to society.
13 MS. CHAITOVITZ: Thank you. Steve. Did you
14 have it up before? Okay Peter.
15 MR. MENELL: I'm going to disagree with Ben in
16 the sense that just because liability has been
17 determined does not for me establish that it was
18 clearly a violation. We have a whole bunch of
19 doctrines in copyright that make it a, you know, a
20 judgment call when we're dealing with both the
21 infringement doctrine which is itself, you know,
22 involving lots of subjective elements as well as the
23 fair use adjustment which is very, very subjective.
24 And so I would at a minimum say we ought to
25 distinguish between what might be just, you know, sort

1 of supplanting copies, you know, take a major motion
2 picture, someone's put that in a place where it's
3 accessible, as opposed to someone who's doing a remix.
4 And -- but the way in which statutory damage
5 applies to the two situations I think is worthy of
6 distinguishing in the law, that these are different
7 types of acts and we ought to avoid over -- you know,
8 we should avoid windfalls in the situation where we
9 don't think that there is, you know, some intent, you
10 know, where there's some legitimate reason to think
11 that I thought this was okay. I think within, you
12 know, your category of how you would perhaps fine tune
13 it.
14 The other issue, the first one you raised was
15 the damage cap. I think that's probably the one most
16 relevant to the secondary liability situations. And
17 there is perhaps reason to have deterrence when you're
18 dealing with sort of large scale activities. But
19 there's no reason to go that much beyond what it would
20 take for people to enforce.
21 And so what we're trying to do is make sure
22 there isn't under detection and to get into the, you
23 know, the billion dollar multiplier cases doesn't make
24 any sense. If you use the basic theory of deterrence,
25 we just need to have enough incentive for people to

1 enforce.

2 The other feature that I would tie in is the
3 public involvement with enforcement. And that's
4 perhaps outside of what we're talking about here, but I
5 think it's closely related that there are activities
6 that may be worthy of public enforcement, but there I
7 would say criminal enforcement maybe isn't the right
8 ticket either.

9 So I think we could look across the secondary
10 liability situations, think about some of the chilling
11 effects that Evan was talking about and come up with a
12 system that would essentially create a more tailored
13 incentive for enforcement without the overkill that
14 we're seeing under this system.

15 MS. CHAITOVITZ: Thank you. Victoria.

16 MS. SHECKLER: I would respectfully disagree
17 with you, Mitch. I think there is a not consensus on
18 whether or not we need recalibration of statutory
19 damages. I think we need to step back and consider
20 what the purpose of statutory damages is in the first
21 place.

22 And the purpose, you know, is to deter the
23 infringement activity from taking place. It is not
24 just to replace what profits may have otherwise been
25 there. We need to keep that in mind. That is the

1 purpose. If it's just to, you know, be like
2 contractual damages, it's not going to serve that
3 purpose.
4 Second with respect to the idea that statutory
5 damages chill innovation, I would point out that in
6 2011, Limewire sold for $105 million during the
7 statutory damage phase. That same year there's a
8 34 percent increase in investment in music services.
9 So at least in our experience it isn't true.
10 MS. CHAITOVITZ: Thank you. Ganka.
11 MS. HADJIPETROVA: I think everybody on this
12 panel recognizes that statutory damages have been a
13 great tool to bring both parties to the table because
14 they do provide some predictability in an area in a
15 context where it's quite challenging to calculate
16 damages otherwise.
17 But I think in the context secondary liability
18 in particular, I think the question of damages goes
19 hand in hand with the effectiveness of finding the
20 underlying liability first, which means we have to
21 first fix our safe harbor rules. And from there on I
22 think we got to move to the damages question, in
23 particular statutory damages in cases of secondary
24 infringers, secondary liability infringers where we
25 could be talking about really huge numbers of infringed

1 works. Courts will have -- will need the flexibility
2 that fairness requires much more than maybe in smaller
3 cases.
4 So in that respect I think also looking at
5 some of the suggestions that you mentioned earlier,
6 namely lowering the minimum of statutory damages per
7 work infringed, putting a cap or redefining the --
8 rethinking the definition of innocent infringer will
9 be -- will all have their place.
10 MS. CHAITOVITZ: Thank you. Emma.
11 MS. SAMUELSON: So the statute actually aims
12 to make statutory damage awards just. And right now
13 sometimes they may be just and sometimes they aren't.
14 But I think that having studied the legislative history
15 on the development of statutory damages both under the
16 1909 act and under the 1976 act, there was really an
17 effort initially to calibrate by type of work in a way
18 that would be kind of this is the kind of damage that
19 might happen in this particular domain. And in '76 we
20 moved away from that. And part of the reason we moved
21 away from that and moved toward per-work liability was
22 a way to make damage awards less excessive.
23 And so the concern of the broadcasters at the
24 time was if I, let's say, even inadvertently broadcast
25 something and it reaches 5 million households, I don't

1 want to be liable for 5,000 or 5 million times some
2 statutory damage number. That actually doesn't seem
3 fair, so they made it per work. So now the broadcaster
4 would only be liable up to at the time the '76 act was
5 passed $50,000 rather than kind of all the money in the
6 world.
7 And what we've done instead of really
8 developing a set of guidelines by the judges through
9 common law kind of adjudication, we haven't ended up
10 developing principles yet. I'm still hoping that that
11 will happen. But the statutory framework is too broad
12 and too open, especially in this day when per work
13 actually is the cause of excessiveness of some awards
14 and not the solution to the problem.
15 So in terms of caps on liability, there are a
16 number of countries that have caps both for
17 noncommercial and also for other kinds of uses. So it
18 would not be unknown in the world to have cap like
19 that. That actually doesn't seem to me to be the
20 optimal solution at least for the secondary liability
21 because there are just too many different kinds of
22 situations that we might be needing to address.
23 Giving courts discretion to lower awards is a
24 much better idea from my standpoint because the awards
25 are supposed to be just and judges are in a better

1 position to kind of decide about what awards are just
2 and they should be thinking about how to make awards
3 just, not just saying okay, it's kind of like somewhere
4 in the middle of 750 and $150,000 thousand and we
5 have -- we can just kind of wing it. That just seems
6 wrong to me.
7 Doing something about innocent infringement so
8 that it's actually a meaningful thing I think would be
9 a positive development. Again, I read hundreds of
10 cases involving statutory damage awards and I found
11 exactly one in which a lower amount was awarded. And
12 it was to somebody who was like a little mom and pop
13 Korean guy who kind of didn't know he was dealing with
14 counterfeit goods, but that's the only case I ever saw
15 involving that. And so it's not really a meaningful
16 thing.
17 In terms of my proposal and statement that I
18 submitted before was in the cases of secondary
19 liability, that there be a limit to -- on statutory
20 damages to approximating actual damages if -- unless
21 there was a proof that no reasonable person could have
22 believed the conduct was unlawful.
23 So if we're dealing with a situation where you
24 have the guy who's in the -- the guy who's building a
25 technology and inducing infringement, that's not

1 something that you can reasonably think was lawful. So
2 don't have the cap on that. But it seems to me that if
3 you want to actually realistically try to stop the
4 chilling effects that are actually happening out there.
5 And the other thing is that these statutory
6 damage ranges have given rise to the copyright troll
7 problem that is extracting rent from people even who
8 probably are making fair uses, but do you really want
9 to go to court and face a liability of that much, I
10 think probably not.
11 And it actually is interesting to me, Ben,
12 that you want to talk about statutory damages as
13 punitive. I'd rather have that in a statute because if
14 it's in the statute that it's punitive, then the
15 Supreme Court's jurisprudence on due process limits on
16 punitive damage awards would actually be applicable.
17 So I'm actually in favor of that.
18 MS. CHAITOVITZ: Thank you. Steve and then
19 Evan.
20 MR. TEPP: Wow. So there's a lot to cover
21 now.
22 So I agree with the characterization that
23 Congress has historically sought to keep statutory
24 damages in a range or at a level that is just and
25 avoids exorbitant awards. I think Pam did a good job

1 of articulating that, how that happened under the '09
2 act. I've been looking at statutory damages
3 legislative history as well all the way back to 1790.
4 The change to the per infringed work standard
5 that of course we have now that occurred in the '76 act
6 I think was not simply to avoid exorbitant awards.
7 There was a reference to some broadcaster concerns in
8 the 1961 report of the register of copyrights to the
9 house judiciary committee. And that was a sub issue.
10 That same report noted that the Copyright
11 Office felt that the concern of multiple exorbitant
12 awards in multiple infringement cases is more
13 theoretical than real. And although in that report the
14 Copyright Office did recommend an overall cap on
15 damages per case, it reversed itself four years later
16 in the 1965 report to Congress.
17 I think -- I think the whole change that we
18 saw from the per infringing copy to per infringed work
19 in the '76 act was a prescient one because historically,
20 as we know, the reason we've had statutory damages
21 since the beginning of the republic and even prior to
22 the constitution and state laws is precisely because
23 it's difficult or impossible to prove the actual harm
24 in many cases.
25 Today if we had to try and prove the number of

1 copies that were made during the course of an
2 infringement, particularly in the online space, that
3 would be extraordinarily difficult and unproductively
4 time consuming and expensive.
5 So what we ended up with instead of this
6 amount for public performances of dramatical musical
7 works, this amount for copying literary works and so on
8 that we had for 188 years is, yes, it's a broad range.
9 We have a broad range in the statute. It applies to
10 all types of works. It applies to all volumes of
11 infringement of that work. It applies to innocent. It
12 covers willfulness. It covers close calls and it
13 covers blatant criminal enterprises.
14 We trust the court to do its best to get it
15 right. It's correct that in 1976, statutory damages
16 awards were usually determined by the judge. Of course
17 in 1999, the most recent time Congress touched
18 statutory damages, it was aware that juries would be
19 deciding that and it didn't choose to change the
20 structure, even though that structure predated the
21 Feltner decision from 1998.
22 It seems to me that when we talk about some of
23 the close cases, we would have to recognize that they
24 involved necessarily an entity that doesn't have a
25 license, that pushed the envelope for fair use and

1 didn't get it, but didn't qualify for the safe harbors,
2 and thus they're on the hook for some liability. The
3 courts can, of course, take into account that scenario.
4 But given how easy it is to destroy entire
5 markets in the online space, the mere compensatory
6 aspect of statutory damages, I think there's a real
7 danger of undermining that if we start putting per-case
8 limits or lowering the entire range because of the
9 scope of harm that can occur. And compensatory damages
10 by definition are never exorbitant. They are merely
11 compensatory.
12 MS. CHAITOVITZ: Thank you.
13 MR. TEPP: I'll cover the rest later.
14 MS. CHAITOVITZ: Well, I see Evan and Ben and
15 then Pamela. But since it's your second time at the
16 mic, if you could try to make the comments brief so we
17 can get on to a couple more questions.
18 MR. ENGSTROM: I will be brief. I just want
19 to push back on the idea mentioned earlier that -- or
20 the suggestion that somehow large statutory damages,
21 liability doesn't really have an effect deterring
22 innovation. I don't think it passes logical muster to
23 say that it can defer infringements but won't
24 discourage innovation. These are two sides of the same
25 coin, that it simply doesn't make sense.

1 And I don't think it's particularly
2 instructive to point to something like Limewire's sale
3 during the statutory damages phase to say well, look,
4 here's an example of value in light of potential
5 damages. Let's not forget that they got to the
6 statutory damages phase. We're talking about companies
7 that are just starting out.
8 And I don't think the solution to problems
9 with infringement is to prevent use agnostic services
10 from starting. However you feel about the operators of
11 Limewire and Napster, it's difficult to argue that
12 these technologies, these use agnostic technologies
13 underlying these services don't have value. If you
14 were saying the VCR had no value, I think it's pretty
15 clear that it has value. I think we've seen from --
16 obviously YouTube is instructive. That has value.
17 And to prevent these things from starting
18 because of the threat of potential damages clearly has
19 a deterring effect on innovation. And it just -- I
20 just don't think it makes any sense to say well, we can
21 deter infringement, but let's not worry about
22 innovation because invariably if you're trying to make
23 a decision whether to get into a murky marketplace with
24 unclear statutory damages, unclear safe harbors, it
25 just does not make financial sense to take a risk in

1 such an opaque legal framework.
2 MS. CHAITOVITZ: Ben.
3 MR. SHEFFNER: I just want to address one
4 particular point that Professors Menell and Samuelson
5 both made, I believe, which is that the statute itself
6 is so vague that it leads to unpredictable results.
7 It's of course true that the statute just says that the
8 court shall award statutory damages in an amount it
9 considers just. And since Feltner we now know that
10 court actually means jury.
11 And if that was the entire story, I would
12 agree there was some weight to that argument that the
13 statute is too vague. But of course juries are not
14 simply instructed to do what's just. Juries are
15 instructed with specific instructions. And I can't
16 speak for every single district court that's ever
17 instructed a jury about statutory damages, but I know
18 here in the 9th Circuit and in the 7th Circuit and I
19 know that the ABA has model jury instructions on
20 statutory damages that, in fact, take into
21 consideration many of the factors that Professors
22 Menell and Samuelson have mentioned.
23 I'm just going to tick off a few of them that
24 are mentioned in some of these statutory damages jury
25 instructions. Things like the duration of the

1 infringement. The willful -- the degree of willfulness
2 of the infringer. That helps differentiate between the
3 truly bad actor who is out there to induce others to
4 infringe against a remix artist who has made a close
5 fair use call and turned out to be wrong.
6 The profits reaped by the infringer. The
7 revenues lost by the copyright owner. The value of the
8 copyright. The cooperation of the defendant in
9 figuring out how much infringement has actually taken
10 place.
11 Those are just a number of the factors, but
12 again, it shows that, yes, juries are not simply given
13 the instruction to go back in the jury room and do
14 what's considered just. They have heard evidence in a
15 trial and they are given a number of factors and juries
16 do what juries do. Is it sometimes unpredictable, yes.
17 Juries are unpredictable in all areas of law, not just
18 copyright. That's the nature of the system that we
19 have.
20 And there's certainly -- just to wrap up.
21 There's certainly nothing wrong with having
22 instructions like that properly done that allow the
23 jury to take into account, again, many of the factors
24 that Professors Samuelson and Menell have mentioned
25 already.

1 MS. CHAITOVITZ: I'm going to just butt in
2 right now with a question that you can work into your
3 comments because it builds off of what you just
4 mentioned and what you have mentioned earlier,
5 Professor Samuelson, about guidelines.
6 A variety of commenters talked about creating
7 guidelines for judges and for juries when awarding
8 statutory damages. So I was wondering you thought
9 about this idea and what should be in the guidelines.
10 And furthermore to what Ben was talking about,
11 to what extent do you know that jury instructions in
12 the recent litigation, whether they have or have not
13 spelled out factors to be considered and what do you
14 think are important factors that should be considered
15 in the guidelines and should there be some kind of
16 standardizations of guidelines from -- instructions
17 from jurisdiction to jurisdiction.
18 MS. SAMUELSON: So I think jury instructions
19 can be part of a solution. I don't know that they are
20 the solution altogether because by the time the jury
21 has a list of ten factors, it's hard to really sort
22 them out. I think judges are more careful about trying
23 to do that kind of sorting out. And of course a lot of
24 what I would guess happens in these cases is sometimes
25 the judges use guidelines and sometimes they don't.

1 And so guidelines that stood outside of the jury
2 instructions I think would be more useful.
3 In my article in the William and Mary Law
4 Review, I gave a set of principles that actually I
5 would recommend be part of it. And in the interest of
6 time I'm not going to try to remember each and every
7 one of them.
8 But one that actually not only was appealing
9 to me but was appealing also to some of the folks that
10 I worked with on the Copyright Principles Project, it
11 was really sort of trying to think about statutory
12 damage awards in terms of multiples over actual damages
13 and profits, depending on the degree to which the
14 person, in fact, was just stepped over the line, in
15 which case something that approximated actual damages
16 and profits was a small multiple over that would be
17 appropriate.
18 And for the baddest of the actors, a much
19 large multiple over that. That at least I think
20 achieves a deterrent effect across the board better
21 than the range that we have.
22 So suppose that actually you are a bad guy and
23 you make 5 million copies of a particular work,
24 statutory damage awards as to that could be no more
25 than $150,000. Now, I'm not going to suggest that we

1 should raise that to 5 million because that's going to
2 make the range of statutory damages much, much greater.
3 But what I'm saying is that if, in fact, you infringe
4 this many works only once, you could end up with a much
5 higher statutory damage award than somebody who made 5
6 million copies of one work.
7 So there's something that's not well
8 calibrated now and something that focused attention on
9 damage and multiplied it just seems to me to be
10 something that has deterrent effect that actually is
11 more likely to be relatively just and is in keeping
12 with due process actually.
13 MS. CHAITOVITZ: Thank you. Okay. I lost the
14 rest of the order. So we can go from -- why don't we
15 start with you, Ganka, and then go down.
16 MS. HADJIPETROVA: In fairness I was probably
17 the last one.
18 MS. CHAITOVITZ: Okay. So then we'll start
19 with Steve and work this way.
20 MR. TEPP: So on the issue of guidelines, I
21 think not only are there jury instructions, there are
22 guidelines in case law. There are number of different
23 cases that have outlined some of the relevant criteria.
24 A fair process amongst stakeholders to work out
25 something that's reasonable, you know, that seems like

1 a reasonable thing to do.

2 I did want to come back to some of the other
3 points that were raised earlier. In terms of the claim
4 that due process, substantive due process analysis of
5 punitive damages should be extended to copyright
6 statutory damages, I agree that they currently don't.
7 There's no circuit in the country where that's the law
8 now. And for good reason. Those things, the factors
9 articulated by the Supreme Court there went to things
10 like well, what's the ratio between actual damages and
11 the statutory damages -- and the damages awarded.

12 Of course the whole purpose of statutory
13 damages is that we don't know what actual damages are.
14 We can't prove them, which unfortunately makes the
15 recommendation from the Principles Project frankly
16 unworkable. As I recall correctly, the dissenters on
17 that point raise that in the report of the project.

18 MS. SAMUELSON: That's not true.

19 MR. TEPP: Okay. My memory is incorrect
20 there. I'll take your word for it. Nonetheless, the
21 reality is statutory damages exist because actual
22 damages are difficult to prove. And so working off the
23 multiple of actual damages doesn't seem particularly
24 useful.

25 With regard to abusive litigation, these --

1 first of all, there has not been proof that there is
2 abusive litigation at a significant level. The article
3 that's been cited talks about suits against file
4 sharers and the article itself noticed that --
5 recognized that that's infringement. So you have a
6 copyright owner with a copyrightable work vindicating
7 the rights against what's established in the law to be
8 infringement.
9 Now, if they used particular litigation
10 tactics that are unsavory, there are tools to deal with
11 that both in the Copyright Act and in the Rules of
12 Civil Procedure. I don't think it's helpful to our
13 conversation to characterize copyright owners who are
14 vindicating their rights in meritorious claims with
15 some sort of villanizing term. And it certainly
16 shouldn't bear on what statutory damages should be.
17 And then finally with regard to the concern
18 that excessive statutory damages awards could chill
19 innovation, of course we do have empirically a
20 significant amount of innovation going on. And the
21 reality is when you look at the numbers, statutory
22 damages range today is no higher, in fact, lower
23 adjusted for inflation than it was in 1978 when the '76
24 levels came into being and in 1909 when that -- when
25 those set of levels were enacted.

1 So statutory damages are, in fact, lower today
2 than they have been in the past. So I don't think it
3 supports this claim that there is inherently a chilling
4 effect from them; quite the opposite, we see that there
5 are instances where statutory damages are
6 insufficiently high, 5 million infringements of a
7 single work was a good example of that.
8 I'm not asking for them to be higher, but we
9 can see a shortcoming there in reality. And it comes
10 back again to in the theoretical sense you can imagine
11 a calculation that's very, very high. In a couple of
12 cases people have seen judgments that they don't
13 particularly like. Those judgments could have been
14 lower within the range had the Court thought that was
15 just, but it didn't.
16 None of that proves that the system or the
17 current range is flawed. It just proves that you can
18 imagine a range that you don't think is reasonable or
19 you can find a case that you don't agree with, but it
20 doesn't prove that the system is, as one of my fellow
21 panelists said, broken. Thank you.
22 MS. CHAITOVITZ: Thank you.
23 MR. STOLZ: So on the point about guidelines,
24 I do think guidelines would be really helpful. I know
25 they are a feature of some of the small number of other

1 countries that have statutory damages and copyright do
2 include specific guidelines.
3 I think it's well and good to say courts can
4 produce predictable results, but the empirical evidence
5 here, and there's quite a bit of this in Pam's article
6 with Tara Wheatland is that courts haven't. The cases
7 are -- the damages awards, they are all over the map
8 for the same conduct or for very similar conduct.
9 Empirically, when I'm counseling a client,
10 whether it's a small software developer or an amateur
11 videographer or various other kinds of clients and they
12 want to know what is the possible outcomes here. Often
13 I have to say well, you know what, I have to tell you
14 it could be 5,000 and it could be 100,000. Could be
15 1 million. Those are actually equally possible in your
16 case based on case law and base on my review of jury
17 instructions.
18 So, yes, those things have the potential to
19 help, but they haven't. I think including guidelines
20 in the statute might.
21 The second point, I want to push back on this
22 mantra that damages are difficult or impossible to
23 prove in copyright cases. It's a categorical statement
24 that is far broader than any possible evidence for
25 that. And it's -- frankly it's an out-of-date notion.

1 I think the origin of that idea and then the origin of
2 statutory damages in copyright were in an era before
3 civil discovery. And then before modern expert witness
4 practice.
5 But you look at any other area of law and
6 there are plenty of them where, generally speaking,
7 damages are hard to prove. Look at personal injury
8 law. Look at pain and suffering damages in a tort
9 suit. Look at you economic harm in a complex
10 anti-trust suit. Look -- there's really -- you can
11 almost say in any area of law and you can see
12 categorically, you know, damages are hard to prove, yet
13 the law requires that the plaintiff prove damages with
14 evidence.
15 The law doesn't give the plaintiff an
16 automatic out, a pass from actually putting on a case
17 to the jury as to how much their harm was or how much
18 the defendant profited. It is really, with a few minor
19 exceptions, only in copyright that we have this sort of
20 religious notion that in any copyright case, damages
21 are hard to prove.
22 There may be some. There may be -- and there
23 should be ways to deal with that. Statutory damages
24 can deal with that. But this notion that, you know, if
25 the subject of those case is copyright, then damages

1 are necessarily hard to prove and therefore you
2 shouldn't have to prove them. And, yes, it can be
3 expensive, but it's expensive in an anti-trust case.
4 It's expensive in, say, a toxic products class action.
5 But it's still required. It's required because it
6 forces our notions of due process and fairness.
7 It's an extraordinary claim I think to say
8 that in copyright, in copyright alone, American
9 copyright alone is proving damages not a factor.
10 And third point about, well, I guess I
11 wouldn't say trolls because Steve is insulted by that
12 word, so I guess I'll use some words that some federal
13 judges have said they've called it. They've called it
14 akin to extortion. They've called it a shakedown.
15 They've called it outmaneuvering the legal system.
16 I think it's heartless, heartless, to look at
17 the actual numbers there and the actual people who,
18 many of whom did not infringement, many of whom really
19 bore no legal liability or responsibility, you know,
20 who were, you know, extorted. And the numbers are
21 high. And we cannot sit here and talk about statutory
22 damages and not talk about the incentives that it
23 creates for that kind of behavior.
24 I mentioned this yesterday, but the troll
25 suits that's defined as multi defendant John Doe suits

1 in copyright, they were one-third of all copyright
2 suits filed in the United States in 2013. These are
3 not small numbers. This affects thousands of people.
4 And they don't go to judgment. So you cannot say that
5 every one of those people, or even most, you cannot say
6 well, they were infringers so it doesn't matter how
7 they were punished.
8 These cases don't go to judgment because of
9 the intimidation factor and the potential for
10 bankrupting damages is so high that they settle, you know,
11 regardless of liability, regardless of defenses. This
12 is something that we just really have to keep in mind
13 here.
14 MS. PERLMUTTER: What we're going to do, I
15 know there's still some people, since we're running out
16 of time, so first of all if we can ask people to keep
17 their comments a bit shorter. And we do have one other
18 question about individual file sharers. So Ben will
19 ask that and then those who still have their cards up
20 can fold that into their comments.
21 MR. GOLANT: Thank you, all. This has been a
22 very fruitful conversation but I did want to get this
23 one question in and this is in regard to individual
24 file sharers. It goes like this, should individual
25 file sharers be treated any differently from the

1 individual nonprofit-seeking infringers. And your
2 comments are welcome.
3 MS. SHECKLER: I think that the solution of
4 guidelines is something that should be explored for
5 that question as well. There are guidelines, I think
6 guidelines that could be placed out there. There is a
7 difference, I think, to some extent with somebody
8 that's a borderline fair use case versus someone who
9 willfully infringements and willfully distributes
10 thousands of individually copyrighted works and then
11 lies about it.
12 There's a big difference between those two
13 types of activities. And the damages associated with
14 that should take into account the difference in those
15 type of activities.
16 And Evan, just to hark back onto something
17 else you said earlier, it sounded like you were
18 suggesting that the only way to innovate was to
19 infringe. I hope you didn't mean that.
20 MR. GOLANT: Please go ahead. Fold in your
21 answer responses to what Ann had said as well as to my
22 question.
23 MS. SAMUELSON: So I think when it comes to
24 individual file sharers, Ben and I had an exchange
25 about some of these issues. And in connection with

1 that, I did some research and discovered that in all of
2 the cases in which judges had rendered statutory damage
3 awards that were reported in the case law, judges were
4 ordering $750 per infringed work for damage awards that
5 were in the kind of five figure level. And even that I
6 think to most people might seem pretty excessive, not
7 necessarily the person sitting next to me.
8 But I think some part of a reason to try to
9 think about a cap on liability, I'm not going to say
10 this specifically for file sharers because I wish they
11 didn't do that too. But for noncommercial infringement
12 activity, having cap on liability I think is a
13 reasonable thing if you want people to respect
14 copyright law.
15 I have a real strong sense from having talked
16 to people all over the country about the Jammie Thomas
17 and Joel Tenenbaum cases is they just think that that
18 makes the law look outrageous and ridiculous and it
19 can't possibly be just. Canada, as I think you
20 probably know, has a $5,000 Canadian cap on liability
21 for noncommercial infringements and it would seem to me
22 that that actually would be something that would be
23 worth considering in trying to make a copyright law
24 that people could actually respect.
25 I really think that the disrespect issue is

1 even more serious than the troll issue that Mitch was
2 talking about. And of course the thing is that while
3 I'm very glad that you're focused on two of the bad use
4 cases, that ones against secondary people who may be
5 secondarily liable and the noncommercial file sharers,
6 there are problems with statutory damage awards across
7 the board. These are not the only two situations in
8 which there really are outrageous things.
9 And I'll say one last thing, which is that
10 very, very few of the developed countries in the world,
11 the ones that we think of as having strong copyright
12 industries, have statutory damages at all. All of the
13 ones that have statutory damages, and there only five
14 of the developed countries that have them, have caps
15 and limits on their statutory damage awards. Much more
16 sensible than the ones that are in our statute.
17 MR. GOLANT: Thanks. Peter.
18 MR. MENELL: We are right now waiting for some
19 sort of results from the Copyright Alert experiment.
20 So I'm feeling that, you know, we might get some
21 information about whether or not that mechanism is
22 valuable. There's also discussion about small claims
23 tribunals, which strike me as a much better way to deal
24 with these kinds of questions if we can't resolve them
25 through the kind of informal ISP-related alerts.

1 But in any case, I think it's in the long term
2 best interest of the industries that are often fighting
3 for the, you know, retention of strong punitive
4 measures, it's in their interest to move away from it.
5 I think if -- now that we have services like Spotify,
6 we have Google Play, we have Netflix, we have a lot of
7 great services that are emerging and I think the system
8 ought to be recalibrated to channel people into
9 services and in some ways saying, well, I had this
10 service, that might be a way to help to calibrate.
11 Because that's the goal. The goal is not to
12 be making money off of people who are using the
13 internet. The goal is to get people into markets that
14 are much more sensible for the activities.
15 So that deals with the small scale. I just
16 want to make a couple comments about the big issues.
17 Number one, I'm not convinced that judges or juries are
18 better at dealing with this. I mean, we have the
19 MP3.com case. It was a judge case, but it was a
20 ridiculous award, well beyond what anyone could have
21 proven as actual damages under even the most
22 adventurous theories.
23 The closest analogy we have in the copyright
24 area is perhaps -- when we're talking about secondary
25 infringement on a large scale, is to anti-trust law.

1 And those are always kind of make up your economic
2 theory. They are really hard to deal with. And I
3 would just take the YouTube Viacom case as an example.
4 I'm very -- I'm not sure there was any actual net harm
5 to Viacom. I think the result of the litigation
6 produced content or at least contributed to producing a
7 much healthier ecosystem.
8 But there's no reason to have a billion dollar
9 risk out there. And so I think we could look at the
10 cases and we could identify situations. From an
11 economic theory, the big issue is under detection.
12 That's why we put in a little extra. That's why we
13 have treble damages in anti-trust.
14 So if we look at that question from an
15 economic lens, we would really want to get evidence of
16 is this going to be under enforced and try to think
17 through that calculus rather than saying we can't prove
18 harm. I think it's really trying to look at all of
19 those issues in a way that ensures we're getting the
20 right amount of enforcement.
21 I think we're getting under enforcement in the
22 file sharing area. We may be getting over enforcement
23 in the secondary liability area.
24 MS. HADJIPETROVA: To continue the
25 conversation about guidelines and basically simplifying

1 the system because it seems to me that the more we
2 slice and create multiple schedules for secondary
3 damages, secondary versus individual, the more
4 difficult and less practical the system would be
5 naturally.
6 So instead of dividing the different culpable
7 parties into what type of -- whether that's individual
8 infringers or entities, I would rather say that a much
9 more sensible division would be along the lines of
10 commercial versus noncommercial use. And to make this
11 even more useful and effective, we could follow the
12 example of 107 and put that and legislate that rather
13 than leave it to jury instructions that may or may not
14 be followed.
15 Another way to possibly diminish the draconian
16 effect of statutory damages if we are keep them is
17 probably to find a way to aggregate or redefine work
18 instead of -- and I know I'm going here into the very
19 nitty-gritty, but it might be helpful also too look at
20 these issues as well.
21 For instance, with musical works, rather than
22 looking at a song, we could look at a whole album. And
23 there might be also other ways to aggregate. If
24 there's a number of infringers, if we're talking
25 secondary liability infringers, we might instead of

1 count all the individual infringers, the foundation or
2 that -- the underlying cause of the infringement, we
3 could just look at, again, a single work and we could
4 redefine that as well.
5 MR. GOLANT: Evan, go ahead.
6 MR. ENGSTROM: Just to quickly respond to
7 Vicki's question on what I mean. Let's be clear,
8 innovation is not synonymous with infringement. There
9 are all sorts of quality innovations that people in the
10 content industry called infringing that weren't. As
11 Mitch mentioned, VCRs, MP3 players, peer-to-peer
12 software, Bit Torrent.
13 The technologies themselves are not evil
14 technologies. Sure, people can use technologies in a
15 variety of ways and as someone representing startups,
16 we don't want people to engage in bad behavior. And a
17 lot of these startups that we represent depend on IP
18 protection.
19 So it's not that we're saying oh, well, we
20 need to make sure that the world is free for
21 infringement. Far from it. We need to make sure the
22 world is free for innovation. And a lot of these are
23 close calls. That's the point. It's not easy -- it's
24 too simple to say well, innovation equals infringement.
25 That's far too simplistic.

1 It's the difficulty in making some of these
2 determinations that reveals what a dangerous effect
3 large statutory damages can have. A lot of these
4 companies that might be getting into a business that
5 sure, it's unclear under the law. I mean, clearly the
6 law isn't that clear right now. They're going to be
7 disincentivized from doing the stuff.
8 Obviously, to touch on Steve's point earlier,
9 that there's no empirical evidence of chilling
10 innovation and therefore statutory damages don't chill
11 innovation, I think that's kind of a misleading
12 counter-factual. Obviously it's difficult to measure
13 how many companies didn't start because of the risk
14 inherent in the marketplaces in which they're
15 innovating.
16 And we need to recognize, obviously, that
17 times have changed. There are very difficult questions
18 that copyright law has to answer. And it's this gray
19 area of trying to navigate a way to prevent
20 infringement but to encourage innovation that makes
21 fixed large scale statutory damages seem like such an
22 inappropriate mechanism for sorting out very nuanced issues
23 that aren't so clear and if we have these huge
24 potential penalties aren't going to get resolved in a
25 fair way through the judicial system.

1 MR. GOLANT: Thanks for all your comments.
2 We're going to be moving now to the audience. Anyone
3 who'd like to come up to the microphones, your time is
4 now.
5 And Hollis, anyone on the phone?
6 MS. PERLMUTTER: Let me just add we have to
7 stop at two. So we need to have quick interventions at
8 this point. Thank you.
9 MS. SEIDLER: Good afternoon. My name is
10 Ellen Seidler and I'm an independent film maker,
11 blogger, college processer, teach digital media and
12 film. And I just want to say that I think a lot of
13 time here has been spent focusing on individual
14 infringers, and as someone who's been outspoken
15 fighting piracy, I don't care about individual
16 infringers in the slightest.
17 To me the focus should be on the enablers of
18 piracy and those who profit from them. And I certainly
19 also think that we should remember that artists are
20 innovators. Tech does not have a corner on that
21 market. And so often is spent we have discussions
22 where we say we don't want to hurt innovation. We
23 don't want to stop innovation. Meanwhile, when you
24 look at what's happening with online infringement, that
25 is hurting innovation every day and diminishing the

1 content, the quality and the diversity of creative
2 works that are available.
3 And so the focus needs to be on those entities
4 that enable piracy for profit. And we all know who
5 those folks are. And, anyway, like I said, I don't
6 care one bit about individual infringers downloading a
7 torrent. That's not where the battle should be.
8 Thank you.
9 MR. GOLANT: Thanks for that. Anyone else?
10 MR. GIVEN: David Given, I was on the panel
11 this morning on remixes. I just want to address one of
12 the points that Professor Menell was making about under
13 detection and over detection and under policing and
14 over policing. Built into our copyright enforcement
15 regime, of course, is the difference between timely
16 registered works, which of course qualify for statutory
17 damages, and works that aren't timely registered in
18 advance of the infringement.
19 There is a whole body of those works, and in
20 my personal and professional practice, a large number
21 of those instances where people have unregistered works
22 that have been knocked off abandon their claims. So in
23 terms of working out an economic model or mathematics
24 to figure out where we fall, I think you do have to
25 give due consideration to that body of works that in

1 the first instance because of the way the system is set
2 up don't qualify for statutory damages.
3 The only other point that I would make for the
4 panel's consideration and for the task force's
5 consideration is that, again, in my personal and
6 professional practice, the ability to pursue statutory
7 damages is a very important tool in my toolbox when I
8 am prosecuting defendants for copyright infringement.
9 On the other hand, when I'm defending and
10 corporations in copyright infringement claims, I have
11 other tools in my box pursuant to the Rules of Civil
12 Procedure and other places that I could go. For
13 instance, Rule 68 which allows my client to offer
14 judgment to cut off attorney's fees awards, for
15 instance, that are, you know, already built into the
16 system and that give defendants in copyright
17 infringement cases where there are the prospect for
18 large statutory awards some control over that.
19 MR. GOLANT: Thanks for your comment. Anyone
20 else?
21 MS. PERLMUTTER: We wanted to really extend
22 our heartfelt thanks to everyone who's come today and
23 in the other roundtables and taken part so
24 enthusiastically and actively. This is, as we said,
25 the fourth and final roundtable. There have been

1 dozens of panelists and hundreds of audience members
2 both live and online who've participated as this series
3 has unfolded. And it's been an extremely productive an
4 enlightening series of discussions.
5 This will help us greatly as we start thinking
6 through how to come up with some conclusions and
7 recommendations as part of a White Paper coming out of
8 the Green Paper ideas.
9 So I would like to reiterate, first of all,
10 our strong appreciation for the hard work by the USPTO
11 team that made all of these events go so smoothly and
12 so successfully and that's Hollis Robinson, Linda
13 Taylor and Angel Jenkins. And we could never have done
14 it without them. And also to extend a special thanks
15 to the Berkeley School of Law and the Center for Law
16 and Technology for hosting us and for such generous
17 hospitality from our friends and colleagues.
18 And just administrative notes, there will be a
19 transcript of today's hearing and a recording of the
20 webcast available on both the USPTO and the NTIA
21 websites next month. And if you want to be kept
22 apprised of ongoing work on all of the Green Paper work
23 streams, you can sign up for our copyright alerts at
24 the USPTO web page, there's a -- website. There's a
25 copyright page and that will show you where you can --

1 there's a big button to get on to the alerts.
2 We expect to be issuing a White Paper that
3 touches on all of these issues and draws on everything
4 we've heard and learned over the last few months at
5 these roundtables. That is likely to be -- we'll be
6 working on it over the next few months. It's likely to
7 be issued towards the end of the year or sometime early
8 next year.
9 So please do stay tuned and, again, thank you,
10 we really appreciate your help and your input.
11 (Proceeding concluded at 1:56 p.m.)
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18 the foregoing transcript is a full true record of the
19 testimony given. (Civ. Proc. 2025.540 (a))
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23 offering same to all parties or their attorneys attending
24 the deposition and making same available at the same time
25 to all parties or their attorneys. (Civ. Proc.

1 2025.320(b))

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7 financing all or part of the action, nor shall I collect

8 any personal identifying information about the witness as

9 a service or product to be provided to a party or third

10 party who is financing all or part of the action. (Civ.

11 Proc. 2025.320 (c))

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13 DATED August 12, 2014

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